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THE  
INSURANCE  
LAW JOURNAL.

REPORTS OF DECISIONS  
RENDERED IN INSURANCE CASES IN THE FEDERAL COURTS,  
AND IN THE STATE SUPREME COURTS.

WALTER S. NICHOLS, Editor.

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REPORTS OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE FEDERAL  
COURTS, AND IN THE STATE SUPREME COURTS.

*From certified transcripts in our possession.*

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COURT OF APPEALS OF MARYLAND.

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AMERICAN FIRE INS. CO. }

vs.

BROOKS ET AL.\* }

The policy was procured by a broker and on its termination the renewal receipt was forwarded to the broker by the general agent and delivered to the insurer who paid the premium to the broker, but the latter through illness failed to remit. A notice of threatened cancellation was thereupon directed to the broker, and subsequently a letter was sent to insured, whose interests had meanwhile passed to receiver. The party receiving this letter replied that the premium should be paid. But, not receiving it, the general agent made entries on his books understood to be equivalent to cancellation.

*Held*, That the broker is the agent of the insured, but his agency terminates upon the delivery of the policy.

*Held*, That acts relied on to establish that the broker is the agent of the insurer may be shown, although the policy stipulates that no person shall be deemed an agent unless duly authorized.

*Held*, That the questions whether the broker delivered the renewal and received the premium as the agent of the company was for the jury.

*Held*, That the burden of showing compliance with conditions requisite to cancellation was on the company.

Notice of cancellation by mail is not effectual unless received. Where five days previous notice was requisite and the notice was not received until after the date fixed for cancellation, such cancellation on the date fixed would be ineffectual.

R. H. SMITH and A. S. NILES, *for Appellant.*

A. H. TAYLOR, *for Appellees.*

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\* Decision rendered, March 25, 1896.

PAGE, J.

This is an action on a policy of insurance issued by the appellant to Walter B. Brooks and W. H. Bosley, receivers of the Gay Manufacturing Company, upon a steam sawmill and machinery situated at Bosley, Gates County, N. C. At the time of its issuance, Archibald H. Taylor and William H. Bosley, trustees, held a mortgage upon the property; and the policy contained a provision by which, the "loss, if any," was made payable to them "as their interest may appear." This suit is now prosecuted for their use and benefit, by the receivers, in pursuance of an order of court requiring them to make collection of all unpaid claims arising upon policies of insurance on the property of the company, which had been destroyed by fire. Policy No. 5,450, being that which forms the subject of this suit, was placed through the agency of George B. Coale & Son, brokers of Baltimore City, at the request of Mr. Bosley. Mr. Coale states in his testimony that the policy was forwarded to him by Mr. Kelley, the general agent of the company, and was delivered by himself to the receivers; that he collected the premium, and paid it to the company, less his commissions; and that he was never notified by it not to collect the premium. He further testified that he informed Mr. Kelley who Messrs. Brooks & Bosley were, and what business they were engaged in. The policy was dated the 21st August, 1891, and ran for one year from the 20th August. On 1st August, 1892, a renewal receipt was sent by Mr. Kelley to Coale & Son. In his note transmitting it, Mr. Kelley states that he forwards to the Coales, "according to order received;" but there is no evidence that the plaintiffs gave such an order, or that it was given by the Coales, as a consequence of any conversation had with them or of any act for which they were responsible. Mr. Coale delivered the receipt to the receivers, and received from them a check for the premium; but, by reason of illness, he failed to remit the money to the company. On the 6th of October, the general agent of the company wrote to the Coales: "We seem to be without your remittance for August on policy No. 5,450, and will thank you for the same;" and again on 3d November: "Premium of \$82.50 is still due on policy No. 5,450," etc.; "and, unless same is paid, we, of course, will consider our liability as having ceased, after receipt of this notice." Neither of the receivers nor trustees nor any officer of the Gay Company was at any time informed, before the fire, of these letters or of their contents. On the 29th of November, Mr. Kelley wrote to the Gay Manufacturing Company, directing his letter to Bosley, Gates County, N. C. The following is a transcript of this communication:—



Philadelphia, November 29, 1892. Gay Manufacturing Company, Bosley, Gates County, N. C. Gentlemen: Under date of 20th August last, at the request of your agents, Messrs. George B. Coale & Son, of Baltimore, we renewed our policy No. 5,450, by issuing renewal receipt No. 1,397, covering \$1,500 on your sawmill plant at Bosley, the premium agreed upon being \$82.50, which has not yet been paid to us, notwithstanding we have repeatedly called the matter to your attention, through your agents, Messrs. George B. Coale & Son, 25 South Street, Baltimore, Md.; and we now write to advise you that the policy will be canceled on our books for nonpayment of premium on December 6th, proximo, in accordance with the terms of the policy, unless payment be made before that date, after which date no further liability will be recognized, and will look to you for the unearned portion of premium for the time insurance has been in force, viz., August 20th to December 6th, 108 days; amount earned, \$24.41. Yours, very truly, Wm. B. Kelley, General Agent.

This letter, thus addressed, finally came into the hands of George L. Barton. Barton's relation to receivers seems to be somewhat uncertain. He was located at Suffolk, Va., about 25 miles by rail from Bosley, and had charge of the mills at both places. He signed his name as "Manager," but, Mr. Bosley says, that was a "self-constituted position." He was, however, in charge of the business at both places, and was representing the receivers there, if any one was. The date when he received Mr. Kelley's letter does not clearly appear, but probably it was the 5th day of December, for on that day he wrote to Mr. Kelley: "Your favor of November 29th, addressed to our company, at Bosley, Gates County, N. C., has just been received at this office." In this letter, Barton expresses surprise that the premium had not been paid on the renewal, as Coale & Son had received it promptly, and concludes with saying: "We do not wish to lose your good company on our list, and assure you, you shall receive the premium, which we did not know had not been paid. As soon as we hear from Coale & Son, we will write you again on the subject." Not having received the premium from the Coales, on the 6th of December Mr. Kelley caused to be made on the books of his company certain entries, which, in that office, were understood to mean the policy was canceled, though that was not written in words. On the 3d of June the property was destroyed by fire. It does not appear that either of the receivers or trustees was informed of this correspondence, or of the entries on the books of the company, except that before or after the fire Barton told Bosley that the company had canceled one of their policies, because Coale had not paid the premium; and that he (Barton) had notified the company they would be responsible for it. Bosley says this conversation took place "some time" before the fire; but Barton recollects talking the matter over with him after the fire, but could neither affirm nor deny that he had had such conversation before;

but, whenever it was had, Barton showed Bosley the letter of the defendant's agent and his own reply. Later on, Barton, having obtained from the receivers authority, made out the proofs of loss, and on 28th July forwarded them to the company. Mr. Kelley replied on the 31st July. He returned the proofs, and assigned for so doing the following reasons:—

Policy No. 5,450 having been canceled before the fire, by a notice to you, under date of November 29, 1892, acknowledged by you December 5, 1892, and no premium consideration ever having been received on same, the papers having evidently been sent us in error. The claim you make under Elizabeth City policy No. 4,676 is in error, because the apportionment embraces policy No. 5,450, which has been canceled, as above stated. The error is against yourselves, as the amount properly due in the settlement as apportioned to the valid policy, No. 4,676, should be \$821 51. When you make your claim for this amount in proper form, we shall be glad to recognize it under that policy, but no claim can be admitted under policy No. 5,450.

Upon this state of the proof, the court instructed the jury that if the defendant issued the renewal receipt, and sent it to Broker Coale to be delivered to the plaintiffs, and it was accordingly done, and the premium was paid to Coale on said delivery, and the fire occurred, and the proofs of loss mentioned in the evidence were submitted to the defendant, as required by the policy, the plaintiffs were entitled to recover notwithstanding the money received by Coale was in fact not paid over by him to the defendant. The appellant contends there was error in this instruction, because (1) the policy was properly canceled, and (2) it ought to have been left to the jury whether Barton was the agent of the insured, and also whether Bosley, receiver and trustee, had not received notice of cancellation in proper time, or notice in which he acquiesced, "some considerable time before the date of the fire." These contentions present views diametrically opposite to those underlying the court's instruction. The theory of the court seems to be that while there was evidence in the cause to enable the jury, if they believed it, to find the receipt of the renewal premium by the appellant, there was none sufficient in law to establish a cancellation of the policy.

It appears to be well settled that, where one engages another to procure insurance, the person so employed is the agent of the insured, and not of the insurer, in all matters connected with such procurement: *Insurance Co. vs. Reynolds*, 36 Mich., 502; *Oil Co. vs. Triumph Ins. Co.*, 64 N. Y., 85. This rule applies to cases where the insurance has been effected through the medium of a broker, although the broker may have solicited the insured to take out the policy. Such solicitations only cannot constitute the broker the agent of the insurer, so as to bind the latter for the acts, declara-

tions, or omissions of the former: 1 May, Ins., § 124a; *Insurance Co. vs. Swigert*, 11 Ill. App., 590. But, when the broker's employment extends only to the procurement of the policy, his agency is not continuing. It ceases when the purpose of his employment has been accomplished; that is, upon the execution and delivery of the policy: *Grace vs. Insurance Co.*, 109 U. S., 278; *Hinkley vs. Arey*, 27 Me., 364; *Lohnes vs. Insurance Co.*, 121 Mass., 438; *Hermann vs. Insurance Co.*, 100 N. Y., 411. If the broker undertake to do acts outside of such employment, the question for whom he acts will depend upon the special circumstances of the case; and, if the assured or insurer relies upon such acts to bind the other party, the burden of proof rests upon him who seeks to bind the other thereby, to prove his authority. In the absence of direct proof, of actual authority, and where the effort is to bind the insurer, the insured may establish the agency by showing what acts the insurer has permitted the broker to do, and that the act relied on ought reasonably to be inferred to be within the scope of the apparent authority implied from such acts: 2 Wood, Ins., § 420; *Smith vs. Insurance Co.*, 47 Hun., 37; *Pierce vs. People*, 106 Ill., 23; *Insurance Co. vs. Crutchfield*, 108 Ind., 518; *Kausal vs. Association*, 31 Minn., 17.

It is contended, however, that these principles do not apply to the case at bar, by reason of this provision contained in the policy, viz.: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." It is difficult, however, to perceive how this clause can be made applicable in this case. The purpose of the provision could not have been to take from the insurance company the power to appoint an agent by parol, and thereby, in many cases, to secure immunity from the consequences of its own acts. If the clause is to be so construed as that although the company has expressly, or by acts which warrant the implication, appointed an agent, yet it shall not be responsible for the conduct of such agent while acting within the scope of his real or apparent authority, unless such appointment is in writing, then the clause is a mere trap to ensnare the unwary policyholder, and a device by which an insurance company, for its own purposes, may abrogate and repeal the fundamental principle of the law of agency. The object of the insertion of the clause was to protect the company from the statements, knowledge, and acts of persons connected with the procuring of the policy, by the clear understanding of the parties to the contract that in any matter relating to such insurance no person, unless duly authorized in writing, shall be deemed its agent: *Banking Co. vs. Teiger* (Va.); *Grace vs. Insurance Co.*, 109 U. S., 278; *Arthurholt vs. Insurance*

Co., 159 Pa. St., 7; Insurance Co. vs. Lee, 73 Tex., 641. In this case the uncontradicted evidence was that the employment of Coale & Son by the insured extended only to the procurement of the policy. Their duty was "to place the policy." This being so, when the policy was delivered, their functions were ended so far as the appellees were concerned. The policy was sent to Mr. Coale, and by him delivered to Mr. Bosley. To Mr. Coale was also sent the receipt for the premium which he collected, and remitted to Mr. Kelley, retaining his commissions. One year later the renewal receipt was forwarded to Mr. Coale; and, when it was delivered, he again collected the premium. That it was intended by Mr. Kelley that Coale should collect the premium, and remit to him, was left by the instruction to be determined by the jury. The course of dealing between Coale and Kelley in relation to this and other policies, the inclosure to Coale of the renewal receipt, and Kelley's letter of October 6, 1892 (in which he writes to Coale, "We seem to be without your remittance," etc., "and will thank you to send the same forward at once,") were all before the jury, and tended to prove what that intention was. If they found the intention was that Coale should deliver the receipt and collect the premium, these payments to him were equivalent to payment to the company.

It is also insisted that the policy was effectually canceled, on the 6th day of December, and that the prayer is bad because it ignores that fact. This position necessarily assumes that the policy was in full force up to that date. The cancellation is an alleged fact, set up by the appellant, and the burden of proof is upon it to establish it: *Runkle vs. Insurance Co.*, 6 Fed., 145; *Mohr & Mohr Distilling Co. vs. Ohio Ins. Co.*, 13 Fed., 74. The right to cancel is reserved, by a clause in the policy, to both parties. It may be canceled by the insured, at his own request; and by the company, by giving five days' notice of such cancellation. If it shall be canceled by the company, the clause further provides that

If the premium has been paid, the unearned portion shall be returned on surrender of the policy, etc., except that, when the policy is canceled by this company by giving notice, it shall retain only the pro rata premium.

These are conditions upon which the right of the company to cancel rests. They must be strictly construed and strictly performed: *Runkle vs. Insurance Co.*, *supra*; *Lattan vs. Insurance Co.*, 45 N. J. Law, 453. Five days after notice of the cancellation is therefore a condition precedent, which must be complied with by the company before it can perform the act of cancellation. Here the notice was not that the policy had been canceled, but, unless the premium was paid on or before the 6th of December, it "will be canceled" on

that date, "and no further liability will be recognized" thereafter. Now, leaving out of view, without expressing any opinions thereon, the questions raised at the argument growing out of the hypothetical character of the notice, and whether Barton's relation to the insured was such that a service on him was binding on the appellees, it is clear that the mere service of such a notice as this, if the premium had in fact been paid, or the insurer was chargeable with its receipt, would not ipso facto work a cancellation. The policy would have to be canceled by the insurer, by some act clearly indicating that he had done so (1 Bid., Ins., § 376); and this act could not be effectually performed, under the provision of the policy, until the five days had expired. The entries upon the books of the company, by which the actual cancellation was shown, were made on the 6th day of December. Is there any evidence in the case tending to prove the five days had passed at that date? The notice was sent by mail, and in such case the receipt must be shown: *Farnum vs. Insurance Co.*, 83 Cal., 246; *Mullen vs. Insurance Co.*, 121 Mass., 171. It was addressed, not to the insurers, but to the Gay Manufacturing Company, and forwarded, not to the residence of the insurers or of Barton, but to Bosley, in North Carolina, 25 miles from Suffolk, where the superintendent of the receivers had his office. The only evidence tending to prove the date when it reached the hands of any one connected in any manner with the receivers is that contained in Barton's letter to Kelley of the 5th of December, in which he states that his letter containing the notice "has just been received at this office." The act of cancellation was therefore made one day after the receipt of the notice by Barton. This was not within the right reserved in the policy, and was an utterly void act. Had the attempt to cancel been made later on, another question would have arisen, upon which we have now no occasion to comment. No other attempt was made; and what was done, for the reasons given, was nugatory and void.

As these views dispose of the claim that the policy was canceled, we deem it unnecessary to discuss the many other points raised in the argument in reference to the subject. Finding no error in the rulings of the court, the judgment will be affirmed.

Judgment affirmed.

## SUPREME COURT OF MONTANA.

HOLTER LUMBER CO.

vs.

FIREMAN'S FUND INS. CO.\* }

The policy insured a one-story frame building and additions, to be occupied as a dwelling and greenhouse, with permission to complete. The agent was told of the intention of the owner to move the building to an adjacent lot to connect with a greenhouse being built. It was moved to the lot and enlarged from four to nine rooms but not connected with the greenhouse. The building burned.

*Held*, That the identity of the building with that described was a question for the jury.

*Held*, That evidence of cost of building at the time of trial is not admissible. The question is as to value at time of loss, and in determining the measure of damages the cost of building at such time is one of the factors.

## Statement of facts by HUNT, J.

This is an action on a contract of fire insurance. It is alleged that about April 1, 1892, the defendant, by Phillip Gibson, its agent, solicited of J. H. Russell, the owner of the premises, insurance upon a one-story frame building and additions thereto, to be situated on lots 5, 6, and 7, block 24, of the Boston & Great Falls Addition to Great Falls; that Russell notified defendant that he would have said building insured as soon as it was removed to said lots, and, as soon as he was ready for the insurance, he would notify the defendant to issue the policy; that, on or about June 9th thereafter, Russell notified defendant that he was ready to have the policy issued, and the policy was issued; that at the time of the solicitation by Gibson, as agent, Russell paid in advance the premium for the said policy; and that it was well known to defendant that Russell did not want the policy issued and delivered until the house was removed to the lots hereinbefore referred to; and that the policy was not delivered until after the house was removed. On February 9, 1893, it is averred, the property was totally destroyed, and that, on February 10th, Russell and plaintiff, the assignee of Russell's interest, notified defendant of the fire, and thereupon defendant waived the conditions of the policy requiring that notice of loss should be in writing, and released Russell from the performance of all conditions relating to proofs of the loss, and promised to pay plaintiff the sum of \$600, the amount of the insurance, and stated that no further notice of the loss or proofs of the loss were necessary; that thereafter defendant refused to pay the insurance, upon the ground that the

\* Decision rendered, May 25, 1896.

property covered by the policy was not destroyed by fire. The answer alleged a delivery of the policy to Russell on April 7, 1892, and set up that, at the time of the execution and delivery of the contract of insurance, Russell was engaged in the erection and construction of a building for use as a dwelling and greenhouse, upon the premises described in the policy, and that Russell applied for the policy upon the building aforesaid, then in process of construction. The defendant denied that the building described in the policy was destroyed by fire. The answer admitted that there was a fire on the 9th of February, 1893, whereby a dwelling house, at that time standing upon one of the lots in the policy of insurance described, was destroyed by fire, and denied that at any time prior to the delivery of the policy the company was ever notified that the building which was afterwards destroyed by fire would be removed to, or erected upon, any of the lots mentioned in the policy; denied that Russell ever said that he desired insurance upon the building which was destroyed by fire, or that he ever requested the defendant not to issue or deliver a policy until after the building which was subsequently destroyed by fire was removed to the lots mentioned in the policy. It is also alleged that the building which was burned was erected long subsequent to the issue and delivery of the contract of insurance, and was not attached to, or in any manner made a part of, the building insured, and which was upon the said premises and in process of construction at the time of the making of the contract of insurance; that the building destroyed was never used as a greenhouse; that the plaintiff failed to make proofs of loss as required by the terms of the policy; that any information to plaintiff that plaintiff need furnish no written proofs of loss was given while under the belief that the building described in the policy had been destroyed. The answer denies all waiver, and pleads concurrent insurance without authority. The replication denied the new matter set forth in the answer. Evidence was introduced before the jury. At the conclusion of plaintiff's testimony, the defendant moved the court to dismiss the action, upon the ground that the evidence showed that the property insured had not been destroyed by fire, that the building destroyed was not covered by the policy of insurance, and because it appeared that the building destroyed was never occupied as a greenhouse. The court granted this motion. Plaintiff excepted, and appeals from the order for non-suit and judgment for costs. The transcript contains no judgment, but, by leave of this court, plaintiff has filed a copy of the original "judgment and order in the case," in which the following entry appears after the formal recitals: "Defendants then moved the court for a

nonsuit, which motion was sustained by the court, to which plaintiff excepts. It is therefore ordered and adjudged by the court that this action be dismissed, and the case withdrawn from the jury. It is further ordered, adjudged, and decreed by the court that the defendant recover of and from the plaintiff its costs and disbursements herein expended, amounting to \$18.80. And it is further ordered by the court that plaintiff be granted a stay of proceedings for thirty days to prepare statement on appeal."

JAMES DONOVAN, *for Appellant.*

A. J. SHORES, *for Respondent.*

HUNT, J. (after stating the facts.)

The appeal in this case is "from the order of nonsuit and judgment for costs." Respondent contends that an order for nonsuit is not appealable. But it is laid down in *Leese vs. Sherwood* (21 Cal., 152), that a dismissal of an action is in effect a final judgment in favor of the defendant. "It is a final decision of the action as against all claim made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action." See, also, *Zoller vs. McDonald*, 23 Cal., 136, and *McLeran vs. McNamara*, 55 Cal., 508. *Hayne*, New Trial & App., p. 559, in note 21, puts this quære: "Is not an order granting a nonsuit a final judgment? Such an order amounts to a dismissal of the action, and we have seen that a dismissal is a final judgment." Here the court granted a motion for nonsuit, dismissed the suit, and ordered and adjudged that respondent recover its costs. This was a judgment. *Hayne*, New Trial & App., p. 555, and note. The only possible thing left to do was the entry of a more formal judgment by the clerk. Surely, the effect of the ruling of the court was that of a final decision against plaintiff, and we think he could appeal from such an order, as a judgment.

Contracts of insurance ought to be construed to carry out the intention of the parties, as expressed or indicated by their language used: *Beach, Ins.*, § 546. Such contracts having for their object indemnity, the rule is that they are to be construed liberally to carry out such objects. "No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity which in making the insurance was his object to insure." *May, Ins.*, § 175. It is also an established principle in the construction of fire-insurance policies, as well as other contracts, that the words of the agreement are to be applied to the



subject-matter about which the parties are contracting at the time, the presumption being that such matter is in the minds of the parties at the time of their agreement: *Wood, Ins.*, p. 145. Bearing these principles in mind, was the action of the lower court in granting a nonsuit correct? The evidence tended to show that in April, 1892, Mr. Gibson, the defendant's agent, solicited insurance from Russell, owner of the premises; that Russell told him that he intended to move the house he was then living in to the lots described in the policy, and would connect it with the greenhouse then being constructed on said lots described in the policy. This building to be moved was a one-story house, with four rooms, attached to a greenhouse. The policy and description therein were made out by the agent, and were upon J. H. Russell's

One-story frame, shingle-roof building, and additions, while occupied as a dwelling and greenhouse, situated on lots Nos. 5, 6, and 7, block 24, on the ——— side of ——— avenue, and between ——— street, and in Boston and Great Falls addition to ——— street, Great Falls, Montana. Other concurrent insurance permitted. Permission granted to complete.

After the dwelling house was moved to the lots, Russell received his policy. The dwelling house was moved to one of the lots described in the policy, but not connected with the greenhouse, which stood on the furthest of the three lots so described. The fire destroyed a one-story frame house, the same house that was removed from the place where it had stood when the agent solicited the insurance, but with additions thereto, which made it a nine instead of a four room house. The identity of the property described, whether the building burned was covered by the policy, was the main question. That was one of fact, and we think was erroneously decided: *Southwest Lead & Zinc Co. vs. Phoenix Ins. Co.*, 27 Mo., App., 446. Parol evidence is admissible, not to vary or contradict the terms of the policy, but to explain it,—to get at its true meaning: *Tesson vs. Insurance Co.*, 40 Mo., 33, 50 Mo., 112; *Beach, Ins.*, § 552. "The general rule is that the construction of the policy of insurance is a question of law for the court to determine, and warranties, as we shall see hereafter, must be strictly enforced, regardless of their materiality; but when the language employed to describe the thing warranted is not free from ambiguity, or when it is equivocal, and its interpretation depends upon the sense in which the words are used, in view of the subject to which they relate, the relation of the parties, and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. Such a question is to be submitted to the

jury under appropriate instructions." *Rich., Ins.*, § 45. On a ruling upon a motion for a nonsuit, the law regards the issues proved which the evidence tends to prove: *Soyer vs. Water Co.*, 15 Mont., 1.

In our opinion, the plaintiff made out a *prima facie* case of the loss by fire of his one-story, frame, shingle-roof dwelling house, situate upon the lots, and described in the policy. It follows that the court ought not to have granted a nonsuit unless it appeared that defendant's additional ground of motion was well taken—that the building destroyed by fire was never occupied as a greenhouse. But we do not think that, *prima facie*, the defendant is relieved from liability because the frame, shingle-roof building and additions were not occupied for the two purposes,—a dwelling house and a greenhouse. The evidence tends to prove that the agent and the insured understood that the frame house was for dwelling purposes, while the green house was for its proper purposes, and that the policy was made out with that understanding. At least, there is nothing in the policy inconsistent with the evidence to that effect. Furthermore, upon the whole evidence in the record, the conduct of the company, by its agent Gibson, who was in Great Falls after the fire, tends to prove that the agent intended to insure the particular house destroyed. By expressly waiving formal proofs of loss after the fire, and saying that the defendant was ready to pay its loss, he seems to have identified the house destroyed as the house insured. Of course, if the hazard were increased by not connecting the house and greenhouse, and such increase were without defendant's consent, different questions would arise. But those matters are not now before us. The plaintiff sought to introduce evidence of the value of the property destroyed, by asking for opinions of builders and others upon descriptions given. Much of this testimony was excluded. The rule laid down by the Supreme Court of Colorado appears to be just, and to be approved of by late authorities. It is this: "The measure of damages in an action for such a loss is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one by reason of age and use, are all proper subjects of inquiry." Judgment reversed, and cause remanded for new trial.

Pemberton, C. J., concurs. De Witt, J., not sitting.

## SUPREME COURT OF SOUTH CAROLINA.

LAGRONE

vs.

TIMMERMAN ET AL.\*

One who attempted to enter a mutual insurance association which had no legal existence at the time his policy was issued, and did so relying on mistaken misrepresentations of those who held themselves out as agents of the association, is not estopped from denying its corporate existence.

To make a failure of the court to give a proper instruction available error, there must have been a request for it.

A charge that, "if the jury believe, from the evidence, that the defendants," etc., "then the defendants are liable," etc., is not within the constitutional inhibition against charging on the facts.

Parties who hold themselves out as agents of a mutual insurance association, which, in fact, has no legal existence, and enter into a contract of insurance, signed by themselves as agents, are personally liable for the performance of the contract, though they acted in good faith, and believed that their statements were true.

A corporation to whom such power has not been given in its charter, either in express terms or by necessary implication, cannot organize a subordinate corporation.

In an action on a policy of insurance, purporting to be a contract with an association named therein, the by-laws of an organization, to which no reference is made in the policy, are not pertinent to the issue. Gary, J., dissenting.

A policy purporting to be issued by an association which had no legal existence could not render any of the parties agents of such non-existent corporation.

In an action on a written contract of insurance, evidence of what occurred before, at the time, or after, the policy was issued, is inadmissible to vary the contract.

In an action on an insurance policy, which contains no condition that it shall be void if the fire occurred while the machinery was being operated by steam, a requested instruction to that effect is properly modified by adding that the jury must believe that such condition was agreed to as a part of the contract.

It is not error to permit a jury to retire and resume the consideration of a case, after they have once dispersed, thinking that they had agreed on a verdict, when, in fact, they had not.

Respective actions by D. P. and J. H. Lagrone, against joint defendants W. H. Timmerman, J. S. C. Carpenter, and J. W. Hardy, on fire insurance policies, heard together. From judgments in favor of plaintiffs, defendants appeal. Both affirmed.

The charge of Judge Earle was as follows:—

"It is very pleasant to you, doubtless, as I know it is to me, to listen to the eloquent arguments of counsel, and judges as well as juries are more or less affected by them. It is their province to

\* Decision rendered, March 26, 1896. From S. E. Reporter.

present the case for their clients, and in this cause each side has been presented well. It now becomes our duty to decide the case. It is my province to pass upon the law of the case. You are to take the law from the bench. If I should be mistaken in what I say to you, there is another court where my rulings can be reconsidered, and, if any injustice results, that can be corrected. But it is for you to consider the facts, uninfluenced by anything I might say to you, even if I were disposed to say anything to you. I have no right to express any opinion about any of the facts of the case. They are for you, and exclusively for you.

"Now, the issues are presented by the pleadings. The plaintiff comes into court, and in this paper presents his cause of action. What does he tell you? He tells you, in substance, that on the 9th of October, 1893, the defendant J. W. Hardy, representing himself as soliciting agent of a corporation he styled as the Farmers' Mutual Fire Insurance Association of the County of Edgefield, induced the plaintiff to take out an insurance policy in said alleged corporation, covering the plaintiff's gin house and machinery, for the sum of five hundred dollars, against loss by fire, which, by the terms of said pretended policy, was insured from said date, until the said policy should be canceled by the plaintiff or by the said pretended association, the plaintiff paying a premium of \$2.50 for said policy of insurance, and being, by the terms thereof, subject to further assessment for losses incurred by said company, it being represented that said association was a mutual fire insurance company. The plaintiff further alleges that said defendants caused to be issued to him said policy of insurance, wherein the defendant W. H. Timmerman signed, styling himself as president, the defendant J. S. C. Carpenter signed, styling himself as general agent of said company, and the defendant J. W. Hardy representing himself as the soliciting agent of said company. The plaintiff further alleges that he took the policy as a genuine policy, and thereafter, within the time limited, his property was consumed by fire,—his gin house and machinery,—and that he lays his damages caused by the fire in the amount of five hundred dollars, for which he prays judgment.

"Now, the defendants, on their part, come into court, and by their answer they represent to the court their side of the case. In the first place, they deny what the plaintiff says, except so far as their answer admits the allegations of the complaint; and they say to you, 'that, under and by virtue of an act of the general assembly of this state, approved December 18, 1891, entitled "An act to incorporate the Farmers' Mutual Insurance Association of Chester, S. C.," J. S. C. Carpenter, R. T. Mockbee, W. O. Guy, O. Barber, and all other

persons who shall become members thereof were constituted a body politic and corporate, under the name of the Farmers' Mutual Insurance Association of Chester, S. C., and under that name shall have all the powers, privileges, and franchises incident to such corporations under the laws of this state.' And thereafter certain provisions of that act are set out in the answer. They say: 'That, on the ——— day of December, 1891, at the town of Edgefield, in the county of Edgefield, in the state aforesaid, under and by virtue of the power and authority conferred by said act of the general assembly of said state and the by-laws of said corporation hereinbefore set forth, J. S. C. Carpenter, the general agent of said corporation, proceeded to organize, and did organize, a subordinate or branch organization of the said the Farmers' Mutual Insurance Association of Chester, S. C., for the county of Edgefield, and the defendant W. H. Timmerman was chosen president, and J. S. C. Carpenter was chosen general agent, of said subordinate organization.' Then they further allege: 'That, on or about the 9th day of October, 1893, a policy of insurance was issued to the plaintiff in said the Farmers' Mutual Insurance Association of Chester, S. C., by the said subordinate organization for the county of Edgefield, covering the plaintiff's gin house and machinery, and thereby said association and the plaintiff, who signed said policy, became mutually bound by the terms, limitations, and conditions therein contained, and the by-laws of said association, made a part thereof, and said policy of insurance was in all respects a valid and binding contract of insurance, according to the terms thereof, and the loss sustained by plaintiff would long since have been paid, if he had been, at law or in equity, entitled to same under the terms of said policy.' Then they say that one of the by-laws of that company provided: 'The agent shall take no steam engine into this association. If a gin house or other buildings be taken into this association, which shall at intervals be operated by steam, the insurance on such building or buildings adjacent and endangered thereby shall be removed, so long as it is operated; but, the steam being removed from such building, the policy shall again become intact. That the property covered by said policy of insurance was a gin house and machinery, operated by steam at intervals, and the said property was destroyed by fire when the same was being operated by steam; and, under the terms of said policy of insurance, and the aforesaid by-laws, being a part and parcel thereof, the insurance was removed at the time said property was destroyed by fire, and the plaintiff was not entitled to anything, at law or in equity, under said policy, and for that reason

alone he was not paid the amount specified in said policy or any sum whatever.'

"Now, then, as an amendment to the answer, they raise further issue: 'For a further defense, the defendants allege that, when the policy of insurance described in the complaint was issued to the plaintiff, it was mutually understood by both parties thereto that it was The Farmers' Mutual Insurance Association of Chester, S. C., operating in Edgefield County, through its subordinate branch in said county, that was being bound, and the corporation therein referred to, and that, by the use of the words, "The Farmers' Mutual Fire Insurance Association of South Carolina," and "The Farmers' Mutual Fire Insurance Association for the County of Edgefield," used in said policy, were put there by mutual error and mistake of the parties, each of whom, at the time of the issuance of said policy, well knowing that The Farmers' Mutual Insurance Association of Chester, S. C., operating in Edgefield County, through its said subordinate branch, was the insurance company bound thereby, and was named and called by all parties thereto as "The Farmers' Mutual Fire Insurance Association of South Carolina," and "The Farmers' Mutual Fire Insurance Association for the County of Edgefield," and that, in using the latter words, the parties thereto meant The Farmers' Mutual Insurance Association of Chester, S. C., operating in Edgefield County, through its said subordinate branch, and that it thereby became liable on said insurance contract.'

"Those are the issues presented which have been formulated by the parties in their pleadings which have been read to you. Now, gentlemen of the jury, the plaintiff claims that he was misled by the defendants, that the defendants represented that they were acting as agents of a corporation, and that, when he took out this policy, he believed he was taking out a policy issued by a corporation. Now, what is a corporation? It is an artificial being, created by the legislature, where several persons petition that they be allowed to transact any kind of business as one person; that they and their successors shall continue as one person in law. No matter how many persons come in, and how many members go out, it still remains an artificial being. As some one has said, like the river Thames, although it changes every minute, it is the same river. It is an artificial being, created by statute, created by the legislature, and having only such powers as are expressly granted in the charter, in the act of the legislature, or as are by implication necessary to carry out the powers that are so granted. By referring to the act of the legislature by which the Chester Company was created, they say that the Chester Company could not organize a corpora-

tion in the county of Edgefield,—had no such power; that the act did not give it to them; and, furthermore, if the act did give it to them, it would be unconstitutional, because, while the legislature has the power to create a corporation, it could not delegate that power to a corporation. So far as that part of the answer is concerned, you may eliminate it. They are not protected by the charter granted to the Chester Company. I do not think there is any doubt about that.

“But they say, at the time this policy was issued, that they intended to insure under the power granted by the legislature to the Chester Company, their intention being now to act as agents of that company, being duly authorized by law, as they understood it, and that, at the time when plaintiff took this policy, he so understood it, and it was a mutual mistake. Now, upon that I charge you, gentlemen of the jury, that the defendants cannot be relieved from liability under that defense, unless you believe it was a mutual mistake. No matter what Gov. Timmerman understood, no matter what Mr. Carpenter understood, no matter what Mr. Hardy understood, no matter what they intended, no matter how honest they may have been in their belief, unless you come to the conclusion that this plaintiff also understood it, also made the mistake, also fell into the error, in other words that it was a mutual error, then that defense cannot help them; but, if it was a mutual error, if both parties to this contract did so believe, did so intend, did make this mistake mutually, then it would be a good defense, because, now, you observe, in every contract, the very term itself implies there must be a coming together. Two minds must meet. Did their minds meet upon this contract? If both parties to it were in common error, both parties intended that the contract should be something different from what is written, if it was common error, then the plaintiff could not claim he was damaged. It must have been a mutual mistake, no doubt about that.

“Assuming there was no mutual mistake,—that is for you to determine entirely,—but now, in the event that you should come to the conclusion, in the first place, that those defendants did sign that policy representing themselves as agents of a certain corporation,—and here you have the right to take the testimony on the stand and the admissions in the answer, you have the right to consider all these matters in coming to your conclusion; did they intend, now, to insure him, in a corporate body? Did they sign a paper called a ‘policy of insurance,’ and take his money, and deliver him that policy, under those circumstances, that led him to believe that he was taking out a policy of insurance in a corporation? Then I

charge you that, whenever one, as an agent, assumes to act for another, and that other was not authorized himself to do the act, the agent is personally liable. The law requires every one, when he assumes to act for another, to disclose his principal, to say who his principal is; and, if he does not do it, and you make a contract with him, you can sue him; you can make him individually liable. So, if he represents that he is agent of a corporation when there is no corporation in existence, then he is bound just as the corporation would have been bound had it been in existence. Upon that I will read to you from a decision of our own courts, which I think bears upon this question: *Edings vs. Brown*, 1 Rich. Law, 250. There is a good deal in this case, gentlemen, that I would not deem it necessary to read to you; but, as the case is not very long, I will read it. It contains, as I understand it, the law as laid down by the former Supreme Court of South Carolina, upon this subject, as to where one signs a paper as agent when in fact he was not agent:—

“‘In 2 Kent, Comm. (2d Ed.), 630, it is affirmed “that an agent becomes personally liable when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power.” In Story on Agency, this doctrine is said to “rest on a plain principle of justice, for every person, acting for another, by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act, and thereby draws the other party into his reciprocal engagement.” It is contended that, under these authorities, the agent is only responsible in an action on the case, and that an action cannot be maintained on the instrument as if it were executed by the agent personally. But the cases cited refute such construction. In *Dusenbury vs. Ellis* (3 Johns. Cas., 70), the note was signed, “For Peter Sharpe, Gabriel Dusenbury, Attorney,” and it was ruled that the defendant was bound, as if he had executed the note in his own name; and that the name of the person for whom he assumed to act should be rejected as surplusage, and that the party accepting the note, under such mistake or imposition, should have the same remedy against the agent as he would have had against the principal, if he had been really bound. In *Ballou vs. Talbot* (16 Mass., 461), it was held that an agent without authority, signing a note in the name of another, was only liable in case.’ In another case, referred to here, the court says: ‘It was an action on the case by an indorsee against the defendant for accepting by procuration a bill for the drawee, not having authority to do so. The circumstances precluded any imputation of fraud, and on the trial Lord Tenterden directed the jury to find a verdict for the



defendant, with leave to move to set it aside and enter the verdict for the defendant, with leave to move to set it aside and enter the verdict for the plaintiff.' You will observe in that case all imputation of fraud was excluded, and the judge directed that the verdict be entered for the defendant. It went up to the higher court, and the king's bench 'ordered judgment to be entered for the plaintiff on the ground that the mere misrepresentation, by the defendant, of his authority to make the acceptance for the drawee, made him liable to all by whom the bill might be taken on the faith of the acceptance for the injury sustained by the unauthorized act of the defendant. In the opinion of the court, delivered by Lord Tenterden, it is said an action could not have been maintained against the defendant as acceptor. \* \* \* Whenever one undertakes to make a contract in the name of another, his signature should be held as a guaranty that he has authority to bind the principal. It is only just that one who pretends to give a security to another, by assuming to contract in the name of a person whom he has no authority to bind, should supply, out of his own means, the security which he fails to impose on his principal. The undertaking to bind another, without authority to do so, imports fraud or culpable negligence, and should fix on the guilty person responsibility for the injury that may result from his act. All the authorities agree that the measure of damages must be the injury sustained, whether the action be in tort or on the contract, and the conflict of authorities is resolved into a question of the form of the action. An action on the instrument affords the most direct and just measure of compensation. If the contract be for the payment of money, in either form of action the damages must be the sum stipulated; and if the contract be for performance of any other act, compensation for the breach or neglect of the duty may as fairly be decided in the one form as the other. It is objected, that by holding the deed to be the deed of the agent—' You will observe here is a case where the agent made the deed, signed in this way: 'Catharine Brown, [L. S.] per R. E. Brown, Trustee.' In this case, Catharine Brown was a married woman at that time. She had no right to make this contract,—had no right to appoint an agent to bind her by his act. The contract was made and signed: 'Catharine Brown, [L. S.]—her seal,—per R. E. Brown, Trustee.' 'It is objected that, by holding the deed to be the deed of the agent, the intention apparent in the terms of the execution of it, that he should be a party only as agent, and his nominal principal bound to the stipulation of the instrument, is violated. The intention of the other and innocent contracting party is defeated if he has not that security which the agent professed and

undertook to give. In this alternative, the wrongdoer cannot complain that he should be substituted to that contract which he imposed on the other party by undertaking to execute in the name of a principal whom he had no authority to obligate. Such substitution is only fair and reasonable indemnity. It is enforced, in the case of a guardian contracting in the name of his ward, of an administrator contracting in his representative capacity, of a trustee for his cestui que trust, of an agent buying goods in the name of his principal, who exceeds his authority, on the principle that a contracting agent is bound where there is no responsible principal to whom resort can be had. In all these cases it is manifest that the parties held answerable never intended to make themselves liable, and may have received no consideration, and yet it is held they are bound. In *Sumner vs. Williams* (8 Mass., 176), the administrators of an insolvent's estate, under a license of the court to sell, by deed conveyed an estate. In all the terms and covenants of the deed, the representative capacity in which the defendants contracted was sedulously expressed. It is admitted, in the judgment of the court, that the grantors intended to guard against any personal liability, and that the grantees did not rest on any supposed liability of the grantors for their security, but both parties believed the estate of the intestate would alone be affected by the covenants. To the arguments derived from these considerations, the reply of the court is, "You meant to secure us by these covenants; and, as you had no authority to do it in the form you contemplated, you are bound by your deed to do it yourself."

"That is the law of South Carolina, as I understand it. It expresses better than I can the law which bears upon that subject. So, now, if these defendants did undertake to insure this plaintiff in a corporation that had no existence, if they did so represent it, signed their names as president and so on, although they honestly believed they had the right to do it, although in their judgment they had the authority under this Chester charter, and if the plaintiff did not fall into a common mistake at the time, if that mistake was not mutual, then he would be entitled to recover, unless they have brought this under another exception to which I will refer you. Now, he who claims that he has been damaged by misrepresentation of another must show that that misrepresentation was of a material fact, and he must show that he has lost as a proximate result of the misrepresentation. Now, was it material here? Did these gentlemen represent that they were officers of corporation? Did they induce this plaintiff to take out that policy under that representation? Then, if they did, it is for you to say whether it is material. Has he

sustained any loss by reason of it? Was his house burned down, the house he understood to be insured in this company and not in the Chester Company? Then the question would be, what would be his damage?

"I will now refer to these 'requests to charge.' I am requested by the plaintiff: '(1) If the jury believe, from the evidence, that there was no mutual mistake between the plaintiff and J. W. Hardy as to the issuing and accepting of the policy of insurance mentioned in the complaint, then the by-laws of the Chester Company would not be competent, and the jury should not consider such by-laws.' I so charge you. You must find that there was a mutual mistake before you can consider the Chester by-laws, because that would have nothing to do with this case. I am further requested by plaintiff to charge: 'That, if a person assumes to act as the agent of a principal who has no legal existence, and as such agent enters into a contract with another, then the person contracting as such agent renders himself individually liable to the party with whom he contracts; and if such party has been damaged by reason of his having relied upon such contract, then the person who entered into such contract as agent renders himself individually liable to the other contracting party, the extent of such liability being the damage sustained by such contracting party by reason of his having relied upon the contract so entered into with him.' That is good law. 'That corporations have only such powers as are expressly granted to them by their charters, or such as are necessarily implied to carry out the purposes for which they were chartered.' I have already charged you to that effect. That it is the province of the court to construe the charters of corporations, and the jury are bound to accept the construction as given by the court; and, in the case now on trial, the court instructs the jury that the Farmers' Mutual Insurance Association of Chester had no right to organize or create any subordinate corporation in Edgefield, and that such subordinate association is not a corporation, and it has no power to make a contract.' I so charge you. 'If the jury believe, from the evidence, that the defendants W. H. Timmerman and J. S. C. Carpenter signed the instrument produced by the plaintiff, which purports to be a policy of insurance, and that the defendant J. W. Hardy solicited the plaintiff to enter into such contract, and if the plaintiff was induced by such act to enter into and accept such contract as a valid policy of insurance, then the defendants are liable to the plaintiff for all damage which he sustained through his reliance upon such supposed contract.' I so charge you. 'That whether the defendants entered into the contract through fraud, or bona fide,

makes no difference as to their liability to the plaintiff; for the law is that, if one of two innocent persons must suffer loss, he who brought about such condition is responsible, and is bound to make good to the other party any damage which the unauthorized act has brought about.' I so charge you. 'If the jury find for the plaintiff, then he is entitled to recover the amount which the evidence shows that he has been damaged by fire to the gin house and machinery, named in the supposed policy of insurance, to the extent of \$500; that is, if the damage to the gin house and machinery amounts to \$500 or more, the plaintiff could only recover \$500, but if the damage is less than that amount, then the verdict should be for the actual damage,—whatever the jury may find that to be.' I so charge you.

"The defendants request the court to charge you as follows: 'If the jury believe, from the evidence, that the plaintiff was informed, when he accepted the policy, that he could not recover if the fire should occur at a time when the machinery operated by steam was in motion, then the plaintiff is not entitled to recover.' I charge you that, provided the jury believe, from the testimony, that that condition was agreed to as a part of the contract. If that condition was agreed to as part of the contract, and if the fire was caused by steam being operated at the time, then he could not recover. If this was stated upon the insurance policy, and the by-laws so prescribed, it would be for the court to say whether that by-law was reasonable or not. I could not undertake to say such a by-law was unreasonable. You would have to come to the conclusion that was incorporated or understood, at the time, to be a part of the contract. The mere fact that his policy refers to by-laws is not sufficient. While these defendants have the right to stand upon that policy, the policy itself does not set out that provision, but does refer to by-laws. Now, if you believe that this plaintiff endeavored to get these by-laws, that he was ignorant of them, that he did not know what they contained, then he cannot be bound by them; and we have had no by-laws introduced in this case as belonging to this association, and the Chester by-laws can have no effect upon it unless, as I have already charged you, there was mutual mistake between the parties in supposing he was being insured in the Chester Company. 'It is now settled law that there can be no fraud, misrepresentation, or concealment in law without some moral delinquency. There can be no actual legal fraud which is not a moral fraud.' I so charge you, but decline to charge the remainder of the request. '(2) In order that the plaintiff may recover in this action he must show that there was no such corporation as the one described in the complaint,

and that the defendants, at the time of the issuance of said policy, \* \* \* attempted to insure the plaintiff in a concern that had no legal existence.' I so charge you. I have left out certain words in the request to charge, which I decline. 'Fraud is not presumed from the fact that the statements are false, but the plaintiff must prove the fraud as well as every other material allegation of the complaint denied by the answer of defendants by the preponderance of the evidence.' I so charge you, and say, further: 'Fraud is not presumed from the facts that the statements are false.' That is true as to actual fraud. I further instruct you that fraud may be inferred from all the facts and circumstances which have been proven. 'In order to constitute actionable fraud, so far as the question of knowledge is concerned, the jury must believe, from the evidence, that the defendant, being without knowledge and without any belief on the subject, recklessly made the representations with the intent to deceive, before they can find a verdict for the plaintiff.' I decline, except with this modification: Every man must be presumed to intend to do what his words, spoken or written, would reasonably imply. If, therefore, one makes statements, from which, from the words used or written, taken in their common acceptance, a certain conclusion is reasonably drawn by another, such conclusions must be presumed to have been intended. '(5) If the jury believe, from the evidence, that the defendants ——' The fifth is declined. '(6) Before the plaintiff can recover in this action, he must establish, by the preponderance of the evidence, three things: First. That the representations were false. \* \* \* Third. That the plaintiff has been damaged by said false representations.' I so charge you. I decline to charge the second subdivision. '(7) If the jury believe, from the evidence, that the defendant issued the contract of insurance described in the complaint, and in doing so attempted and intended to insure the plaintiff in the Farmers' Mutual Insurance Association of Chester, S. C., by using the words "The Farmers' Mutual Fire Insurance Association for the County of Edgefield," and that said name was used for the former association, it is a mere misnomer, the said Chester Association would be bound thereby, and the plaintiff could not recover in this action.' I decline to charge that, except under conditions already specified. 'That, to constitute fraud, it is not only necessary that the representations should be false, but also that the party making it should know it to be so, or have reason to believe it to be so, at the time it was made. The fraud and the scienter or guilty knowledge constitute the grounds of the action.' I charge you this is true in actual fraud. I charge you, on the subject, that actual fraud is cunning deception,

artifice used to circumvent, cheat, or defraud another, and that that is not the basis of this action. As I understand, there is no actual fraud intended to be charged. Constructive fraud is such as the law infers from the relationship of the parties and from the circumstances by which they are surrounded, and from the negligent performance of some act, or the negligent omission to do something whereby another has been deceived or misled, to his prejudice, and where the intent to deceive is either established by the testimony, or is to be inferred from the facts and circumstances proved. I charge you that, in many cases of what is known as 'legal fraud,' there is no moral turpitude.

"Now, gentlemen of the jury, take this case. You will consider it upon the testimony, and under the law, without regard to the parties at all. We are to do justice between man and man. Every man has the right to come into court, state his grievance, and prove it. If he proves it by the preponderance of the testimony, and is entitled to relief under the law, then it is the duty of the jury to give it to him. If he does not prove it by the preponderance of the testimony, then it is the duty of the jury to say, in their verdict, that he is not so entitled to it. By the preponderance of the testimony is meant the weight of the testimony, not the number of witnesses. You may believe one man, and not believe a dozen men. By that testimony which produces conviction in your mind you are to decide the case. If you find for the plaintiff you will say: 'We find for the plaintiff so many dollars,' writing it out in letters and not figures. If you find for the defendant, say: 'We find for the defendant.' Take the record."

Jury retired. It was agreed that the jury should render a sealed verdict. Before court reassembled next morning, the jury were released from their consideration of the case, the foreman having announced to the constable in charge of them that they had agreed. On reassembling of court, they were called over, and asked if they had agreed upon a verdict. The foreman announced that they had agreed, but, during the interval of their dismissal and the reassembling of court, one of the jurors had notified him that he was dissatisfied with the verdict. The court said the verdict could not be accepted, and that the jury would have to retire again. Mr. Croft objected. Objection overruled. Mr. Croft then asked the court to instruct the jury as to section 20 of the by-laws. The Court: "I have not read all the by-laws. If the only by-law which refers to the exemption of the company when steam is used in a building is section 20, then, after reading that section, I will give you my construction of it. 'The agent shall take no steam mill into this asso-

ciation. If a gin house or other buildings be taken into this association, which shall at intervals be operated by steam, the insurance on such building, or buildings adjacent and endangered thereby, shall be removed so long as it is so operated, but, the steam being removed from such building, the policy shall again become intact.' As I understand, that policy covered the gin house and machinery. Now, I charge you, if this insurance had been in the Chester Company, the Chester Company had given insurance upon the gin house and machinery, while they had the right to pass this by-law, and while the court rules it is not an unreasonable by-law, still it would be given a strict construction, and if the house had been burned, steam being used, which would exempt the company from liability, it could only exempt the company so far as it is here declared, to wit, as to the building, and would still be liable as to the machinery. That's my construction of section 20."

Jury retired again, and, after considerable deliberation, the foreman announced they desired further information from the court. Jury brought out, and the foreman handed the court a slip of paper. The Court: "The following question is propounded to the court by one of the jurors who 'wants further information as to the fact of the officers acting unwittingly in representing an insurance company which in fact was not a legal company, and its effect on the parties concerned, and are said officers individually liable for losses under policies issued by them?' As I charged you before, gentlemen of the jury, where one undertakes to represent a company as agent, and it turns out he was not authorized to act, or that he is acting for some one, or pretending to act for some one, who had no authority to contract, then he who represents himself as agent is individually liable. And I further charge you that, if he so represents himself to act for another, although he may have had honest opinion that he had the authority, yet if it turns out that he had no such authority, and if the person with whom he contracted was not so advised at the time, then he is individually responsible. His good faith has nothing to do with the matter; but when they both—the contracting parties—were equally deceived, where there was a mutual error, he would not be liable."

Defendants' grounds of appeal are:—

"(1) Because the presiding judge erred in overruling the defendants' motion for a nonsuit. (2) Because the presiding judge erred in holding, on defendants' motion for a nonsuit, that the defendants admitted the corporate existence of the association described in the complaint and named in the policy of insurance held by plaintiff, and that the admissions of the answer were sufficient to carry the

case to the jury. (3) Because the presiding judge erred in allowing the case to go to the jury when there was no evidence adduced to show that the plaintiff did not have a valid contract of insurance, which policy constituted the basis of the action. (4) Because the presiding judge erred in charging the jury as mentioned in the plaintiff's fourth request, which was as follows: 'If the jury believe, from the evidence, that the defendants W. H. Timmerman and J. S. C. Carpenter signed the instrument produced by the plaintiff, which purports to be a policy of insurance, and that the defendant J. W. Hardy solicited the plaintiff to enter into such contract, and if the plaintiff was induced by such act to enter into and accept such contract as a valid policy of insurance, then the defendants are liable to the plaintiff for all damage which he sustained through his reliance upon such supposed contract,'—for the reason that the defendants would not be liable if the plaintiff knew as much as the defendants in reference to the policy of insurance so issued. (5) Because the presiding judge erred in charging as requested in the said fourth request of plaintiff, in that he charged upon the facts, in violation of section 26, art. 4, of the state constitution. (6) Because the presiding judge erred in charging the jury as contained in the plaintiff's fifth request to charge, as follows: 'That whether the defendants entered into the contract through fraud or bona fide makes no difference as to their liability to the plaintiff, for the law is that, if one of two innocent persons must suffer loss, he who brought about such condition is responsible, and is bound to make good to the other party any damage which his unauthorized act has brought about.' Such principle of law, if sound, is inapplicable to this case, as the policy was a mutual contract of insurance, and a mutual agency for an unauthorized principal (if such was the case), and as no personal liability could arise between the parties thereto, all being on an equal footing. (7) Because the presiding judge erred in refusing to charge the eighth request of the defendants, which was as follows: 'That, to constitute fraud, it is not only necessary that the representation should be false, but also that the party making it should know it to be so, or have reason to believe it to be so at the time it was made. The fraud and the sciepter, or guilty knowledge, constitute the grounds of the action.' (8) Because the presiding judge erred in charging the jury that the Farmers' Mutual Fire Insurance Association of Chester, S. C., had no right, under its charter, or under the law, to organize a subordinate or branch organization in Edgefield County, as was done in this case. (9) Because the presiding judge erred in ruling and holding that good intention, good faith, and



honesty of purpose amounted to nothing in a case like the one at bar. (10) Because the presiding judge erred in refusing to charge the defendants' first request to charge without modification. (11) Because the presiding judge erred in holding that the law laid down in the case of *Edings vs. Brown* (1 Rich. Law, 255) was the law of this case, whereas they differ, particularly in this: that, in the former case, the parties were entire strangers, and acted at arms' length, and in the case at bar the parties dealt with each other as the members of a mutual insurance association. (12) Because the presiding judge erred in ordering or permitting the jury to retire and resume the consideration of the case when they had once dispersed, thinking that they had agreed upon a verdict, when, in fact, they had not. (13) Because the presiding judge erred in his construction of the twentieth by-law of the association, which is as follows: '(20) The agent shall take no steam mill into this association. If a gin house or other buildings be taken into this association which shall at intervals be operated by steam, the insurance on such buildings adjacent and endangered thereby shall be removed so long as it is so operated, but, the steam being removed from such buildings, the policy shall again become intact,'—in this: that the association would still be liable for the loss of the machinery, even though it was burned when being operated by steam. (14) Because the presiding judge erred in holding that this case was one of constructive fraud solely, which he erroneously defined to be 'such as the law infers from the relationship of the parties, and from the circumstances by which they are surrounded, and from the negligent performance of some act, or the negligent omission to do something, whereby another has been deceived to his prejudice.' (15) Because the presiding judge, having charged the jury as contained in the defendants' second request, as follows: 'It is now settled law that there can be no fraud, misrepresentation, or concealment in law without some moral delinquency. There can be no actual legal fraud, which is not a moral fraud,'—erred by afterwards charging the jury as follows: 'That, in many cases of what is known as legal fraud, there is no moral turpitude.'

FOLK & FOLK and SHEPPARD BROS., *for Appellants.*

CROFT & TILLMAN, *for Respondents.*

McIVER, C. J.

These two cases, being of a similar character, were heard together; but, as they differ in some of their features, it seems to us best to consider them separately, and we will first consider the case of *D. P. Lagrone*. But the remarks we shall make in regard to the points

made in that case must be regarded as applicable to similar points made in the other case. D. P. Lagrone commenced his action against the defendants on the 1st day of September, 1894, on a paper purporting to be a policy of insurance, a copy of which is set out in the case, to recover the amount of his loss by fire in the destruction of his gin house and machinery connected therewith. The following is a copy of so much of the policy as it is deemed necessary to set forth here:—

\$500.00. No. ———. Policy of the Farmers' Mutual Fire Insurance Association of South Carolina. This agreement this day entered into between D. P. Lagrone, who is called the "insured," and the Farmers' Mutual Fire Insurance Association for the County of Edgefield, whereby it is agreed, etc.

Setting forth the terms and conditions of the contract in detail, which, at this point, need not be stated. This paper was signed by the parties as follows: "W. H. Timmerman, Pres. J. S. C. Carpenter, Gen. Agt. D. P. Lagrone, Ins." This contract seems to have been entered into on the 3d day of October, 1893; at least, that is the day from which the insurance was to commence. This action was brought against the defendants individually, and was based upon the theory that the defendants held themselves out as agents of the Farmers' Mutual Fire Insurance Association for the County of Edgefield, when, in fact, there was no such association legally established, and therefore the defendants, pretending to as agents of a corporation having no legal existence as such, and no power to enter into the contract evidenced by the policy, became personally liable for the performance of such contract. The defense was so fully and fairly stated in the charge of the circuit judge, which will be reported, as to supersede the necessity of making any further statement. The case came on for trial before his honor, Judge Earle, and a jury, and, when the complaint was read, the defendants demurred to the same on the ground that it did not state facts sufficient to constitute a cause of action, in this: "It being described in the complaint as a mutual insurance association, the plaintiff is estopped from denying the corporate existence of the association." The demurrer was overruled, and no exception was noted to such ruling, and there is no ground of appeal imputing error in such ruling. That matter, therefore, may be dismissed from further consideration. It is stated in the case that the answer was amended so as to allege that, the plaintiff having become a member of a mutual insurance association, and recognized its existence by paying assessments and otherwise, he is estopped now from denying the corporate existence of the association. At the close of the testimony adduced in behalf of the plaintiff, defendants moved for a

nonsuit, upon the ground that the plaintiff, having become a member of a mutual insurance association, is estopped from denying its corporate existence, and upon the further ground that there is no testimony to sustain the material allegation in the complaint that there was no such corporation as a Mutual Fire Insurance Association of Edgefield, S. C., a fact which was known to the defendants. The motion was refused upon the ground that the admissions in the answer were sufficient to carry the case to the jury. The defendants then offered their testimony, and the judge charged the jury, as set out in full in the case, and a verdict was rendered in favor of plaintiff. From the judgment entered thereon defendants appealed, upon the several grounds set forth in the record; but, as they should be embraced in the report of the case, along with the judge's charge, we need not set them out in detail here.

The first, second, and third grounds of appeal may be considered together, as they all relate to the question as to whether the nonsuit was improperly refused. It seems to us that the most cursory reading of the pleadings and evidence as set out in the case will show that there was testimony tending to prove that the Farmers' Mutual Fire Insurance Association of Edgefield County had no legal existence at the time this policy was issued, in October, 1893, and never had any such existence until the act constituting such corporation was approved January 4, 1894 (21 St. at Large, 619), which act was offered in evidence before the plaintiff closed his testimony. And the answer shows that this fact was known to defendant, who manifestly relied upon the erroneous notion, as we shall hereafter see, that, under the by-laws of the Chester Association, which had been chartered in 1891, they had authority to organize the Edgefield Association, and undertook to do so. If, therefore, the Edgefield Association had no legal existence, it is difficult to understand how the plaintiff could become a member of a corporation which had no existence; and the fact that he undertook to become so, under the mistaken representation of defendants that there was such a corporation, certainly could not work the estoppel claimed by defendants. We think it clear that neither of these three grounds can be sustained. The fourth and fifth grounds of appeal impute two errors in charging plaintiff's fourth request: (1) In not adding to that request the further instruction that defendants would not be liable if the plaintiff knew as much as the defendants in reference to the policy of insurance; (2) that, in charging that request, the constitutional inhibition against charging on the facts was disregarded. As to the first imputed error two answers may be made. In the first place, the judge was not requested to give any such additional

instruction, and, if the defendants desired such instruction, it was their duty to ask for it; and, in the second place, there was no testimony upon which such additional instruction could properly have been asked for, as there was no evidence that plaintiff knew as much as the defendants in reference to the policy of insurance. As to the second error, the phraseology of the request itself. "If the jury believed from the evidence," etc., is a sufficient answer to that imputation. The sixth, seventh, ninth, and eleventh grounds of appeal make substantially the same question, and may therefore be considered together. That question is whether the defendants can be held liable without proof of actual, moral fraud on their part. That point is so conclusively determined, by the authorities in this state, adversely to the view contended for by appellants, that we need not go elsewhere for authority, though much of it would be found collected in our own cases, upon which we shall not rest our conclusions. In *Bank vs. Wray* (4 Strob., 87) it was held, expressly affirming the previous case of *Edings vs. Brown* (1 Rich. Law, 255) that, if one signed a note or indorsed a bill as agent, when he is not agent, he is personally liable, although he do so bona fide, and does no other act to deceive or mislead the person with whom he deals, except by the assumption of agency when he is not agent. Falsehood and deceit are not necessary to charge an agent personally with a contract he had no authority to make. In the opinion of the court in that case we find language so pertinent to the present case that we quote and adopt it here: "The injury proceeded from the act of the defendant. He would evade liability under the plea of innocent mistake. In a moral sense, the act of defendant may have been innocent, for he had no desire or apprehension of mischief to his principal; but, in its practical effect, it was not innocent. \* \* \* But, even when the agent, bona fide, believes he has authority to contract, and has not, he is still personally liable. In such cases, it is true, the agent is not actuated by any fraudulent motive, nor has he made any statement which he knows was untrue. But his liability depends on the same principle as in the first case." In this case the court takes pleasure in saying that the evidence does not justify any imputation of moral fraud or intentional wrong on the part of these defendants, and, indeed, we do not understand that any such imputation is made. But, under the principles laid down in the cases above cited, in which cases of the highest authority elsewhere are reviewed, we must hold that the absence of moral fraud or intentional wrongdoing on the part of the defendants is not sufficient to relieve them from liability. It follows, therefore, that these grounds must be overruled.

The eighth ground of appeal, which imputes error to the circuit judge in instructing the jury that the Farmers' Mutual Fire Association of Chester, S. C., had no power to organize a subordinate branch organization in Edgefield County, cannot be sustained. A corporation, which is a creature of the legislature, can have no powers except such as conferred by its charter, either in expressed terms or by necessary authority to support it. But, if any is desired, it may be found in the case of *Thomas vs. Railroad Co.*, 101 U. S., 71, and in *Oregon Ry. & Nav. Co. vs. Oregonian Ry. Co.*, 130 U. S., 1, 9 Sup. Ct., 409. Turning, then, to the charter of the Chester Association, which will be found in 20 St. at Large, 1315, it is very clear that no such power has been conferred, either in express terms or by necessary implication. We do not wish to be understood as admitting that the legislature would have the power to delegate its legislative power to a corporation by authorizing it to create another corporation, for the legislature has not undertaken to do so, and hence no question as to its power in that respect arises in this case.

The tenth and thirteenth grounds, which impute error in refusing to receive the by-laws of the Chester Association in evidence in this case, may be considered together. Inasmuch as the policy upon which this action was based contained no reference whatever to the by-laws of the Chester Association, it is difficult to conceive how such by-laws would be pertinent to any issue in this case. This ground is overruled. The twelfth ground of appeal cannot be sustained. If the Edgefield Association had no legal existence, as we have seen, it is difficult to conceive how it could have any members of any kind. The policy, purporting to be issued by a company or association which had no legal existence, and which, therefore, could have no agents, does not, and could not, render any of the parties agents of such nonexistent corporation. That association cannot be regarded as a mutual company, for the obvious reason that it was no company at all.

The fourteenth exception cannot be sustained. It is a familiar rule that, when the parties have reduced their contract to writing, the court can only look to the terms in which the parties have expressed their intention in such writing. In 1 Greenl. Ev., § 275, it is said: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and oral testimony of a previous colloquium, between the parties, or of conversations or declarations, at the time when it was

completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, parol, contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." Under this rule, it is very clear that the testimony of the witness referred to in the fourteenth exception as to what occurred at the time the policy was issued, or before, or afterwards, was inadmissible. The fifteenth exception cannot be sustained. In the first place the circuit judge did not instruct the jury that this was a case of constructive fraud; but, if he had done so, we, as we have said, so regard it, and think it due to the defendants to say that there does not appear to be any element of moral fraud in the transaction. And, in the second place, there was no error in his definition of constructive fraud, as may be seen by reference to those standard authorities: Cooley, Torts, 474; Story, Eq. Jur., §§ 258, 259; 2 Pom. Eq. Jur., c. 3, § 4. The sixteenth exception must be overruled. It is an entire misconception of the charge of the circuit judge to suppose that there was any inconsistency whatever in the charge. In the one place, in response to one of the requests submitted by the defendants, he was speaking of actual, moral fraud, while, in the other place, he was speaking of a different and distinct class of frauds,—legal or constructive fraud. The seventeenth exception needs no special consideration, as it is very obvious, from what we have already said, that it cannot be sustained.

We proceed next, to the consideration of the case of J. H. Lagrone, or, rather, to those points wherein it differs from the case of D. P. Lagrone. The main difference between the two cases is that, in the case of J. H. Lagrone, the answer was amended by inserting a paragraph alleging a mutual mistake in framing the policy of insurance, and that it was mutually understood that the policy was issued by the Farmers' Mutual Insurance Association of Chester, S. C., operating in Edgefield County, through its subordinate branch, and was the company bound thereby, and that, by the name used in the policy, the parties meant the Farmers' Mutual Insurance Association of Chester, S. C., operating in Edgefield County, through its said subordinate branch, and that it thereby became liable on said insurance contract; whereas, in the case of D. P. Lagrone, there was no such amendment, and no such allegation in the answer. The only exceptions, therefore, necessary to be noticed in this case are the tenth, eleventh, twelfth, and thirteenth. The tenth exception cannot be sustained, for two reasons: (1) Because it is not in proper

form, as it does not set forth the request to charge referred to, or the modification complained of; (2) because, even if it was presented in the proper form, it could not be sustained, because the request as submitted was charged, and the only modification made was a very proper one, that the jury should believe the fact upon which such request was based. There being nothing in the policy to show that there was any condition therein stated that the insurance should be void if the fire occurred while the machinery was being operated by steam, of course it was necessary that the jury should be satisfied, by the evidence, that such condition was agreed to as a part of the contract, before such condition could affect the plaintiff's right to recover. It is clear that there was no error in so modifying the request. The eleventh exception is based upon the assumption that the policy was issued by a mutual insurance association; and, as we have seen there was no such corporation 'as that named in the policy, this assumption is unfounded. This exception cannot, therefore, be sustained. The twelfth exception must be overruled, as the question there made is distinctly disposed of adversely to appellants by the case of *Devereux vs. Press Co.* (14 S. C., 396), where the facts were substantially the same as those presented in this case. The thirteenth exception cannot be sustained for two reasons: (1) Because the point there raised has no practical application to this case; (2) because, even if it had, there was no error in the construction which the circuit judge placed upon the by-laws referred to. First. Inasmuch as the jury had been explicitly instructed that, if they believed that there was any such mutual mistake as that alleged in the amendment to the answer, the plaintiff could not recover, and inasmuch as the jury did find a verdict in favor of the plaintiff, we are compelled to assume that the jury did not believe that there was any such mutual mistake; and, if there was not, then it was impossible to conceive what the by-law of the Chester Company had to do with this case. Hence, the proper construction of such by-law would be a purely speculative matter, so far as this case is concerned, and, consequently, it would make no difference whether the circuit judge was right or wrong in his construction of the by-law. Second. The by-law referred to reads as follows: "The agent shall take no steam mill into this association. If a gin house or other buildings be taken into the association which shall at intervals be operated by steam, the insurance on such building or buildings adjacent and endangered thereby shall be removed so long as it is so operated; but the steam being removed from such building, the policy shall again become intact." The judge construed this by-law

as a reasonable by-law, but that it must receive a strict construction; and, therefore, while the company would be relieved from liability for the building if it was burned while the machinery was being operated by steam, it would not relieve the company from liability for the machinery if it was burned while operated by steam, for the reason that nothing was said about machinery in the by-law. We do not see how any other construction could be placed upon it without interpolating words into the by-law which it does not contain. But, as we have said, we do not regard this question as pertinent to the case.

It will be necessary for the reporter to include in his report the charge of the circuit judge and the exceptions thereto in this case of J. H. Lagrone, as well as the charge and the exceptions in the case of D. P. Lagrone. The judgment of this court is that the judgment of the circuit court in both of the cases above stated be affirmed.

GARY, J. (dissenting.)

In my opinion, there was testimony tending to show that the plaintiffs contracted with reference to the by-laws of the Farmers' Mutual Insurance Association of Chester, S. C., and that his honor, the presiding judge, was in error in his charge to the jury upon this question. I think there should be a new trial, and therefore dissent from the judgment announced by the majority of the court.

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## SUPREME COURT OF MINNESOTA.

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LEVINE ET AL.

vs.

LANCASHIRE INS. CO.\*

Where on the trial a party objected to the admission of certain books of account on the ground that they were not properly authenticated under the statute, he cannot be heard to urge on appeal that the statute was inapplicable, and that they should have been authenticated according to the common-law rule.

In an action against an insurance company for the value of a stock of merchandise destroyed by fire, day books, ledgers, and other books of account, kept in the usual course of business, showing the amount and value of the goods, are competent evidence, when properly verified or authenticated.

The fact that some entries were made by the bookkeeper from temporary slips furnished by salesmen will not affect their character as original entries.

The fact that books of account contain some errors affects their credibility, but, in the absence of evidence that the books were fraudulently falsified, will not necessarily render them incompetent.

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\* Decision rendered, Nov. 6, 1896. Syllabus by the Court.



In an action to set aside an award, it is competent for one of the arbitrators (who refused to join in the award) to testify as to acts of partiality and misconduct on part of the other arbitrators.

Where it is assigned as error that the court refused to make an additional finding, the case or bill of exceptions must show that it contains all the evidence upon the issue upon which the finding was requested.

The rule applied that, where an insurance company objects to the sufficiency of proof of loss on one ground alone, this amounts to a waiver of all other objections.

The evidence considered, and *held* sufficient to invalidate an award on the ground of the partiality and misconduct of the arbitrators.

*Held*, also, that the defendant company had by its conduct waived its right to a new appraisal as a condition precedent to plaintiffs' right of action on the policy.

Also, that by its conduct on the trial it waived its right, if any, to have any of the issues in the case tried by a jury.

The fact that the judgment entered by the clerk does not conform to the court's order for judgment cannot be raised by appeal without first applying to the trial court to have the judgment corrected.

KUEFFNER, FAUNTLEROY & RICE and ALLEN & BALDWIN (J. N. Searles and D. H. Twomey, of Counsel), *for Appellant*.

DRAFER, DAVIS & HOLLISTER and H. J. GRANNIS, *for Respondents*.

MITCHELL, J.

This was an action on a fire-insurance policy for \$2,000 upon a stock of merchandise of the alleged value of over \$56,000, upon which there was concurrent insurance for \$46,500; the total alleged loss being \$37,858.44, of which defendant's proportional share would be \$1,561.66, of which \$725.25 had been paid, and judgment for the balance of \$835.91 was demanded. The policy contained the usual provisions that upon the occurrence of a loss the plaintiffs should give the defendant immediate notice, and within sixty days after the fire furnish proofs of loss; that the amount of the loss should be ascertained or estimated by the parties themselves, or, if they differed, then by appraisers, one to be selected by each party, the two so chosen to select an umpire; that, if the two appraisers should disagree, their differences to be submitted to the umpire, and the award of any two should determine the amount of the loss; that the parties should pay the appraisers selected by them respectively; that the defendant should not be deemed to have waived any provision of the policy, or any forfeiture thereof, by any act or proceeding on its part relating to such appraisal; that the amount of the loss or damage having been thus ascertained should not become payable until sixty days after notice, ascertainment, estimate, and satisfactory proof of loss, including an award of appraisers when an appraisal had been required; that no suit or action on the policy for the recovery of any claim should be sustainable until after full compliance with all the foregoing requirements; that the policy should

be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, whether before or after loss. The complaint alleges that upon the occurrence of the loss the plaintiffs performed all the conditions of the policy, including the rendering of proofs of loss; that, a disagreement having arisen between the parties as to the amount of the loss, they, pursuant to the conditions of the policy, selected two appraisers, who in turn selected an umpire; that the appraiser selected by the defendant and the umpire made an award determining plaintiffs' loss to be \$17,602.13, and no more, which award was accepted by the defendant, but rejected by the plaintiffs on the ground of fraud, misconduct, and partiality on part of the appraisers. The complaint then sets out the facts constituting the alleged fraud, misconduct, and partiality on part of the appraisers which it is claimed rendered their award void. It also alleges that the defendant waived the furnishing by plaintiffs of any other or further proof of loss than those already furnished. Aside from a general denial of all the allegations of the complaint, except as admitted, qualified, or explained, the answer consists of three defenses, viz : First, a denial of the allegations of fraud, misconduct, and partiality on part of the arbitrators, and an insistence that their award was valid, which defendant has fully performed and satisfied by the payment of the \$725.25; second, that this sum was paid by the defendant and accepted by the plaintiffs as full payment and satisfaction of all claims or demands under the policy; third, that the plaintiffs were guilty of fraud and false swearing as to the amount and value of their stock and the amount of their loss, which, under the conditions of the policy, rendered it void. The reply put in issue the new matter contained in the answer, and especially that the plaintiffs had accepted the \$725.25 in full satisfaction of all claims under the policy, and alleging that they only accepted it on account as part payment.

Upon the trial the two main issues were as to—First, the alleged fraud, misconduct, and partiality of the appraisers; and, second, as to the actual amount of plaintiffs' loss. Upon the second issue the controversy was not so much as to the amount of damage to goods saved as to the amount and value of goods totally destroyed; the defendant claiming that the value of the latter was trifling, while the plaintiffs claimed that it amounted to between \$16,000 and \$17,000. The court found as facts, substantially in accordance with the allegations of the complaint, that the amount of plaintiffs' loss was \$37,858.44, viz., goods totally destroyed \$15,741.72, and damage to goods saved \$22,116.72; that the arbitrators were guilty of the acts of fraud, misconduct, and partiality alleged; that the \$725.25

was paid by the defendant and accepted by the plaintiffs as part payment, and not in full satisfaction of their claim under the policy; that within the prescribed time the plaintiffs furnished proofs of loss, and, in response to defendant's request, further or supplementary proofs, which were accepted and retained by defendant without further objection. No express finding was made, and none seems to have been asked for, upon the issue as to plaintiffs' fraud and false swearing regarding the amount of their loss. As the burden of proof on this issue was on the defendant, the findings are equivalent to a finding in favor of the plaintiffs. Indeed, no serious attempt seems to have been made on the trial by defendant to maintain this issue by proof. As conclusions of law the court held that the award was void, and should be vacated, and constituted no bar to this action, and that the plaintiffs were entitled to judgment for \$835.30. Upon these findings judgment was entered in favor of the plaintiffs for that sum, but not in terms adjudging the award void. Defendant's assignments of error are seventy in number. They have been so unnecessarily multiplied, and so many of them are so palpably without merit, that we cannot be expected to consider each separately. All we feel called upon to do is to make special mention only of the most important ones, and to dispose of the remainder by merely saying that they are without merit.

1. The first forty-seven relate to various rulings of the court upon the trial as to the admission or exclusion of evidence. Most of these that are worthy of notice have reference to the admission of plaintiffs' books of account, consisting of their journal, ledger, and invoice book, which may all be considered together. While this class of evidence had some bearing on the question of the misconduct and partiality of the appraisers, as tending to show that they arbitrarily and willfully refused to examine and consider important and material evidence, yet the main purpose of it was to prove the amount of plaintiffs' actual loss. They introduced—First, an inventory of stock on hand, taken in the regular course of business on January 1, 1893; second, their journal and ledger, also kept in the regular course of business, and especially the merchandise account, purporting to contain an account of the amount and value of all merchandise bought or sold between the date of the inventory and the date of the fire, which occurred December 13, 1893. In connection with and as corroborative of these books, the plaintiffs also introduced the original invoices of goods bought between January 1 and December 13, 1893, which the evidence tended to show were carefully compared with the goods upon their arrival, and then, in the regular course of business, entered in the invoice book. Inasmuch as the goods were

charged to merchandise at their cost price, and credited at their selling price, this documentary evidence was supplemented by testimony as to the average profit over cost at which the goods were sold. If plaintiffs' books were correctly kept, this evidence would show the amount and value of the merchandise on hand at the date of the fire, and a comparison of this with the amount and value of the goods saved would show the amount of plaintiffs' loss. If the proper foundation was laid, there can be no doubt of the competency of this kind of evidence. Indeed, in case of a total or partial loss of a large and miscellaneous stock of merchandise, it is of necessity the only kind of evidence that can be produced. Books of account, or "shop books," as they are often called, are usually introduced in evidence only to prove services performed or articles delivered to the person named in the entries in the course of dealings between the parties creating the relation of debtor and creditor. But the competency of such evidence in cases like the present, and for the purpose for which these books were introduced, is fully recognized by the authorities: *Insurance Co. vs. Weide*, 9 Wall., 677; *id.*, 14 Wall., 375. This rule is founded on considerations of necessity, for ordinarily there is no other or better evidence in existence. It is claimed, however, that these books were not verified so as to lay the proper foundation for their introduction in evidence. After a careful examination of the record, we are satisfied that the preliminary proof substantially fulfilled all the requirements of Gen. St. 1894, § 5738, and hence that they were properly admitted, if the provisions of that statute apply to books of this kind. Counsel's contention is that this section only applies where the books are offered to prove moneys paid, goods delivered, or services performed to or for the party charged therewith; that as these books were not of that kind, or offered for that purpose, they should have been proved according to the common law, which required the supplementary oaths of all the different clerks or bookkeepers who made the entries, except where it was made to appear that they were dead or were out of the state, and that their testimony could not be obtained. Although such books may not come within the terms of the statute, yet as no reason now suggests itself to us why, in the nature of things, the same authentication should not be sufficient in all cases where books of account kept in the regular course of business are competent evidence, it may be a question whether the courts would not be justified in adopting by analogy the mode of authentication provided by the statute. But we do not decide that question, as it is not necessary to do so in this case. When plaintiffs' journal was offered in evidence the objection made to its introduction was that "it was not

properly authenticated under the statute." The ledger was then offered in connection with the journal, and the two were admitted together, without any other or further objection. Under this objection the point is not now open to the defendant to claim that the books were not authenticated according to the common law. The objection was that they had not been authenticated as required by the statute, thereby assuming and conceding that the statute applied. Immediately following the introduction of the journal and ledger, the plaintiffs offered in evidence their inventory and invoice book. The only objection made to the admission of this book, going to the question of preliminary proof, was that "it was not properly authenticated." If the statute was applicable to the journal and ledger, it was equally so to this book. There was nothing to advise the court that the objection was not the same as that made to the journal and ledger, to wit, that it was not authenticated as required by statute, and nothing to suggest that counsel claimed that the common law, and not the statutory, mode of authentication was applicable. The court having been led to understand that counsel recognized the statute as applicable, and that their objection merely was that its requirements had not been complied with, they cannot now shift their ground and claim that the statute was inapplicable. The fact that some of the entries were made by the bookkeepers from temporary slips furnished by salesmen did not affect their character as original entries: *Paine vs. Sherwood*, 21 Minn., 225; *Webb vs. Michener*, 32 Minn., 48. It appears that the books were not kept according to the most approved business methods; that they contained errors, notably two of great magnitude in the merchandise account as posted in the ledger, although entries elsewhere in the books furnished the means of detecting and correcting these errors. The books are not before us, but, so far as the evidence returned discloses, it would justify the conclusion that they were honestly kept, in the ordinary course of business, as a record of the daily business of the plaintiffs. There was no evidence that would have justified, certainly none that would have required, a finding that the books were fraudulently or intentionally falsified. The competency of such books is a question for the court, to be determined from the appearance and character of the books themselves, as well as the supplementary evidence of authentication. The mere existence of some errors, in the absence of anything showing that they were the result of fraud, would not necessarily render the books incompetent, although it would undoubtedly affect their credibility: *Cogswell vs. Dolliver*, 2 Mass., 217; *Mathes vs. Robinson*, 8 Metc. (Mass.), 269;

Rodenbough vs. Rosebury, 24 N. J. Law, 491. We cannot say that the court erred in admitting the books in evidence.

2. With a view to invalidating the award, the plaintiffs called as a witness the dissenting arbitrator, who testified to certain acts and words of the other arbitrator during the pendency of the submission tending to show partiality and misconduct on his part. The only thing that we discover in the testimony of this witness which was at all material, or which, if incompetent, could have prejudiced the defendant, was that part tending to show that the other arbitrator unreasonably refused to examine the books of the plaintiffs for the purpose of ascertaining what goods plaintiffs had on hand at the time of the fire, and seemed to have prejudged the case by assuming that the books had been falsified and were unworthy of any credence. This evidence was objected to on the ground that "one appraiser [arbitrator] cannot testify to any facts or circumstances relating to the conduct of any of the appraisers with reference to the award, on the ground that one appraiser cannot testify to facts impeaching the award." It will be observed that this evidence was not offered for the purpose of explaining or altering the award, but with a view to invalidating it altogether; nor was it calling on an arbitrator to testify as to the grounds of his decision, but as to extrinsic facts tending to show misconduct on the part of one of the arbitrators who joined in making the award. It is also to be observed that the witness was not called to impeach his own decision, for he had never joined in the award. It is not necessary here to go into a consideration of the general subject as to how far an arbitrator may be called on to testify respecting matters connected with the reference. We apprehend no case can be found which holds that an arbitrator (especially one who has refused to join in the award) is incompetent to testify as to acts of misconduct committed by another arbitrator. If such was the law, the grossest fraud, corruption, or partiality might prevail, and its victim have no relief. The rule, founded on considerations of public policy, that no affidavit shall be received from a juror to impeach his verdict, is not applicable, to its full extent, to arbitrators.

3. Assignments of error Nos. 48 to 57, inclusive, relate to the refusal of the court to make certain additional findings. These cannot be considered, for the reason that the bill of exceptions does not purport to contain all the evidence upon the questions as to which the additional findings were requested. This is just as necessary where exception is taken to the refusal of the court to make a particular finding as where exception is taken to one that is made, upon the ground that it was not justified by the evidence: *Groomes vs.*

Waterman, 59 Minn., 258. Moreover, the findings that were made covered all the issues in the case, and those requested related to mere matters of evidence.

4. Assignments of error Nos. 58 to 64, inclusive, are to the effect that certain findings were not justified by the evidence. So far as these findings were material and responsive to the issues made by the pleadings, they were justified by the evidence. The finding that the defendant accepted and retained the original and supplemental proofs of loss without further objection was amply justified by the evidence, for more reasons than one. The fire occurred December 13th. The parties entered into a written submission to arbitration as to the amount of the loss on December 27th, which was long before the time for furnishing proofs of loss had expired. This of itself constituted a waiver of furnishing proofs as to the amount of the loss: *Carroll vs. Insurance Co.*, 72 Cal., 297. Nevertheless, the plaintiffs, having rejected the award (made January 18th), did on or about February 2d furnish what purported to be formal proofs of loss, in accordance with the terms of the policy. To these proofs the defendant, on February 16th, made certain objections, the main burden of which was that the amount of loss claimed was not in accordance with the award, and notifying the plaintiffs that the company did, and at all times would, insist "that any claim under said policy for loss and damage by said fire should be on the basis of said award, and on no other basis." To obviate certain other objections to the form of the proofs, the plaintiffs on February 27th furnished supplementary proofs which were received by the defendant on March 2d. In response thereto the defendant wrote to plaintiffs on March 22d that these proofs were not accepted as satisfactory because "the amount claimed to be due from the company under its policy was greatly in excess of its proportion of the loss as fixed by the award of the appraisers chosen as provided by said policy." This was the only objection made to the proofs, and, according to a familiar rule, was a waiver of all others. The bill of exceptions does not purport to contain all the evidence as to whether the \$725.25 was paid by the defendant and accepted by the plaintiffs in full of their claim, or only on account. Hence the question whether the finding on that issue was justified by the evidence cannot be considered. The findings as to the fraud, partiality, and misconduct of the two arbitrators who made the award are of evidentiary, rather than of the ultimate issuable, facts. We do not think that the sufficiency of the evidence to support these findings is properly presented by the record, for the reason that the bill of exceptions does not purport to contain all the evidence on that issue,

except upon one specific act of alleged misconduct. But, so far as these findings are material, they were justified by the evidence which is contained in the record, and are amply sufficient to avoid the award. The arbitrator chosen by the defendant was receiving from it for his services the very liberal compensation of \$50 per day. The evidence tends to show that he seemed to have been actuated throughout with the idea that, because he was chosen by the company, it was incumbent on him to act as its representative, and do what he could for its interests. He also seems to have been mainly instrumental in selecting as umpire a confessedly incompetent person, whose action he practically dominated, thus virtually making himself sole arbitrator. The evidence also tends to show that he entered upon the discharge of his duties with the preconceived and fixed opinion (which he was quite free to express) that the fire, as well as plaintiffs' loss, was fraudulent, and that their books had been purposely falsified. It also tends to show that he had been informed in advance (perhaps by defendant's adjuster) of the two errors, already alluded to, in plaintiffs' books, and that he examined their books merely enough to verify the existence of these errors, and then refused to examine them further, and proceeded to appraise the value of the goods totally destroyed at \$650, upon what could have been little more than a mere guess. This was neither the animus nor conduct due from an arbitrator, whose duty it is, by whomsoever chosen, to decide the matters submitted to him impartially, and with the same judicial fairness as a judge or juror. The award of arbitrators should not be lightly set aside. Neither are they bound by the same strict rules as courts, in their investigations. But in view of the findings, and the evidence justifying them, showing that the award was virtually the decision of one man, who seems to have prejudged the case, and acted as the partisan of one of the parties, we think the court was amply justified in holding that the award should be set aside. As the bill of exceptions does not purport to contain all the evidence as to the value of the stock before the fire, the sufficiency of the evidence to support the finding on that issue cannot be considered. But inasmuch as the answer admits that the stock was worth much more than the amount of the loss as found by the court, and as there is no error assigned as to the latter finding, we fail to see how the finding of the court as to the value of the stock is at all material.

5. The remaining assignments of error present only one question worthy of special mention, viz., that, if any judgment in favor of the plaintiffs should have been rendered, it should have only been one setting aside the award. This contention is based on two grounds:



(1) That the defendant was entitled to a jury trial as to the amount of the loss; (2) that, even if the award was properly set aside on account of the misconduct of the arbitrators, the stipulation in the policy for the determination of the amount of the loss by appraisers still remained in force, and that a new award was a condition precedent to a right of action on the policy. The action was brought to set aside the award and to recover on the policy. There can be no doubt but that all this relief may be granted in the same action. Assuming that the defendant was entitled to a jury trial as to the amount of the loss, this was a right which it could waive. The defendant expressly stipulated that the verdict of the jury on a former trial might be set aside, and the cause submitted to the court, on the evidence already taken, for the entry of such judgment as the parties were entitled to. It is true that in this stipulation the defendant reserved the right to object to the entry of any judgment other than one determining the validity or invalidity of the award; also that on the trial its counsel objected to the admission of any evidence as to the amount of the loss. But this reservation and objection evidently proceeded upon the theory that even if the award was set aside the amount of the loss must be determined by new appraisers, and had no reference to the right of trial by jury. If the defendant desired a jury trial of any of the issues, it should have distinctly advised the court of the fact. See *Greenleaf vs. Egan*, 30 Minn., 316; *Lace vs. Fixen*, 39 Minn., 46; *Peterson vs. Ruhnke*, 46 Minn., 115; *Smith vs. Barclay*, 54 Minn., 47.

6. According to the rule laid down in the leading case of *Scott vs. Avery* (5 H. L. Cas., 811), as well as in the decisions of this court in *Gasser vs. Insurance Co.* (42 Minn., 315), and *Mosness vs. Insurance Co.* (50 Minn., 341), undoubtedly the provision in this policy for the determination of the amount of the loss by arbitration was a condition precedent to a right of action on the policy, and not a mere collateral stipulation to enter into a submission. The law also, undoubtedly, is that under such a provision, if an award is set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement for an appraisal still remains in force, and a new appraisal, unless it had become impossible, would still be a condition precedent to a right of action on the policy unless waived: *Hiscock vs. Harris*, 80 N. Y., 402; *Carroll vs. Insurance Co.*, 72 Cal., 297; *Hood vs. Hartshorn*, 100 Mass., 117; *Thorndike vs. Association*, 146 Mass., 619; *Davenport vs. Insurance Co.*, 10 Daly, 535; *Uhrig vs. Insurance Co.*, 101 N. Y., 362. Assuming, without deciding, that this award failed without fault on part of the defendant, yet its conduct after plaintiffs rejected the award clearly con-

stituted a waiver of the right to a new appraisalment. Not only did it never ask for or even suggest a new appraisalment, but in its communications with plaintiffs it expressly insisted on the award already made, and notified them that any claim under the policy must be on that basis, and no other. It took the same position in its answer: *May, Ins.*, § 496b. The fact that the judgment did not conform to the court's order for judgment, by in terms adjudging that the award be set aside, cannot be considered, for the reason that no application has ever been made to the trial court to have the judgment corrected. Judgment affirmed.

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## SUPREME COURT OF KANSAS.

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SPRINGFIELD FIRE & MARINE INS. CO. }

vs.

PAYNE ET AL.\* }

In the absence of fraud or mistake, the written agreement of the assured and several insurers for the appraisalment of a fire loss is the best evidence of the intent of the parties in entering into it.

For the purpose of testing the validity of an award of appraisers of a fire loss, it is improper to submit to the jury whether the appraisers were in possession of the facts necessary to an intelligent conclusion, or whether they took into consideration all the items of the loss covered by the policy. Such an award is valid and binding if the proceeding is honestly and fairly conducted, but, in the case of destroyed property, which an appraiser had never seen, fairness would require that he be informed by evidence of some sort (not necessarily under oath) as to the character and value of the property; and, unless an opportunity is afforded to impart such information, the award will not be binding.

Evidence of the cost of a building is not usually evidence of its value at a particular time; but witnesses who are not architects, builders, or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction, such inability affecting the weight, but not the competency, of the testimony.

Although a submission to appraisers may not be a condition precedent to the commencement of an action, for the reason that neither party made a written demand therefor, yet, when an appraisalment is agreed upon, the parties are bound by the award, unless the same is invalid; and the burden of proof in that respect rests upon the party who challenges it.

Statement of facts by MARTIN, C. J.

In 1887, Thomas J. Payne commenced, and in 1889 completed, the erection of a fine dwelling house at Argentine. On November 8, 1888, the plaintiff in error issued a policy of fire insurance thereon for the sum of \$4,000, to run for three years. Policies were issued by three other companies, aggregating \$15,000. The house was destroyed by fire about 2 o'clock on Sunday morning, May 3, 1891.

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\* Decision rendered, Oct. 10, 1896. Syllabus by the Court.

Within a few days after the fire, the adjusters of the several companies, or some of them, had a conference with Payne and his attorney at the Coates House, in Kansas City, Mo., in relation to the loss, but the evidence is quite conflicting as to what occurred there. The policy of the plaintiff in error contained the following clauses:—

The amount of sound value and the loss or damage shall be determined by agreement between the company and the assured. But if at any time differences shall arise touching any loss or damage, every such difference shall, at the written request of either party, be submitted at equal expense of the parties to competent expert and impartial persons (not interested in the loss as creditors or otherwise, nor related to the assured or claimants), one to be chosen by each party, and the two so chosen, in case of their disagreement, shall select a third to act with them; and the award in writing, under oath, of any two of them, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy; \* \* \* and, until the \* \* \* award had, the loss shall not be payable.

And—

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

Payne testified that the adjusters made no claim that his loss was not equal to the amount of the policies, but they represented that it could not be paid until after an appraisal thereof, which was a requisite formality to payment without suit. The testimony of the adjusters was to the effect that they disputed the amount of the loss, and claimed that it was much less than the sum of the policies, and that they proposed the selection of appraisers, as provided by the policies, to fix the amount of the loss. Nothing was then agreed upon, but the attorney for Payne said that he would make proofs of the loss. On or about June 17, 1891, however, Payne and the several agents and adjusters of the insurance companies signed a written agreement for the appointment of P. B. Messenger and S. G. Gribi to appraise the loss, and in case of disagreement the said appraisers to select a third to act with them in matters of difference only; the award of said appraisers, or any two of them, made in writing, in accordance with the agreement, to be binding upon both parties; it being stated that the appraisement was for the purpose of ascertaining and fixing the amount of said loss and damage, and not to determine, waive, or invalidate any other right or rights of either party, and that in determining the loss and damage the appraisers were to make an estimate of the total cost of replacing or repairing the property, or the actual cash value thereof at or immediately preceding the time of the fire, and in case of depreciation of

the property from use, age, condition, location, or otherwise, a proper deduction should be made therefor. Messenger and Gribi were sworn as appraisers on the same day, and on June 20, 1891, they selected J. F. Meyer to act as a third appraiser to settle matters of difference in compliance with the agreement. The evidence tends to show that the only matter of difference was as to a gas machine, and the principal question as to that was whether it was covered by the policies or not. It was conceded on the trial that this machine was not covered by the policies. Meyer was sworn as an appraiser on the day of his appointment, and on the same day he and Gribi signed a written appraisal of the loss at \$11,428.51, but Messenger did not sign it. On June 26, 1891, Payne made written proofs of his loss, giving the items thereof, aggregating \$23,689.90. These proofs of loss were soon returned to Payne, who claims that no reasons were assigned for such return, while the companies claim that they did assign specific reasons therefor, and requested their correction. Payne was permitted to testify, over the objection of the insurance company, that the house cost him about \$25,000, and other witnesses, not architects, builders, or contractors, were allowed to state their opinions as to the value of the house from a general knowledge of it, without estimating the value of any of the materials entering into its construction. The essential parts of instructions 4 and 5 given by the court, and excepted to by the insurance company, read as follows: "If you find from the evidence that said plaintiff made and entered into such an agreement for the purpose of submitting questions of difference which had arisen between said plaintiff and defendant touching said loss or damages sustained by plaintiff to the persons therein mentioned for determination, their award to be final and binding upon said plaintiff and defendant as to such loss and the amount of damages so ascertained, and that said agreement was so entered into by the plaintiff of his own accord, knowing the purpose and effect thereof, and not by reason of false representations and fraud, as alleged by said plaintiff in his reply as hereinbefore set out; and that said appraisers, in making such award thereunder, took into consideration all the items of the loss covered by said policy, and were in possession of the facts necessary for them to arrive at an intelligent conclusion concerning the matters referred to them for determination,—then I instruct you that said agreement and the award made and signed by the said J. F. Meyer and S. G. Gribi are binding upon said plaintiff, and his recovery herein will be limited to the amount of such award." "If, however, you find from the evidence that said agreement to submit the questions of such loss and the amount of

damages sustained by the plaintiff to said persons for determination and arbitration was not made and entered into by said plaintiff of his own accord, knowing the purpose and effect thereof, but that said plaintiff was induced to sign the same by reason of false representations and fraud made to or practiced upon him by said defendant or its agents or representative, as alleged in said plaintiff's reply as hereinbefore set out, or that said appraisers making such award made and determined the same without being in possession of the facts necessary for them to arrive at an intelligent conclusion concerning the matters referred to them for determination, and without giving an opportunity for such facts to be presented to them, and that said appraisers did not take into consideration all the items of the loss covered by said policy, as in said reply alleged, then I instruct you that said agreement and award are not binding upon said plaintiff, and you will then determine from the evidence the amount of loss or damage to said dwelling house sustained by said plaintiff from said fire, said loss or damage to be estimated according to the actual cash value of the property at the time of said fire." A verdict was returned in favor of Payne April 15, 1892, for \$4,158.66, and answers were made to certain particular questions of fact. As to the execution of the agreement to appraise, the jury found that Payne examined it, took it to his attorneys, returned to the office of the insurance agent, and requested some alterations therein, and that he knew the contents thereof, and its purpose, before it was signed; but in answer to other questions the jury found that he did not understand the nature and character of the agreement, and that false representations and fraudulent statements were made, whereby he was induced to sign the same. The jury further found that the parties did not differ as to the amount of the plaintiff's loss before the agreement was signed; that Gribi was employed by the insurance companies previous to signing the contract; that Gribi and Meyer were incompetent, because they were not in possession of all the facts in determining the loss; that Payne did not have a hearing or any opportunity to be heard before the appraisers; and that Payne refused to accept the amount of the award on June 20, 1891. Other facts appear in the opinion.

THOMAS BATES and REED & REED, *for Plaintiff in Error.*

HALE & FIFE, *for Defendants in Error.*

MARTIN, C. J. (after stating the facts.)

1. The question of a difference between the assured and the insurers as to the amount of the loss was scarcely an open one after the

VOL. XXVI.—4.

execution of the written agreement of June 17, 1891. That the loss was legitimate does not seem to have been disputed at any time, and the only function that appraisers or arbitrators could perform was to ascertain and fix its amount. Payne did not testify that the agents and adjusters ever agreed to pay him the full amount of the policies, to wit, \$19,000, although he says they did not question the amount of the loss. He admits that the subject of the appointment of appraisers was discussed at the Coates House, and this was more than a month before the agreement was signed. According to the findings of the jury, Payne executed the paper advisedly. Upon his own testimony we are unable to discover any fraud practiced upon him by the insurance companies in order to obtain his signature. It was plainly stated in the writing that the appraisalment was "for the purpose of ascertaining and fixing the amount of said loss and damage," and that "the award of said appraisers, or any two of them made in writing," should be binding upon both parties to the agreement. The writing is the best evidence of the intent of the parties in appointing appraisers, and, there being no evidence of fraud or mistake, Payne should not be heard to contradict what is therein so clearly expressed: *Hopkins vs. Railway Co.*, 29 Kan., 544, 550; *Smith vs. Deere*, 48 Kan., 416; *Getto vs. Binkert*, 55 Kan., 617, 620.

2. The agreement of June 17, 1891, designated P. B. Messenger and S. G. Gribi as appraisers. Messenger had been named by Payne, and Gribi by the insurance companies. Messenger was a carpenter and builder, who had worked on Payne's house, part of the time as foreman, and he was entirely familiar with the materials and workmanship entering into its construction. Gribi was a contractor and builder residing at Wichita, and had on several previous occasions acted as an appraiser of fire losses by the appointment of insurance companies. The evidence tends to show that Gribi was in Kansas City on business before the agreement was signed, and that he consented to serve as an appraiser. Gribi and Messenger went to Argentine on the day of their appointment, and measured the foundation walls, the superstructure of wood having burned, leaving little else to indicate the size and character of the building. A rain coming up, they went to the house where Payne was residing, and he gave them a photograph of the house. From the measurements and the photograph Messenger and Gribi drew a rough plan or diagram of the house. Gribi testified that Payne then and there gave a very full description of the house, with all its materials and workmanship, but this was fully denied by Payne. It is not claimed that Payne had any hearing after that day, or any notice that evi-

dence would be heard as to the character or the value of the building. The appraisers obtained the bill of the Hopkins Planing Mill Company, which included the greater part of the mahogany, cherry, bird's eye maple, and butternut finishing lumber, together with doors of like character; and this bill, with the measurements, the photograph, and the plan made therefrom, appear to have been the sources of information upon which Gribi acted, with the knowledge, if any, derived from Payne, for he did not testify that he obtained any data from Messenger. The latter had the same sources of information, and also the previous knowledge of the house, derived from his personal familiarity with it. Meyer, although appointed by the other appraisers, because of their difference as to the gas machine, seems to have gone all over the calculations and estimates, but it does not appear that he obtained any facts from Payne, or from any other source familiar with the building. Messenger died before the trial. His deposition was taken, but neither party offered it in evidence. An appraisal of existing property is usually made upon actual view, and without the aid of other evidence; and in the case of appraisers entirely familiar with property afterwards destroyed they might make an intelligent estimate upon their former knowledge, but this is not so as to appraisers who have never seen the property. In such case the estimate must be as to property which was, but is not, and a knowledge of it must be derived from evidence of some sort, not necessarily under oath. The measurements, the photograph, and the plan made therefrom, together with the planing-mill bill, would, no doubt, greatly aid Gribi in making an estimate; but if he obtained no information from Payne, or any other person, it could hardly be claimed that his estimate would be an intelligent one. Messenger was well informed respecting the building, and was perhaps competent to make an estimate with the aids before indicated; but he did not sign the award. If he agreed to the amount thereof, however, then it may fairly be considered his by reason of the signature of the third appraiser, in the selection of whom he joined, for by the terms of the agreement the award was sufficient if signed by any two of the appraisers. The rule laid down by the court was too strict in allowing the jury to pass upon the question whether or not the appraisers were in possession of the facts necessary for them to arrive at an intelligent conclusion, and in declaring that, if the appraisers did not take into consideration all the items of the loss covered by the policy, then the award was not binding upon Payne. Very few awards could stand the test of so strict a rule. An award is *prima facie* conclusive between the parties as to all matters submitted to

the arbitrators (*Miller vs. Brumbaugh*, 7 Kan., 343, 352; *Groat vs. Pracht*, 31 Kan., 656), and it will not be set aside for mere irregularities not affecting substantial rights (*Anderson vs. Burchett*, 48 Kan., 153, 29 Pac., 315). In *Underhill vs. Van Cortlandt* (2 Johns., Ch. 339, 361) Chancellor Kent said: "Admitting that there was no corruption or partiality in the arbitrators (and none is pretended), and admitting that there was no misconduct in them during the course of the hearing, nor of fraud in the opposite party (and none is established by proof), then, I say the court cannot inquire into the charge of an over or under valuation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. If every award must be made conformable to what would have been the judgment of this court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence. They have never exacted from these unlettered tribunals—this rusticum forum—the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and, if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators." See, also, *Water-Power Co. vs. Gray*, 6 Metc. (Mass.), 131, 165, and *Hall vs. Insurance Co.*, 57 Conn., 105, 117, and authorities cited.

3. The policy required the insurance company to make good unto the assured the amount of loss or damage to be estimated according to the cash value of the property at the time of the loss, not exceeding \$4,000. One method of arriving at such loss is by estimating the cost of replacing the building, less any depreciation from use, age, or otherwise; and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins. If witnesses to the worth of the building are shown by cross-examination to have little knowledge upon the subject, this would be proper matter of argument to the jury as affecting the weight of their testimony, but it should not be excluded on that account. Evidence of the cost of a building, however, can hardly be said to be evidence of its value at a particular time. Sometimes, from the necessities of the case, it may be proper to inquire as to the cost of an article as tending to establish its value, but there is no such necessity here, and Payne ought not to have been permitted to testify that the house cost about \$25,000.



4. It does not appear that either party made a written request for submission to appraisers, and therefore an appraisalment was not a condition precedent to the commencement of an action (*Insurance Co. vs. Wilson*, 45 Kan., 250; *Insurance Co. vs. Wallace*, 48 Kan., 400); yet, an appraisalment having been agreed upon, Payne is bound by the award, unless it is invalid under the principles above stated; and the burden of proof is upon him to show its invalidity. If, however, the award shall not be sustained, then Payne will be entitled to recover from the insurance company the sum of \$4,000, and interest thereon at 6 per cent per annum from a time 60 days after the proofs of loss were received at Chicago, or so much thereof as shall not exceed four-nineteenths of the total loss, with interest thereon as aforesaid.

The court did not err in refusing to submit to the jury the particular questions of fact referred to in the brief of plaintiff in error, nor in holding that further proof of loss was waived, nor in any other respect material to the case except as hereinbefore indicated; but for these errors the judgment must be reversed, and the cause remanded for a new trial. All the justices concurring.

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## SUPREME COURT OF TEXAS.

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EAST TEXAS FIRE INS. CO. }

*vs.*

PERKEY.\* }

The policy stipulated that if any note given for the premium was not paid when due it should become void and the insured should be liable on the note for the time that it had been in force. When a note became due the insured requested an extension from the local agent, but added that he would pay on notification of its refusal. The agent replied that he had no power but would write to the company and inform him of its decision. Nothing further was heard and the note remained unpaid.

*Held*, That silence on the part of the company was not a waiver of forfeiture and did not estop the company to set up such forfeiture.

When a letter properly addressed is mailed, the presumption that it is received is not overcome by the testimony of the party that he did not remember receiving it.

LEAKE, HENRY, REEVES & GREER, *for Plaintiff in Error.*

HENRY & GREEN, *for Defendant in Error.*

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\* Decision rendered, May 25, 1896.

BROWN, J.

The following conclusions of fact were filed by the Court of Civil Appeals: "On May 19, 1888, the East Texas Fire Insurance Company, appellant, issued an insurance policy in favor of B. Perkey, appellee, running three years, in the sum of \$3,600, on a house and certain furniture therein situated belonging to said appellee, which was burned August 3, 1889. The premium to be paid for said policy was \$90, for which appellee executed his two notes, one due October 1, 1888, and one due May 1, 1889. The policy contained the following clause: 'If the premium of this policy, or any renewal thereof, be not actually paid, or if a draft or note be taken and received in payment of all or any part of said premium, and the same be not paid at the maturity thereof, then this policy shall cease to be of any force or effect from the date of the maturity of said note or draft, and the assured shall be liable on said note or draft for the time this policy was in force at the customary monthly short rates.' The notes contained this clause: 'This company shall not be liable for any loss that may occur during the time this note remains overdue and unpaid.' The first note was presented, but not paid immediately when due, but a short while elapsed thereafter, when payment of same was accepted by the company. About the time the second note became due, the general managers of the company, Trezevant & Cochran, sent the note to their local agent, R. M. Chapman, at Alvarado. When the note was received by Chapman, he immediately notified Perkey that he had the note, demanding payment. Perkey was sick in bed at the time, and lived some five miles from Alvarado; but he sent his son to tell Chapman to hold up until fall on the note, that, if they would, he would pay them good interest, as he would have the money to borrow, and would just as soon pay them the interest, and, if not, to send him word, and he would get the money, and pay it. This message was delivered to Chapman, to which Chapman replied that he had no power to extend the time, but that he would write to the company, and inform Perkey immediately when he got an answer from the company as to when he would have to pay the note, or whether he would carry it over. Chapman did write to Trezevant & Cochran, general managers for the company, which letter was duly mailed to them. Trezevant & Cochran testified that, if any letter was ever received from Chapman concerning such extension, they had no recollection of it, and never saw it. It was further shown that they were general managers for several different companies; that they had an employe who received and opened all the mail, and then passed it to them for examination. This employe did not testify. We do not

believe this testimony is sufficient to refute the presumption that the letter was duly delivered through the post-office to Trezevant & Cochran. We therefore find that the letter was duly received by them. No answer was ever made to this letter, nor did Chapman ever mention the subject to Perkey, who relied upon Chapman's informing him what the company would do as to the extension of the note. Perkey was able to and would have paid the note had he been informed that the company would not carry him until fall. He relied on the company's extending the note, and never knew until this suit was brought that the company was going to rest their claim on the nonpayment of the note. The fire occurred August 3, 1889, about three months after the note was due, and this suit is upon the second note. On May 24, 1889, Trezevant & Cochran sent to Chapman all the overdue notes for premiums, for payment or cancellation of the policies. The Perkey note sued on was omitted from this batch. There was included, however, in the batch, the first note given by Perkey, which had been paid by him, but had never been turned over to him by the company. Chapman, on the day after receiving this batch of notes, wrote to said general managers, calling their attention to the fact that the note inclosed against B. Perkey had long since been paid off. No reply was sent to this letter of Chapman."

Additional conclusions of fact by the said court: "(1) On May 24, 1889, Trezevant & Cochran wrote Chapman the following letter: 'Dear Sir: Upon examination here of the installment note book, we find there were several notes past due under policies covering risks taken by you. The company, having discontinued the installment business, is very anxious to wind up this branch of it, and requests us to have the past-due notes either collected at once, or returned to the assured under the policies, for cancellation. We inclose you herewith a list of notes due and unpaid, together with the notes themselves, and cancellation receipts for each one. If the assured in any of these cases is prepared to take up the notes in full at once, you may deliver the same, and remit us the amount of the note and interest. In all other cases, please return the note to the assured, and take up policy, and send to us, with cancellation receipt signed by the policyholder. We are very anxious to get all of these past-due matters closed out at once, by payment or cancellation, and will appreciate your prompt attention to this matter. Yours truly, P. E. Cochran & Co.' 'P. S. Of course, you and the assured understand that, as soon as the note becomes past due, the policy lapses, and is no longer binding upon the company. If any of these parties desire to pay up the notes, send us the policies, and we will make

indorsements reinstating them, as required by the policy conditions.' (2) The following letter was written by Chapman to Trezevant & Cochran: 'Alvarado, Texas, May 25, 1889. Messrs. Trezevant & Cochran—Gentlemen: Yours of 24th received, containing a batch of notes for cancellation. I find a note against B. Perkey for \$45 00, which was due last October. This note was collected during the fall, and remitted to you. Please explain, if I am not correct. Yours truly, R. M. Chapman.' (3) There was indorsed on the policy the following: 'If the policy has been in force for one month, the short-rate percentage for three year policy would be 10 per cent to be retained by the company in case of cancellation. If the policy had been in force for twelve months, to run for three years after date, then the amount of short rate to be retained is 50 per cent of the premium.'"

The district judge charged the jury, in effect, as follows: That Chapman, the agent of the defendant, had no authority to extend the time of payment on the note due May 1, 1889; and that the failure to pay the note when due had the effect to suspend the liability of the defendant under the policy during the time that said note remained due and unpaid; but that the defendant's general agents could waive the payment of said note when due, and extend the time, if they so desired. If the jury believed from the evidence that, when plaintiff received notice that the note was due, he sent word to the local agent that he desired an extension of the time of payment, but that, if the payment was insisted upon, he would pay at once, and that this message was communicated to the general agents at Dallas, and that they received the message, and that said general agents failed to give notice to the plaintiff that the extension was refused, and, by their silence, left the plaintiff to believe, until the time of the fire, that an extension had been granted him, and that, by reason of such failure, the plaintiff failed to pay the note about the time it fell due, they would find for the plaintiff. But if they believed from the evidence that the general agents never received the notice sent by the plaintiff, and never consented to grant any extension of time to the plaintiff, they would find for the defendant.

If the claim of the plaintiff, that the general agents of the defendant failed to notify him that they did not accept his proposition to extend the time of the payment of the note, rendered the defendant liable, be regarded in the light of making a contract of extension, the charge given by the court is incorrect, because it, in effect, informs the jury that a failure to reply to the proposition of the plaintiff for extension was equivalent to an acceptance of the propo-

sition by the general agents. A contract cannot be inferred from silence, but assent to the proposition must be given in order to constitute such contract: *Insurance Co. vs. Beatty*, 119 Pa. St., 6. The case cited is in point. In that case the holder of an insurance policy, before it had expired, applied to the agent of the company (who had the power) to renew the policy. To this application no reply was given, and the court held that the silence of the agent did not constitute a contract. The assent of the general agents of the defendant might be proved by circumstances, and the evidence which was before the jury would, perhaps, have sustained a finding by them that the general agents did in fact give their consent, although not communicated to the plaintiff himself. But the issue upon this branch of the case was not submitted to the jury. It is true that, in the charge, the court told the jury that, if they believed that the general agents did not have notice, and did not consent to grant the extension, they would find for the defendant. This negative proposition did not cure the error in the charge of the court, because, by law, the burden was on plaintiff to show the consent to the extension of the time of payment of his note, and it did not rest upon the defendant to show that it did not consent. The charge of the court, in effect, instructed the jury, and they must have so understood, that, if the agents of the company failed to make any reply to the application of the plaintiff for extension of time, this would, in law, be equivalent to an acceptance of the proposition. If we consider the claim of the plaintiff as resting upon a waiver by the defendant of its right to forfeit the policy for nonpayment of the note, the charge is even more objectionable. It is assumed by the court in the charge that the failure to reply to the plaintiff's application for extension of time would of itself, without any other circumstances, work an estoppel upon the defendant, and that it would be denied the right to claim the forfeiture arising out of the nonpayment. Silence has the effect to estop a party only where it is, under the circumstances, his duty to speak, and where that silence had the effect to mislead the other party, to his injury: *Bigelow, Estop.*, pp. 564-575; *Insurance Co. vs. Unsell*, 144 U. S., 439; *McCraw vs. Insurance Co.*, 78 N. C., 149; *More vs. Insurance Co.*, 130 N. Y., 545; *Insurance Co. vs. Griffin*, 59 Tex., 513.

The evidence in this case might have justified the jury in finding that the defendant, under the circumstances, was estopped to claim a forfeiture of the policy or a suspension of its liability, because the course of dealing with the plaintiff was such as to justify him in believing that the silence of the general agents meant that the extension of time was granted, and that it did have the effect upon the

plaintiff to cause him to rely upon the insurance secured to him by that policy until the fire occurred. But the circumstances necessary to attend the main fact of silence in order to give it this effect were not submitted to the jury, and they could not have found, under the charge of the court, that such circumstances existed, or that plaintiff did actually rely upon the facts and circumstances, believing that the time for the payment of his note was by the general agents extended. The note was due at the time that it was demanded, and the agent of the defendant demanded payment of it. The plaintiff was informed at the time that the agent had no authority to extend the time of payment, and he did not undertake to do so, but at the request and for the plaintiff made application to the general agents for extension. The defendant was under neither legal nor moral obligation to make reply to the proposition, but it rested with the plaintiff to ascertain whether or not his proposition was accepted by the defendant, unless the circumstances attending and preceding the transaction were such as to authorize him to rely upon their silence as an acceptance.

The evidence, although undisputed as to the circumstances surrounding the parties at the time, is not so conclusive upon the question of estoppel upon the defendant as to justify this court in holding that the error committed by the district judge in the charge given to the jury was immaterial. We cannot say that the jury necessarily found under that charge either that the defendant had actually consented to extend the time, or that the circumstances were such as to justify the plaintiff in relying upon the silence of the defendant's agents, and regarding the matter in the light that the failure to pay the note was waived by the defendant as a ground of forfeiture. For the error committed by the trial court as above indicated, the judgments of the district court and court of civil appeals are reversed, and the cause remanded to the district court for further trial.

## SUPREME COURT OF WISCONSIN.

JOHNSON

vs.

SCOTTISH UNION &amp; NATIONAL INS. CO.\* } .

The policy was procured by one T. on personal property belonging to L. The agent asked T. whose name to place it in and he replied in the name of L. The agent did not know that the name of T. was not L. L. was an infant in business and had engaged T. to procure the insurance. The company alleged misrepresentation and its rule not to insure infants.

*Held*, That the consent of the agent to issue the policy in the name of L. made a binding contract for such insurance.

*Held*, That under the statute of Wisconsin, failure to attach a copy of the application or the representations of the insurer to the policy precludes the company from setting up such application or representations.

A policy will not be avoided for the concealment of a material fact in the absence of any written application or question calling for the statement of such fact, unless such concealment was intentional.

*Held*, That instructions to the agent not to insure minors if unknown to the applicant would not affect the insurance.

## Statement of facts by PINNEY, J.

This action was brought by the plaintiff, an infant, by T. C. Johnson, her guardian ad litem, to recover upon a policy of insurance issued to her by the defendant company, for the value of certain of her personal property covered by it, alleged to have been totally destroyed by fire at Superior, Wis. The defense was that the said T. C. Johnson applied to the defendant's agent for a policy, and represented that he was the owner and in possession of the property in question, and that his name was L. M. Johnson, and relying upon such representations the defendant issued the policy; that it was executed and delivered to T. C. Johnson under the name of L. M. Johnson, under the supposition and belief that he owned the property, and that his name was L. M. Johnson; and that until after the loss the defendant had no knowledge that there was any infant, or any other person than T. C. Johnson, interested in, or who had any title to, said property. The defendant insisted that the policy was void for such misrepresentations, and, in particular, that it was a rule binding upon all agents that it would not insure the property of infants, and by reason of the fact that said T. C. Johnson, having so represented himself as L. M. Johnson, had fraudulently concealed and misrepresented the facts in that behalf material to the risk, and for that the person so represented to be L. M. Johnson had

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\* Decision rendered, May 1, 1896.

no insurable interest in the property. It was alleged that the plaintiff delivered to the defendant a false and fraudulent account of the alleged loss and damage, with the intent to defraud. At the trial it appeared that the plaintiff, an infant 19 years of age, was engaged in manufacturing portraits at West Superior, and had on hand material and stock, portraits, easels, etc., and T. C. Johnson was her agent in looking after the business; that she authorized him to procure the policy on the stock; and that the loss occurred by fire; and the amount of the same was shown. The business was to solicit orders for portraits, take photographs, and enlarge them. T. C. Johnson had no interest in it, but the plaintiff left the active management of it to him, and he had authority to represent her. She had no conversation with the agent about issuing the policy. T. C. Johnson testified to procuring the policy from Prindle & Clague, the agents, and that he talked with Mr. Prindle about it, and discussed and decided on the manner and terms, and, when he started to leave their office, Prindle said, "Hold on; you have not told me whose name to place this in," and he answered, "You may place it in L. M. Johnson's," and he replied, "Very well; I will make it out, and bring it down for you;" that he brought it accordingly; that he did not tell him who L. M. Johnson was, and did not say anything to him about that, or defendant to him (Johnson) and that he did not say anything to let him understand his name was not L. M. Johnson,—did not tell him what his name was. It was admitted that proofs of loss had been furnished. The defendant moved for a nonsuit, which was denied. On the part of the defendant it appeared that the adjuster of the company, after learning the plaintiff was a minor, and her name, and the manner in which the policy had been negotiated and issued, denied liability on the part of the company. And the evidence of the agent who issued the policy was produced, which was to the effect that he issued the policy to L. M. Johnson, a man about 35 years of age; that he did not represent to him that his name was not L. M. Johnson, and that he represented to him that he owned the property insured; that he did not know such a person as T. C. Johnson, and, if he had known L. M. Johnson was a female under the age of 21 years, he would not have issued the policy. There was no written application for the policy, and no copy of any application or representations of the assured affecting the validity of it had been attached to or indorsed on the policy, pursuant to *Sanb. & B. St.*, § 1945a. Proof was given showing that it was a rule of the company not to insure minors, and agents were instructed accordingly; but it was shown that T. C. Johnson, who procured the policy had no notice of these facts. At the close of



the evidence the defendant again moved for a nonsuit, which was denied. The case was submitted to the jury under the instructions of the court, and the jury returned a verdict for the plaintiff for \$884.13. The defendant moved for a new trial on the ground that the verdict was against the evidence, but the motion was denied, and the plaintiff had judgment, from which the defendant appealed.

KNOWLES, DICKINSON, BUCHANAN, GRAHAM & WILSON, *for Appellant*.  
LOUD & O'BRIEN, *for Respondent*.

PINNEY, J. (after stating the facts.)

1. The evidence is undisputed that the plaintiff owned the property insured, and that it was destroyed by fire. It is entirely clear that the defendant's agent understood that the contract for insurance was made with L. M. Johnson, to whom the policy was issued. T. C. Johnson testified, in substance, that the agent said to him as he was about leaving the office, "Hold on; you have not told me whose name to place this in," to which he answered, "You may place it in L. M. Johnson's," and he (the agent) said, "Very well; I will make it out and bring it down for you." The policy was made out accordingly. This evidence was not disputed. There was therefore sufficient evidence of a mutual contract between the plaintiff and the defendant. T. C. Johnson further testified that he did not know that anything occurred to lead the agent to believe either that he was or was not L. M. Johnson; that he gave him the name; that he did not tell him what his name was, and when he came to look at the stock he did not tell him that it belonged to any one else than himself, and he did not ask. The inquiry of the agent was made and understood, no doubt, as an inquiry of ownership, and was answered accordingly. If the agent had desired further or more specific information, he should have made further inquiry. As there was sufficient evidence to warrant a verdict for the plaintiff on all other questions, it is plain that the motion for a nonsuit at the close of the plaintiff's case, and also the motion for that purpose when the evidence was closed, were properly denied, whatever view may be taken of the evidence on the part of the defendant.

2. The defendant did not, in issuing its policy, comply with Sanb. & B. St., § 1945a, and "attach to such policy or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy." It chose to issue the policy without any written application. The result is that, by the

section of the statute cited, it became "precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof or any part thereof in any action upon such policy." The evidence tending to show misrepresentations on the part of the assured at the time the policy was issued was properly stricken out. Where a policy is issued without any application by the assured, and without any questions being put to him as to matters material to the risk, and it contains a clause that it shall be void if any fact material to the risk is concealed by the insured, it will not be invalidated by the fact that the assured did not disclose such material facts, if he did not intentionally or fraudulently conceal them: *Wood, Ins.*, 388; *Van Kirk vs. Insurance Co.*, 79 Wis., 627; *Alkan vs. Insurance Co.*, 53 Wis., 136; *Dunbar vs. Insurance Co.*, 72 Wis., 500. If the defendant's agent had desired further or more specific information in respect to matters material to the risk, it is to be presumed that if he had asked for it he would have obtained it. The defense, so far as founded on alleged false statements or misrepresentations, was wholly untenable. Whether there was any ground for claiming that there was a fraudulent concealment of facts material to the risk, we have no occasion to inquire; for it does not appear that the defendant asked to have any question in this respect submitted to the jury, and no exception was taken to the charge of the court. The only errors assigned are in respect to the denial of the motions for a nonsuit.

3. The fact that the defendant, as a rule of its business, refused to insure the property of minors, and required its agents not to take such risks, was not brought home to the knowledge of the assured. As they were general agents to issue policies of the defendant, the assured could not be affected by private instructions of the company to them in this respect. The proof is that T. C. Johnson, who acted for the plaintiff in procuring the policy, had no notice of such course of business or instructions. The record fails to disclose any error. The judgment of the circuit court is affirmed.

Marshall, J., took no part.

## SUPREME COURT OF ILLINOIS.

FIDELITY &amp; CASUALTY CO., OF NEW YORK, )

vs. }

WATERMAN.\*

The insured was asphyxiated by illuminating gas which escaped into his sleeping room.

*Held*, That this was not within a policy provision that it did not cover injuries fatal or otherwise, from the taking of poison or from anything accidentally or otherwise inhaled or taken.

The company was incorporated in New York, and issued its policy in that state to a resident of Illinois, subsequent to a decision of the highest court of New York that the policy in such case was not exempt.

*Held*, That the effect of a similar decision in Illinois was not to place a construction on the contract not contemplated by the parties.

GARVER & FISHER and W. G. CHALLIS, *for Appellant*.

FROST & McEVoy, *for Appellee*.

BAKER, J.

The accident-insurance policy in suit in this cause was issued by the Fidelity & Casualty Co., of New York, on June 14, 1891, to James B. Marshall, the intestate of appellee, insuring him in the sum of \$5,000 against death through external, violent, and accidental means for the term of twelve months ending June 14, 1892. The policy also made provision for a weekly indemnity in case of bodily injury through like means, but not causing death. The policy was afterwards renewed for an additional term of one year from June 14, 1892. The intestate was asphyxiated by illuminating gas in the Northwestern Hotel at Aurora, Ill., on the night of December 5, 1892. He was found dead in bed on the morning of December 6th, and the room was filled with gas. At the trial there was evidence tending to prove that the gas fixtures in the room were defective; and there was also evidence tending to prove that the deceased was intoxicated at the time of the accident, and that his death was attributable to such intoxication. The case was tried before the court without a jury, and a number of written propositions were submitted to it by appellant to be held as law in the decision of the case, but they were all refused, and exceptions taken. The findings and judgment were for the plaintiff below, and that judgment was affirmed in the appellate court.

The principal defenses relied on by appellant are based upon provisions in the policy, which read as follows:—

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\* Decision rendered, May 12, 1896.

This insurance does not cover disappearances, nor war risk, nor voluntary exposure to unnecessary danger; nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while, or in consequence of having been, under the influence of, or affected by, nor resulting, directly or indirectly, from intoxicants, anæsthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, or any disease or bodily infirmity.

One ground of defense is that, since the policy expressly states that the insurance does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, and the deceased came to his death by means of the illuminating gas which he inhaled while asleep, therefore, according to the true intent and meaning of the contract, appellant is not liable to the administrator for the sum of \$5,000 stipulated to be paid in case of the death of his intestate as the result of external, violent, and accidental means. In *Insurance Co. vs. Dunlap* (160 Ill., 642), this court held that drinking carbolic acid by mistake for peppermint is not within a clause of an accident insurance exempting the company from liability for injuries or death from "taking poison," as such words mean the voluntary intentional taking of poison, and do not include cases of accidental poisoning by mistake, but do include injuries or death from voluntarily taking poison without any suicidal intent. And this court in its opinion referred with approval to the decision of the Court of Appeals of New York in *Paul vs. Insurance Co.* (112 N. Y., 472), and said: "We think the rule established by the Court of Appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question." In the *Paul Case*, thus referred to, the policy provided that the insurance should not extend to any death or disability which may have been caused by the taking of poison, contact with poisonous substances, or inhaling of gases, and it appeared that the insured was found dead in bed in his room at an hotel, and that the gas had in some way been turned on, and his death caused by breathing the atmosphere of the room filled with gas; and it was held that the death was not caused by "the inhaling of gas" within the meaning of the policy, and that those words applied only to a voluntary and intelligent action on the part of the insured, such as in medical or surgical treatment, for dental work, or with a suicidal purpose. And in the subsequent case of *Bacon vs. Association* (123 N. Y., 304), the court of appeals approved the decision in the *Paul Case*, and said: "Upon the question decided the case is conclusive, and we have no disposition to alter our views as expressed therein." In *Pickett vs. Insurance Co.*

(144 Pa. St., 79), where there was a condition that the insurance should not cover death or injury resulting from or attributable, partially or wholly, to inhalation of gas, and the insured went down into a well to make repairs on a pump, and in a short time was found in the well, dead, from asphyxia, caused by poisonous gas at the bottom of the well, it was held that the condition in the policy against "inhalation of gas" contemplated a voluntary and intelligent act by the insured, not an involuntary and unconscious act, and was inoperative to relieve the company from liability. And see, also, *Association vs. Froiland* (opinion filed at Ottawa on March 28, 1896).

It is urged that the exception in the case at bar is broader and more sweeping than the words found in the cases heretofore decided, the words here being, "poison or anything accidentally or otherwise absorbed or inhaled," and that these words necessarily include every possible way by which irrespirable gases can be got into the human system so as to cause death. The additional word "absorbed" found in the language last above quoted, has no application to the case before us, for that word manifestly has reference only to the process of absorption by sucking up or imbibing through the pores of the body. The claim made is not well grounded if the correctness of the point decided in the cases we have mentioned be conceded. That point, as we understand it, is that the word "inhaling," or "inhalation," or "inhaled," as used in exceptions contained in these policies of life or accident insurance, implies a voluntary and intelligent act as distinguished from an involuntary and unconscious act. Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read "poison or anything accidentally or otherwise consciously and by an act of volition drawn into the system by inspiration." This view is fully supported by a late decision of the Court of Appeals of New York. That court had before it, in *Menneilley vs. Corporation*, the case of a provision in an accident policy that it does not insure against death or disablement from anything accidentally inhaled. The insured had died at night of asphyxia, caused by involuntarily and accidentally breathing into his lungs, while asleep, illuminating gas, which had accidentally escaped into his room at an hotel. It was held that the case was not distinguishable in principle from the *Paul Case*, and that the provision in the policy did not relieve the insurer from liability. And we may add that this *Menneilley Case*, which had then just been published, was cited by this court with approval in *Insurance Co. vs. Dunlap*, supra.

Appellant claims that to place the construction we have upon the policy is not to enforce the contract made by the parties, but to

make a new contract for them. This can hardly be so. Appellant is a New York corporation, and made and dated its contract in the city of New York, and this was done several years after the decision in the Paul Case by the court of last resort in that state. It must be presumed that it was then fully advised of that decision, and knew, when it entered into the contract now in suit, what its liabilities were under the agreement that it made. The policy in suit contains a stipulation that the insurance does not cover injuries, fatal or otherwise, received while or in consequence of having been under the influence of, or affected by, nor resulting, directly or indirectly, from, intoxicants. In its brief and argument prepared for this court, all that appellee says in regard to this provision is this: "While the appellate court finds the fact of intoxication against us, we submit that it was error to refuse the propositions on this point, and respectfully refer to clause 2 of our brief in the appellate court, hereto annexed, where this point is considered." Turning to said clause 2, we find that the matter of intoxication is neither mentioned nor discussed therein otherwise than as a contested question of fact, and we also find that neither in that clause nor elsewhere in the brief is there any mention of or reference to any proffered propositions relating to the subject of intoxication. And we further find that the appellate court, in rendering its judgment, passed upon no such propositions of law. If any such refused propositions are to be found in the record, it must be considered, as we have held in numerous cases, that appellant waived in the appellate court all objections to the rulings of the trial court thereon, and cannot renew such objections or make them for the first time in this court.

It is further claimed that there was no compliance with the condition of the policy that affirmative proof of death must be furnished to the company within two months from time of death. It is a sufficient answer to say that there is evidence in the record tending to show a waiver by appellant of proofs of death; that the judgments of the circuit and appellate courts conclusively establish the fact of such waiver; and that no propositions of law were either held or refused which stated what would or could not in law constitute a waiver. We find no error in the record for which the judgment can be reversed. It is therefore affirmed. Affirmed.

## SUPREME COURT OF MISSOURI.

ROBERT E. DAGGS, *Respondent*,

vs.

ORIENT INS. CO., OF HARTFORD, CONN., *Appellant*.\*

The policy was issued upon a building for \$800. The defendant pleaded that the building was worth not to exceed \$100 and the usual provision of the insurance contract that the plaintiff could only recover to the extent of his loss or damage, and that the defendant was willing to pay the amount of the actual damage sustained. The defendant also pleaded that the valued-policy law of Missouri was unconstitutional, in contravention of the constitution of the state of Missouri and of the United States, in that the right of contract is a constitutional right.

*Held*, That the valued-policy law of Missouri is constitutional and that the state has the right to impose any terms whatever upon a foreign insurance company as a condition of its doing business in the state, and that the terms which a state may impose may be either reasonable or unreasonable, and the only remedy which a foreign insurance company has is to keep out of the state, or submit to any conditions which may be imposed upon it by the legislature of such state.

E. J. DAGGS and N. M. PETTINGILL, *Attorneys for Respondent*.A. H. McVEY, *Attorney for Appellant*.

Action upon a fire-insurance policy issued, upon a barn belonging to respondent in Scotland County, Missouri, on the 3d day of June, 1893, for \$800, by a corporation organized in Connecticut.

The policy contained a clause limiting the company's liability "in case of loss to the actual cash value of the property at the time of the loss," and this stipulation was pleaded together with an averment that at the time said property was insured said barn did not exceed one hundred dollars in value. No fraud was charged, or any subsequent depreciation in the property prior to the fire. It is apparent from the foregoing dates that the policy was written and delivered after sections 5897 and 5898, Rev. St. 1889, had been enacted by the General Assembly of this state. Those sections provide that

In all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial

\* Court in Banc. October Term, 1896.

loss the measure of damages shall be that portion of the value of the whole property insured ascertained in the manner hereinafter described bears to the whole property insured.

Section 5898. That no condition of any policy of insurance contrary to the provisions of this article, meaning thereby article four, shall be legal or valid.

The defendant in its answer averred that these two sections were unconstitutional and were in contravention of the constitution of Missouri and the Constitution of the United States. To this plea the circuit court sustained a demurrer and defendant declining to plead further, judgment was rendered for the amount of the policy. All other questions were settled in favor of plaintiff by the admissions of defendant. A statute similar in principle to the statute above quoted was construed by this court in banc in *Havens vs. Fire Ins. Co.* (123 Mo., 403), and full effect given to its provisions: § 6009, Rev. St. 1879. It was pointed out in that case that laws of this character had been enacted in many of the states of the Union and uniformly sustained as entering into and molding insurance contracts thereafter written in said states: *Queen Ins. Co. vs. Leslie*, 24 N. E. Rep., 1072; *Chamberlain vs. Insurance Co.*, 55 N. H., 249; *Reilly vs. Insurance Co.*, 43 Wis., 449; *Emery vs. Insurance Co.*, 52 Me., 322.

In those cases it is true the constitutionality of the several statutes was not directly passed upon, but the fact that so many courts of last resort have uniformly sustained such enactments, is a most cogent reason why this court should proceed with the utmost care in the determination of their validity with reference to the charge that they conflict with the Constitution of the United States and of this state.

If sections 5897 and 5898, Rev. St. 1889, are not unconstitutional they must be held according to the great weight of authority to enter into and form a part of the contract of insurance as fully as if written into it, and if any of the stipulations of the policy conflict with the statute such stipulations must yield to the law: *Havens vs. Fire Ins. Co.* (123 Mo., 403), and authorities there cited.

By the terms of the two sections under consideration they only apply to contracts of insurance "issued or renewed" after the said sections went into effect. They are then wholly prospective in their operation and the insurance in this case was written long after said sections became the law of Missouri. So that when the defendant insurance company entered into this contract it was apprised of the law of this state which prohibited a stipulation in its policies that it would only be liable for the actual value of the property destroyed, and that the statute by its terms annulled this provision of the policy.



The defendant assails this statute on the ground that it violates section one of the fourteenth amendment of the Constitution of the United States. As a predicate for this position defendant argues at length and cites authorities to show that "a corporation" is "a person" within the meaning of the Constitution of the United States: *Railway Co. vs. Mackey*, 127 U. S., 205; *Santa Clara Co. vs. Southern Pac. Ry. Co.*, 118 U. S., 394. But granting that a corporation is a person within the meaning of the constitution for certain purposes, surely no proposition is better settled than that the Constitution of the United States nowhere deprives this state of the power and right to prescribe the conditions upon which it will permit foreign corporations to do business within its boundaries: *Paul vs. Virginia*, 8 Wall, 168; *Philadelphia Association vs. People*, 119 U. S., 110; *Doyle vs. Insurance Co.*, 94 U. S., 535; *Bank of Augusta vs. Earle*, 13 Peter's (U. S.), 519.

Again and again it has been held that the whole matter of admitting foreign corporations to do business in the state rested absolutely in the discretion of the legislature of the state. The terms it imposes may be reasonable or unreasonable. The comity ordinarily extended is accompanied by no legal sanction. The state having extended it may at any time revoke it. This is the doctrine steadily maintained alike by state and Federal decisions: *Doyle vs. United States*, 94 U. S., 50; *Ibid vs. Ibid*, 94 U. S., 535; *Ducat vs. Chicago*, 10 Wall, 415; *Lafayette Ins. Co. vs. French*, 18 How., 404; *R. R. Co. vs. Kountz*, 104 U. S., 11; *Carroll vs. E. St. Louis*, 48 Ill., 172; *Home Ins. Co. vs. Davis*, 29 Mich., 238; *Noble vs. Mitchell*, 46 Amer. & Eng. Corp. Cases, 525; *State ex rel Ben. Assn. vs. Root*, 83 Wis., 667; *Dugger vs. Ins. Co.*, 32 S. W. Rep., 5.

The state has the power to prevent the making of contracts within its borders by foreign corporations altogether, or it may impose such terms as it may deem expedient provided they do not conflict with the exclusive powers of Congress. In the case of *List vs. Commonwealth* (118 Pa. St., 322), it was held that the state has power to prescribe conditions under which foreign corporations shall do business in that state, the court saying: "We can not regard the questions presented by this record as open questions in any sense. They are all settled emphatically and decisively by the decision of the Supreme Court of the United States in *Paul vs. Virginia*, 75 U. S., 168."

In *Paul vs. Virginia*, supra, the facts briefly stated were that Paul, a citizen of Virginia, had been appointed agent of several insurance companies organized and chartered by the state of New York. He filed his authority to act as their agent and complied, or off red to

comply, with all the laws of Virginia prerequisite to a license to solicit and write insurance in said state excepting the provisions requiring a deposit of bonds with the treasurer of the state and the production to the licensing officer of the treasurer's receipt for said bonds. A license was refused him. He thereupon undertook to do business without such license and was indicted and convicted. On writ of error to the Supreme Court of the United States his conviction was affirmed. It was contended in his behalf that the Virginia statute was in conflict with that clause of the constitution which declares "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the clause which vests in Congress "the exclusive power to regulate commerce with foreign nations and among the several states." It was held by the Supreme Court that issuing policies of insurance is not a transaction of commerce. They are not interstate transactions though the parties thereto are domiciled in different states. They are local transactions and governed by local law. As to "the privileges and immunities secured to citizens of each state in the several states" by the other clause relied upon, it was held they were "those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens." "It was not intended by the provision to give to the laws of one state any operation in other states." Said Mr. Justice Field: "Now a grant of corporate existence is a grant of special privileges to the corporators enabling them to act for certain designated purposes as a single individual and exempting them (unless otherwise specially provided) from individual liability." "The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created."

As said by this court in *Bank of Augusta vs. Earle*, "It must dwell in the place of its creation and can not migrate to another sovereignty." "The recognition of its existence even by other states and the enforcement of its contracts made therein depend purely upon the comity of those states. A comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy."

If anything can be deemed settled by adjudication then it is settled that a state can impose upon foreign insurance corporations seeking to transact insurance business in such state such terms and conditions as it may deem proper or may wholly exclude them. It follows then that this act did not curtail any right vouchsafed to defendant by virtue of being a citizen of the state of Connecticut. As such corporation it had no rights in this state save those extended

by the comity of the state and its attempt to limit its liability in case of loss to the actual damages was repugnant to the policy of Missouri as expressed in the statute above quoted. The policy having been written on real property in this state, and delivered to the owner and accepted by him in Missouri, we hold it to be a Missouri contract to be construed according to our own laws. No claim can be made that it makes any unjust discrimination against citizens of other states in favor of our own, or denies them the "equal protection of our laws" as the statute by its terms applies alike to all fire insurance companies whether foreign or domestic: *Railway Co. vs. Mackey*, 127 U. S., 205; *Railroad vs. Emmons*, 149 U. S., 364.

2. The learned counsel for defendant have filed a most elaborate brief, a large portion of which is directed at the supposed bad policy of the statute, an argument much more appropriate before the legislature than this court. They insist it violates the fundamental idea of insurance which is indemnity; that it encourages arson; that it increases the cost of insurance. The time allotted us will not permit a discussion of such considerations even if we felt called upon to defend the wisdom of the legislature. It is well known that the practices of the insurance companies, both life and fire, led to the legislation now so strenuously attacked. Promises held forth to the assured in the policies in use when this and similar statutes were enacted had "too often proven a delusion and a snare," and as the courts were powerless to correct the evil, the legislature interposed not only in Missouri but in many of the states of the Union to remedy the wrong. The manifest policy of the statute is to prevent rather than encourage overinsurance and to guard as far as possible against carelessness and every inducement to destroy property in order to procure the insurance upon it. It was also designed to prevent insurance companies from taking reckless risks in order to obtain large premiums by advising them in advance that they would be held to the value agreed upon when the insurance was written. No company is bound to insure any piece of property without first making a survey and examination of the premises, and it is not compelled to insure the full value then. But having the opportunity to inspect fully before insuring, and then fixing the amount of the risk and receiving the premium based upon such valuation, it ought to be forever estopped in case of a total loss from denying the valuation agreed upon, and such was the law long before this statute was enacted: *Wood on Fire Ins. Co.*, § 43, and cases cited; *Cushman vs. Insurance Co.*, 34 Me., 487.

The policy of the law seems to us wise and wholesome but if it were not, it is the province of the legislature to repeal it and not

ours to usurp legislative authority. More care in the selection of agents and more care in the inspection of the insured property will dispense with many of the objections urged against the policy of this statute.

Long prior to the enactment of this statute "valued policies" were in use as the result of contracts. By a "valued policy" a valuation was fixed in advance by way of liquidated damages to avoid making a valuation after the loss had occurred. Such agreements have been uniformly upheld against the claim that they were wagering contracts: *Universal Ins. Co. vs. Weiss*, 106 Pa. St., 20; *May on Insurance*, § 30, in note 1, and cases cited. The construction put upon a "valued policy" being, that the sum agreed upon was conclusive both at law and in equity save in cases of fraud.

3. But it is urged that this statute changes the rules of evidence within the meaning of the constitution of Missouri: § 53, Art. 4, Const. of Mo. That section, so far as applicable here, is in these words: Section 53. Special and local laws prohibited.—"The General Assembly shall not pass any local or special law: Regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before the courts."

Obviously this prohibition by its terms applies only to special or local laws. The enactment which defendant is combating is a general law applicable not to a special locality but to the entire commonwealth. It is wholly prospective in its operation and hence does not affect any special proceeding or inquiry in any court at the time of its passage. That the legislature, however, may enact a general law changing existing rules even as to pending causes no longer admits of a doubt: *Cooley Const. Lim.* (6 Ed.), p. 450-1; *Rich vs. Flanders*, 39 N. H., 304; *O'Bryan vs. Allen*, 108 Mo., 227.

4. Defendant also invokes section 15, article 2, of the constitution of Missouri, which provides "that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be passed by the General Assembly." It is perfectly apparent that this act in no sense whatever partakes of the nature of an ex post facto law and could by no stretch of construction be retrospective in its operation. It would hardly seem that a court should have been called upon to decide that the provision as to the impairment of the obligation of contracts necessarily referred to laws made after the particular contract in suit was entered into, but such was the case and it was so ruled in *Lehigh Water Co. vs. Easton*, 121 U. S., 388. Further discussion upon this point would be useless further than to add that for the same reasons these sections do not

conflict with section 10, article 1, of the Constitution of the United States which also forbids ex post facto laws, and all laws impairing the obligation of contracts.

5. The learned counsel for defendant insists further that this statute which prescribes that the measure of damages in case of a loss shall be the amount for which the property was insured is unconstitutional in that it conflicts with article 2, section 4, constitution of Missouri, which ordains "that all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government and that when government does not confer this security it fails of its chief design."

This last and final contention is based upon the assumption that a foreign corporation admitted into a state under positive statutory restrictions as to its power to contract nevertheless has all the freedom to contract that a natural person or citizen would have. In a word their position is this, they concede, they say, "that a state may exclude a foreign corporation altogether from its limits, but if it does admit it to do business then all the conditions imposed as the price of admission instantly vanish by virtue of the constitutional guaranty of all "the privileges and immunities of citizens of the several states." The promise is fatal to the conclusion reached. Corporations are not citizens within the meaning of the clause of the constitution invoked by defendant. The decisions of the Supreme Court of the United States which held that no state can regulate foreign or interstate commerce, or prevent a corporation from performing service for the United States government, or deprive a corporation of the right to remove a cause to the federal courts, have not the slightest application to the question now under consideration. The Supreme Court of the United States in those cases, merely decided that in so far as the character, business, or property of a foreign corporation partakes of the nature of those subjects over which the constitution gives Congress exclusive control and denies the state any control, the foreign corporation itself is removed from control of the state. This is not so, however, because it is a foreign corporation, or in distinction from other citizens, or business interests, but solely because it occupies a position, or is engaged in a business, reserved wholly to federal control. A familiar illustration being the exclusive right of Congress to legislate on the subject of patent rights, and a foreign corporation owning a national patent could not be controlled by state legislation. So also a foreign corporation engaged in foreign or interstate commerce. But in

each of these cases it is specifically pointed out that "writing and issuing a policy of insurance is a purely local transaction, wholly subject to the law of the state where the transaction is had, and that as to such contracts the company's rights are limited or restricted by the state law." Those exceptions are noted to the general rule that a state has the absolute power of exclusion, and this power includes the right to allow a conditional and restricted exercise of corporate powers by a foreign corporation within the state: *Bank of Augusta vs. Earle*, 13 Pet., 519; *LaFayette Ins. Co. vs. French*, 18 How., 404; *Ducat vs. Chicago*, 10 Wall., 410; *St. Clair vs. Cox*, 106 U. S., 350; *Pembina Mining Co. vs. Pennsylvania*, 125 U. S., 181.

Having availed itself of the privilege of doing business in this state under the restrictions of a statute which prescribed the effect of its contracts of insurance it must be governed by the laws of this state. It must be held upon every principle of good faith to have assented as to such business to restrictions imposed and to have its undertakings evidenced by policies here made complete, and enforced, as a like contract by our own domestic companies would be, and it is in no position to enter upon the consideration of the power of this state to enact such laws. If the defendant did not desire to abide by our laws, it could have desisted from writing insurance on property and soliciting insurance in this state: *Phoenix Ins. Co. vs. Levy*, 33 S. W., 992; *Thwing vs. Insurance Co.*, 111 Mass., 93.

While it was perfectly competent for the state to have imposed more onerous burdens upon such foreign companies it has not done it and defendant has no right whatever to complain of the policy of our laws.

The defendant did contract under this act; did take the premium, and retain it, and now that the loss has occurred it must pay the loss.

The judgment is affirmed. *Brace, C. J., Macfarlane, Sherwood, Burgess and Robinson, J. J.*, concur in the opinion. *Barclay, J.*, concurs in affirming the judgment for reasons given in his opinion in *State vs. Loomis*, 115 Mo., 307; 21 L. R. A., 806; 1 *Thayer, Const. cases*, p. 935; 22 S. W. Rep., 353.

## SUPREME COURT OF GEORGIA.

ATLANTA HOME INS. CO. }  
*vs.* }  
 TULLIS.\* }

According to the decision of this court in *Insurance Co. vs. Collins* (54 Ga., 376), an insurance company cannot be sued in a county where it had no agent or place of business at the time when the action was brought, although it may have had an agency in that county at the time the cause of action arose.

The decision of this court in *Merritt vs. Insurance Co.* (55 Ga., 103), when considered in connection with its actual facts as disclosed by the record on file in the clerk's office of this court, does not conflict with the ruling made in the case above stated. All of the facts of the *Merritt Case* do not appear in the official report, but the record itself shows that the person served with the process against the insurance company was in fact its agent, and acting as such when the suit was begun and the service perfected upon him.

The court erred in overruling the motion to set aside the judgment, made in due time, and based upon the grounds that the defendant company had never been lawfully served, and that the court had no jurisdiction to render such judgment.

The following is the official report:—

On September 22, 1894, Tullis sued the insurance company upon a policy of fire insurance issued to him by its agents, for the term of one year, from January 3, 1894; a loss by fire claimed to have been covered by the policy having occurred on April 27, 1894. Service of the suit was made upon the agents who had represented the company at Thomasville, where and during the time the policy was issued. No defense to the action was made until after plaintiff obtained a verdict, on April 16, 1895. Four days later, the company moved to set aside the verdict, and to open the default, and for leave to defend the action. This motion appears to be in the form of two affidavits, one by the secretary, the other by the president, of the company; the one dated April 12, the other April 19, 1895. These affidavits set up that the company is a resident of Fulton County, and has never resided outside of that county, or in the county of Thomas; that neither the company nor any of its agents, representatives, or officers had knowledge or notice of the pendency of the suit until April 18, 1895, when they received a letter from plaintiff's attorneys; that no process had ever been served on defendant, and the judgment was rendered without jurisdiction of the person or subject-matter; that on May 9, 1894, the company withdrew all its

\* Decision rendered, July 13, 1896. Syllabus by the Court.

agents and agency from Thomas County, and has not since resided nor had an agent therein upon whom service of process might be had, nor for the transaction of any business; that it had a good and meritorious defense to the suit, to wit, that the policy did not refer to or cover the premises claimed to be destroyed, and the company at no time intended to issue or deliver a policy covering said property; that on July 13, 1894, the company notified plaintiff of its withdrawal from Thomasville and from said county, and that it had cancelled all outstanding policies, and expressed to him \$2.13, the amount of return premium due under the policy, and notified him of its cancellation; and that the policy sued on was a subsisting contract, covering other and distinct property from that claimed to have been destroyed.

It appears from the evidence that the plaintiff was the owner of two houses upon adjoining lots in Thomasville at the time the policy in question was issued. He had applied to Evans & Son, who were then agents for the company at Thomasville, for a policy covering the house which was burned in April thereafter; but, by inadvertence, the agents erroneously inserted in the policy a description of the other of the two houses, and the mistake was not discovered until after the fire occurred. Said agents notified the company of the loss immediately upon its occurrence, and the company sent an adjuster to Thomasville, who examined into the circumstances, and, in repeated conversations, left upon plaintiff's mind the impression that the loss would be satisfactorily settled. It was on the ninth of the following month that the company withdrew its agency from Thomas County. Much correspondence then passed between Evans & Son and the company. On June 12th, the company's secretary wrote to Evans & Son, in reply to a letter from them in reference to plaintiff's claim, stating that he had not complied with the conditions of the policy, particularly as regards the filing of proofs, and that, after this was done, the company would advise them of its position in the matter. Proofs of loss were forwarded to the company three days afterwards, and the company acknowledged receipt of them on June 18th, and propounded to Evans & Son a number of questions regarding the matter. On June 27th, Evans & Son replied to these questions in writing. The testimony for the company was to the effect that Evans & Son failed to transmit the process, or to inform the company of service of the same, and of the filing of the suit; and that on July 13, 1894, the company sent to plaintiff, by express, \$2.13, as the return premium due upon cancellation of the policy, and mailed him a letter stating that the company had withdrawn from Thomasville, and cancelled all outstanding policies, and



thereby gave him notice that the one in question was cancelled, and of no further force. Plaintiff's testimony was that the company had never advised him that it had withdrawn from or ceased to do business in said county, nor had he at any time received any notice that any policy issued by it had been or would be cancelled; and that while he was notified by the agent of the express company of the receipt of a package containing a little over \$2, which had been sent to him, he promptly refused to receive it, and ordered it to be returned to the company. The court overruled defendant's motion, and it assigns the following errors: (1) In holding that the service was valid and effectual; (2) in refusing to allow the company to file its plea to the jurisdiction; (3) in holding that the law gave jurisdiction to the Superior Court of Thomas County; (4) in refusing to exercise discretionary power to open the case, and allow the company to plead; (5) in failing to properly exercise said discretion; (6) in holding that the company was in laches in not informing itself of the suit.

PALMER & READ and JACKSON & LEFTWICH, *for Plaintiff in Error.*

HAMMOND & HAMMOND, *for Defendant in Error.*

PER CURIAM. Judgment reversed.

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## SUPREME COURT OF MICHIGAN.

ZIMMERMANN

vs.

DWELLING-HOUSE INS. CO., OF BOSTON.\* }

The local agent stated to a general agent that he desired to write a policy on his household goods and a barn that he was building, and was told to write it in the usual way; and after the barn was completed, the policy was written.

*Held*, That where the company was not notified of the risk there was no valid contract. An agent cannot insure his own property without notice to the company.

W. G. GAGE, *for Appellant.*

HANCHETT & HANCHETT, *for Appellee.*

MOORE, J.

The plaintiff was a local agent of the defendant at Saginaw, and had been for several years prior to the date of the policy sued upon

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\* Decision rendered, July 28, 1896.

in this case; and, at the time the policy was issued, there was another local agent representing the defendant in the city. On May 15, 1893, plaintiff wrote a policy in the defendant company, insuring himself in the sum of \$1,500 on his household goods, \$250 on his barn, \$100 on his horse, and \$150 on his vehicles, robes, feed, etc. Without notifying the company of this risk, he retained the policy and the daily report which is usually sent to the company until May 20, 1893, claiming that his barn was not completed and ready for occupancy before that date. On that date he sent the policy and daily report, by mail, to the home office of the defendant, at Boston, Mass. These papers were received by the company on May 23, 1893. Before sending the policy, the plaintiff had indorsed upon it the words, "Kindly approve and return." The property covered by this policy was totally destroyed by a large fire on May 20, 1893, about 6:30 o'clock in the evening. The fire started at about 4:30 P. M. The plaintiff notified the company of the loss May 24th, when the general agent, W. J. Nichols, arrived in the city to look after the losses sustained by the company in this large fire. No premium was ever paid or tendered by the plaintiff. The policy was never accepted by the company, and was never delivered or returned to the plaintiff. The company declined to pay the loss. The plaintiff sued the defendant, and the judge directed a verdict in favor of defendant.

It is claimed by the appellant that he was authorized to write this policy by W. J. Nichols, the general agent of the defendant, during a conversation between them in the city of Saginaw, in February, 1893. The conversation is described by the plaintiff as follows: "I told him that I wanted to write a policy upon my own goods, and he said: 'Write it in the usual way.' That is the answer he gave me. I think the conversation occurred at the Bancroft House. It was on the east side of the river, anyway. The subject of the conversation was about business generally, and about insurance business in general. There wasn't anything said about placing a policy upon my property immediately." The property which plaintiff proposed to write was not pointed out to Nichols, but the plaintiff told Nichols it would be his household goods and barn then building. On cross-examination, plaintiff testified: "At the time I had my conversation with Nichols, in February, 1893, I told him that the property I wanted to insure was my household goods and a barn I was then building. I didn't tell him how much insurance I would take out. That is all there was to that conversation." The policy he wrote was written May 15th. It is claimed that this conversation between the general agent of the company, in which the

general agent of the company used the expression, "Write it in the usual way," supplemented by the writing of the policy and evidence "that it is the custom of insurance agents in Saginaw valley to insure their own property in the companies for which they are agents, in the same manner that they insure property of other persons," i. e., "that the custom and usual way in the city of Saginaw and valley of writing policies upon an agent's own property at that time was to make a memorandum of the risk; then he would make a daily report of the risk, and then a policy conforming to that, and spread it upon his insurance register,"—made a contract upon which the company would be liable, whether the policy was accepted at the home office or not: We cannot sustain that contention. When this conversation was held, the barn was not built. It was not finished until about the 15th of May. No statement was made as to the value of the property to be insured, or for how much it was to be insured, or what rate of premium was to be paid. No date had been fixed for the commencement or termination of the risk. Giving the most liberal construction possible to the language used, and what was done, it did not constitute a mutual and valid contract, binding upon both parties: *Michigan Pipe Co. vs. Michigan Fire & Marine Ins. Co.*, 92 Mich., 482.

In its logical order, the next question for consideration is: Did the writing out of the daily report and the policy, and its entry on the policy register, constitute a contract before the policy was approved by the company? It is elementary law that an agent must not be personally interested adversely to his principal: *Green vs. Knoch*, 92 Mich., 26; *Iron Co. vs. Kirkpatrick*, 92 Mich., 252. An agent for receiving applications ceases to be an agent so long as he acts in a matter in which his personal interest is concerned. If he applies for insurance on his own property, as to that property he is no agent of the company. He cannot, by the familiar rule of law, as agent, represent antagonistic interests: *May, Ins.*, § 125, and cases cited. It follows reasonably, I think, that, if the agent cannot act for the company so as to bind it where he himself is an applicant for insurance, the company would not be bound until his act in writing the policy was approved by it. The record shows that, while the policy was written May 15th, for some reason it was not posted for mailing until May 20th, and was not received until May 23d, three days after the loss occurred. The policy never was approved by the company, and no contract creating liability was made.

The judgment is affirmed. The other justices concurred.

## MISCELLANY.

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Cases to which an insurance company is party, which are not actions on policies, but which relate to matters outside of insurance; as, jurisdiction, injunction, mandamus, the relations of statute laws to corporations, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### PREMIUM NOTE—RESCISSION.

In the case of *Jones vs. Methvin*, decided by the Supreme Court of Georgia, Oct. 21, 1895, which was an action by Jones, an agent, on one Methvin, on a note given for the premium on a life policy procured by the former, the following syllabus was furnished by the court. A slight error in the spelling of the name of the insured in a policy of life insurance will not, after his acceptance of the policy, constitute a valid defense to an action upon a promissory note given for the amount of the first premium due upon the policy, unless it affirmatively appears that, after discovering the error, the insured made a proper request for its correction, and the same was refused. Where the insured mailed such a policy to the plaintiff's agent, the former took the risk of the mails; and even if the policy had been accompanied by a communication distinctly pointing out the error, and requesting its correction, but in fact these documents never reached the agent, the plaintiff would not be chargeable with any notice of the defect in the policy, nor with the consequences of a failure to remove the same by having the appropriate correction made. In no event was the error in question, of itself alone, cause for rescission.

### ATTACHMENT.—WINDING UP.

The Supreme Judicial Court of Massachusetts in the case of *Merrill vs. Commonwealth Mutual Fire Ins. Co.*, decided May 23, 1896, held that an attachment on the property of an insurance company after the filing of a bill by the Ins. Commissioner under the statute of 1894, looking to its being placed in the hands of a receiver was void, although at the time the company was only restrained by the injunction from doing new business, where a decree was afterwards rendered appointing a receiver.

1897.]

*Rockford Ill. Co. by Bridges and Stone*



## COURT OF APPEALS OF COLORADO.

ROCKFORD INS. CO., A CORPORATION, ETC., *Appellant*,*vs.*MERRICK A. ROGERS AND MILTON J. STAIR, *Appellees*.\* }

The company, the defendant below, entered the State of Colorado without filing a certificate with the County Recorder or Secretary of State, designating its principal place of business and an agent to receive service of process, as is required by the statute of all foreign and non-resident corporations in general, although it had complied with the laws relating particularly to insurance companies, and had procured a certificate from the Superintendent of Insurance authorizing it to do business.

It appointed an agent, who gave a bond, with two sureties, for the honest performance of his duties, including the paying over to the company of all moneys due, monthly, or as demanded.

The agent failed to pay over a balance of \$927.62, and the bondsmen defended on the ground that the company was doing business in the state illegally. The district court sustained this defense.

*Held*, That, whereas the statute, requiring foreign corporations to file the certificate referred to, prescribed a penalty imposing a personal liability upon the officers and agents of the defaulting corporation; and whereas, there is no provision in the statute declaring the contracts into which such corporations may enter illegal or void, the courts will assume that the personal liability is the only penalty imposed by the statute, and that the legislature deemed this sufficient to insure an observance of the limitation on the power to do business. The contract in question, made by the company, is accordingly not to be held void.

*Held*, Further, that the money collected by the agent belonged to the company, and he was bound to pay it over. The bondsmen are obligated for the honest performance of the agent's duties, and cannot set up the invalidity of the company's insurance contracts to escape liability for the nonpayment of that which the agent received, and which belonged to the company. "The agent got the money and was bound to pay it over. For the faithful performance of his duty in this regard the sureties bound themselves, and they cannot now be heard to defend upon the hypothesis that the original contract between the company and the insured was invalid, or that the corporation had in any respect failed to comply with the statute which attempts to limit the power of foreign corporations to do business in this state."

C. J. BLAKNEY and SYLVESTER G. WILLIAMS, *for Appellant*.WELLS, TAYLOR & TAYLOR, *for Appellees*.

Appeal from the District Court of Arapahoe County.

BISSELL, J.

The correctness of a judgment granted on a motion therefor based wholly on the pleadings is challenged by this appeal. Suit was brought by the Rockford Insurance Co. against Rogers and Stair, as sureties on a bond executed by Wells as principal. The complaint charged that the insurance company was a corporation

\* Opinion rendered, Jan. 11, 1897.

organized under the laws of Illinois, and permitted to do insurance business in this state. Wells was appointed its agent, and during February, 1893, collected funds and moneys belonging to the insurance company amounting to \$938.48; he also collected in March, \$687.23, and of the total sum paid about \$700, leaving \$927.62 which he had collected and failed to pay over. The bond which was set up in the complaint was in the usual form. According to its conditions Wells had been appointed agent of the insurance company in Denver, agreed to accept the trust, keep a regular and accurate record of accounts and moneys received, and pay them over to the company monthly, or as often as they might be demanded. In case of default, the bondsmen were to be liable. The answer admitted the plaintiff's corporate character, but denied that it was authorized to transact business in the state; admitted the agency, the execution and delivery of the undertaking, and on information and belief denied the receipt of the money. As a second defense it set up the foreign character of the plaintiff company, and that the moneys which Wells had received were premiums which had been paid to him for the company on account of divers policies of insurance which the company had issued in Arapahoe County to various parties in the ordinary course of business. The defendants then alleged a failure on the part of the insurance company to file with the Secretary of State or the Recorder of the Deeds in Arapahoe County a certificate signed by the president or secretary, designating its principal place of business and any agent or agents on whom process might be served. The plaintiff replied, denying that the business was carried on solely in Arapahoe County, and averred that it was done in the state, admitted that they had not filed with the Secretary of State or the Recorder of Deeds the certificate mentioned, and then alleged affirmatively an authority to transact business by reason of a compliance with the statutes regulating the conduct of insurance business by foreign companies in the state of Colorado, and a compliance with the regulations of the auditor who is the superintendent of insurance, and the possession of a certificate issued by him authorizing them to transact the business of their company in the state. There were some immaterial amendments subsequently made that are unimportant to this discussion, and the case stood for trial in the district court on these issues. Thereupon the defendants moved for judgment on the pleadings which was heard and granted. It is from this judgment that the appeal is prosecuted.

The appellant insists that for three reasons the judgment is erroneous. It is contended that the failure to file a certificate is



not pleadable in bar to the action, and that the defence could not in any event be available because the parties are estopped by the facts and the relations of the agent to the company from raising the question. It is also contended that in any event the statutes which organized and provided for an insurance department, and in direct terms enacted that the auditor should be the agent of the company on whom process might be served, repealed the former provisions with reference to the filing of a certificate. On at least two of these propositions the law of this state is undoubtedly with the appellant. We would be unadvised except for the opinion printed in the Record as to the precise basis on which the trial court proceeded to enter this judgment. From this we learn that the failure to file the certificate with the Secretary of State or Recorder was regarded by the trial judge as absolutely fatal to the action. It was conceded the position was in apparent conflict with the direct decision of the supreme court on the proposition, and to its intimations and evident acceptance of the contrary rule in a subsequent case which is cited. We are unable to pursue a similar course. The question has been pressed on our attention anew with very considerable elaboration of argument and citation of authorities, and in a forcible oral argument counsel for the appellees insist it is the duty of this court to reconsider the question, and if our conclusions should be in harmony with those of the district judge to adopt a contrary rule. This we decline. In no contingency, and under no circumstances, whether in obedience to our own convictions of what the law ought to be, or of what the weight and current of authority had declared it to be, would we attempt to overrule the supreme court or depart from the precedents it has established. We are forced to no such position, however, by the character of the question or our own convictions respecting it. The constitution and the statutes, which were enacted to carry out its provisions, undoubtedly command foreign corporations who seek to do business in the state, to file a certificate in the office of the Secretary of State or Recorder of Deeds in the county wherein their principal business is to be transacted, and designate an agent on whom process may be served before they shall have the right to transact business within its limits to the same extent and on the same plane as domestic corporations. This is not all, however, that the statutes provide. A penalty is prescribed, and when the foreign corporations fail to observe these statutory requirements a personal liability is laid on the officers and directors of the defaulting corporations. There is no provision declaring all contracts into which they may enter illegal and void, nor is there any other than the general provision

respecting their duty in this particular. Many of the cases in which the question has been discussed simply involved the right of the corporations to enforce a single contract which they had made, and did not in general discuss the question of the invalidity of their contracts where the corporation was attempting to do business as that term is generally constructed. The principle, however, on which the decisions have been put seems to us clearly decisive of the present controversy. Where the personal liability penalty is the only one imposed by the statutes, the courts assume the legislature deemed this sufficient to insure an observance of the limitation on the power to do business: *Utley vs. Clarke-Gardner Lodge Mining Co.*, 4 Col., 369; *Kindel vs. Lithographing Co.*, 19 Col., 310; *Cooper Manufacturing Co. vs. Ferguson*, 113 U. S., 727; *Fritts vs. Palmer*, 132 U. S., 282.

It is quite impossible for this court, in response to the request of counsel, to enter upon a general discussion of the proposition, and adduce all the various reasons which might be urged in support of it. The discussion would subserve no useful purpose, nor would it add aught to the force and effect of what seems to us to be the settled law on this question. We are, therefore, contented with a general statement of the doctrine and our concurrence.

The circumstances of this case, the character of the suit, and the facts alleged as its basis would, in our judgment, in any event render it impossible to adjudge the plea a defense to the suit. The action is not brought on a contract which the company had entered into with another party which involved the transaction of its insurance business or the issuance of a policy from which the insured was attempting to escape because of its illegality or invalidity. Under any of the authorities there can be no question respecting the right of an insurance company to appoint an agent to collect moneys due it, and to take from that agent a bond to answer for the faithful performance of the engagement into which he enters. The moneys which the agent Wells collected belonged to the insurance company. It was money which had been voluntarily paid by the policyholders in return for the protection afforded by the policies, and neither party to the contract of insurance has made, or is making, any question about the validity or character of the insurance contract. So far as we are advised by the record, the contract was fully executed.

The policyholder voluntarily paid his money, accepted the contract, and admitted its validity. The agent simply received the premiums, which was money under these circumstances belonging to the insurance company, and which, by his contract, he was bound

to pay over. The present appellees, by the terms of their bond, are obligated for the honest performance of these duties. Under these circumstances we are quite unable to see how it would have been possible for the agent, if he had been sued for the moneys, to set up the invalidity of the contracts entered into by the insurance company and the insured to escape his own liability to pay over that which he had received, and which, undoubtedly, belonged to the company. On well recognized principles of good morals and fair dealings he would be estopped to question their title to this money, and he would not have been permitted to defend on the plea that the original contract between the company and the insured was entered into in violation of some specific statute. It is oftentimes true one party to a contract may set up in defense that it is *ultra vires*, and beyond the power of the corporation to execute. It has never been conceded, so far as we know, that if a contract is not *ultra vires* one party to it may set up the incapacity of the corporation, or its want of authority to make the contract, which is the basis of the action: *Sherwood vs. Alvis*, 83 Ala., 115.

To adopt any other theory would work out most astonishing results. It would permit a person to accept an agency of a corporation, collect moneys which concededly belong to it, and when sued and asked to account, he would be permitted to defend because of the lack of corporate capacity of the foreign corporation to do business in the state. This would certainly legalize larceny and render embezzlement both legitimate and profitable. Unless some more cogent reason can be shown than any which has been called to our attention, we must decline to bring about such results. The agent got the money and was bound to pay it over. For the faithful performance of his duty in this regard, the sureties bound themselves. They cannot now be heard to defend on the hypothesis that the original contract between the company and the insured was invalid, or that the corporation had in any respect failed to comply with the statute which attempts to limit the power of foreign corporations to do business in this state.

We are asked by the insurance company to decide that the subsequent legislation, whereby an insurance department was created and an agent thereby designated on whom process might be served, repealed the antecedent statutes which prohibited foreign corporations from doing business in the state without having first filed a certificate and designated an agent. There is considerable force in these suggestions, and they were not without the support of adjudications: *St. Louis, etc., Ry. Co. vs. Commercial Union Assur. Co.*, 139 U. S., 223; *State ex rel., etc., vs. Rotwitt*, 17 Mont., 41.

We prefer, however, to leave this question undetermined. We do not regard it as safely and completely presented to this record. The replication undoubtedly sets up the possession of a certificate issued by the auditor authorizing the company to do business in the state. We are not quite able, however, to accept this averment as entirely conclusive and satisfactory on this question. It is somewhat unlike an allegation in the complaint which is admitted by the answer, or one stated in the answer which is admitted by the replication, because under our system all affirmative averments contained in the replication are regarded as denied without further plea. Under these circumstances it might, perhaps, with some reason, be said that there is no admission in the pleading that the company possessed this certificate. While this contention is possible, and the case can be reversed on other grounds without indulging in any presumptions or conclusions which are not warranted by the facts which are concededly before us, we prefer to rest the decision on the other basis. When the case goes back for a new trial, if this fact is proven and established by the record, should the case be thereafter appealed, the question would be presented in such a way that we could without violating any principle, and without indulging in any presumption, pass on the proposition.

The court erred in rendering a judgment on the pleadings, and it will, therefore, be reversed.

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## UNITED STATES CIRCUIT COURT.

EASTERN JUDICIAL DISTRICT OF MISSOURI, E. D.

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CHARLES GIBSON, *Plaintiff*,

vs.

CONNECTICUT FIRE INS. CO., *Defendant*.\* }

A St. Louis, Mo , broker requested a St. Paul, Minn., agent to insure property located in Minnesota, for a Missouri owner, a customer of said broker. The St. Paul agent applied to one of his companies located in Hartford, Conn. The company accepted the risk, and the president signed a policy ("not valid until countersigned by the agent of the company at St. Paul,") and sent it to his St. Paul agent who countersigned it and sent it to the St. Louis broker, who delivered it to his customer, the Missouri owner of the Minnesota property. The policy was the regular "Minnesota Standard Policy" and was so stamped on the folded document in large plain type. It was held for over two years without objection when the loss occurred.

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\* Decision rendered, Sept., 1896.

Preliminary discussion over an adjustment being unsuccessful, an arbitration was agreed to, contrary to the laws of Missouri, but after the arbitrators had entered upon the discharge of their duties, the plaintiff, fearing that their finding would be less than he claimed, protested that he made claim under the Missouri statute, and contended that the policy was a Missouri contract, and subject to the operation of the valued policy laws of that state because he lived there, and the completion of the transaction was only reached when the policy was delivered to him. This was the contention before the court. As stated in the first paragraph below a verdict for plaintiff was entered, and the case considered on its merits on a motion for new trial.

*Held*, When this policy was issued by the defendant, countersigned by its only recognized agent at St. Paul, insuring a house situated in Minnesota, and when it was accepted by the plaintiff there was no fact or circumstance to give color to a supposition that the company was making a contract subject to the local insurance laws of the state of Missouri; nor did the plaintiff believe so for two years thereafter, and until after the time elected to submit the matter to arbitration.

Therefore, to hold the defendant amenable to the greater liability imposed by the Missouri statute would, in my judgment, be little less than a fraud on the defendant. Motion for new trial sustained.

CAMPBELL & RYAN, *Attorneys for Plaintiff*.

BOYLE, PRIEST & LEHMAN, and McDONALD & FAUNTLEROY, *Attorneys for Defendant*.

PHILIPS, J.

This case was tried before a jury. There being practically no dispute between the parties as to the controlling facts of the case, it was suggested to counsel by the court that, as the determination of the case turned entirely upon the law arising from the conceded facts, the jury should by consent be discharged, to afford the court an opportunity for investigation of the questions of law involved. This suggestion not being accepted by the plaintiff, the court directed the jury to return a verdict for the plaintiff, stating to counsel at the time, that this action was not to be taken as the conclusive judgment of the court as to the law of the case, and that, therefore, the defendant could file a motion for a new trial, which the court would take under advisement, so that if the verdict should be approved, on further investigation by the court, it would obviate the necessity of a second trial; otherwise, a new trial would be ordered.

The material facts of the case are sufficiently stated in the following discussion:—

The controlling question to be answered is, is the contract of insurance a Missouri or a Minnesota contract? If the right of recovery is determinable by the statute law of the state of Missouri, the plaintiff is entitled to recover the whole amount of insurance expressed in the policy, but if it is a Minnesota contract, the finding must be for the defendant, as the action in the latter case should have been predicated upon the award of arbitrators duly

made instead of upon the contract for the whole amount of the insurance expressed in the policy.

The evidence showed that one Windmuller, residing and doing business at St. Louis, in the nature somewhat of an insurance broker, had been for some time insuring property situate in St. Louis for the plaintiff, and being aware of the fact that plaintiff owned a house and lot situate at Lake Minnetonka, Hennepin County, Minnesota, suggested to him that he procure insurance thereon, to which the plaintiff assented. Whereupon, Windmuller wrote to one Gilbert, an insurance agent at St. Paul, Minnesota, asking him if he could place five thousand dollars of insurance on this property in companies represented by him. Gilbert, who was the local agent for the defendant company at St. Paul, forwarded an application to the company at Hartford, Connecticut, for a risk of \$2,500 on this property, which was accepted by the company, and a policy made out, signed by the president of the company, on the 18th day of July, 1893, and forwarded to Gilbert to be countersigned by him. The policy thus forwarded to Gilbert contained this clause: "This policy shall not be valid until countersigned by the duly authorized agent of the company at St. Paul, Minn." On receipt thereof Gilbert sent the policy by mail to Windmuller at St. Louis, accompanied by a letter stating the amount of the premium, and directing him to deliver the policy to the plaintiff, if acceptable. The policy was accordingly delivered to the plaintiff who accepted the same without demur.

It is to be observed, in the first place, that Windmuller was not the agent of the defendant company, authorized by it to solicit or make insurance contracts on any property in the state of Minnesota. It was not represented by Windmuller to plaintiff that he had any such agency, nor is there any evidence whatever of any holding out by the defendant of Windmuller as its agent for any purpose. Nor had the plaintiff any ground for supposing that Windmuller was clothed with any such authority. So far as the officers of the company were concerned, there was no recognition of Windmuller in the transaction. And so far as anything appearing on the face of the policy, or from any evidence in the case, it does not appear that the defendant company, at the time it accepted the policy, even knew that the plaintiff was a resident of Missouri.

To maintain the proposition that the policy, nevertheless, became a Missouri contract it is contended by plaintiff that as nothing was said between him and Windmuller at the time of the interview respecting the procuring of this insurance as to the amount of the

premium, and, inasmuch as the company wrote into the policy a different rate from that suggested by Windmuller to Gilbert, and, inasmuch as Gilbert after the countersigning forwarded the policy to Windmuller to be delivered to plaintiff, if acceptable to him, the contract of insurance did not become consummate until accepted by plaintiff at St. Louis, whereby his acquiescence in the amount of the premium was manifested. This may be conceded; but the question remains, did this mere act of acceptance by plaintiff at St. Louis have the effect in law to make the policy a Missouri contract? I hold that when plaintiff accepted the policy he thereby ratified the acts of Gilbert, the Minnesota agent, and by relation it became operative as a Minnesota contract. The case is distinguishable in its facts from cases like those relied upon by plaintiff's counsel, such as life policies, where the assured lived in Missouri, and the insurance was effected through a soliciting agent of the non-resident company, where the assured resided when the policy was forwarded to the local agent to be countersigned and delivered by him to the assured to become operative on payment of the first premium; as, also, to the class of cases of fire insurance effected through a local agent to be countersigned by him and delivered to the insured. There being nothing on the face of the policy and the attending circumstances of the transaction indicating a purpose not to regard it as a contract subject to the laws of the state where the subject matter of the insurance is situated, the policy providing on its face that it should not be valid until countersigned by the duly authorized agent of the company at St. Paul, Minnesota, without any condition respecting the payment of the first premium, why should it be regarded as a Missouri contract? In *Golson et al. vs. Ebert* (52 Mo., 260-271), it is held that where the contract is made with an agent in one state, subject to the ratification of the principal in another state, when so ratified, it becomes a contract of the state, to be interpreted by its laws, where the agent resides. "It would become binding not as a new contract made at St. Louis, but the contract would become binding as made and where made by the agent, and would have just the same effect as it would have if the agent had been fully authorized to make the contract before it is made, and no ratification is necessary." The court further say: "This contract was made in New Orleans, was to be performed in New Orleans, and if it is ratified by defendant it is the contract made and to be performed; hence, we must look to the laws of Louisiana to ascertain its validity."

Windmuller, as already stated, was not the agent of the insurance company, but acted rather for the plaintiff in sending his application

to the company's agent at St. Paul, who countersigned it for the company as its agent, and forwarded it to Windmuller to be delivered to the plaintiff. Windmuller was thus the mere conduit of delivery, and made so by the plaintiff. The delivery, therefore, was the same in law as if it were made by Gilbert directly to plaintiff, and therefore the transaction stands in law the same as if plaintiff had made its application directly to the Minnesota agent, and received from him the policy: *Hicks vs. National C. Ins. Co.*, 60 Fed. Rep., 590.

Be this as it may, the further controlling fact appears in this case that the subject of insurance is real property situated in the state of Minnesota. Looking at the face of the policy, the locus of the company and of the countersigning agent, and the situs of the property itself, there is nothing to indicate that it in any respect pertains to a Missouri contract subject to, or to be affected by, its local laws and internal policy.

The effort of the plaintiff is to subject the policy to the operation of Sections 5897 and 5898 of the Revised Statutes of Missouri. The first section applies to the instance of a single policy on the property, and declares that in case of loss by fire the insurance company "shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured thereon on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount for which the property is insured, the property may have sustained between the time of issuing the policy, and the time of the loss, and the burden of proving such depreciation shall be on the defendant." Section 5898 provides for the instance where the property shall be insured in more than one company. In the event of suit "the defendant shall not be permitted to deny that the property insured was worth the aggregate of the several amounts for which it was insured, unless wilful fraud or misrepresentation is shown on the part of the insured in obtaining such additional insurance; and in such suit the measure of damage shall be as provided in the preceding section." But this section contains the further express proviso that "this and the preceding section shall apply only to real property insured." On settled principles of law, the implication is that it refers to real estate situate in this state. "The legislative authority of any state must spend its force within the territorial limits of the state:" *Cooley Constitutional Limitations*, 151. As such statutes have no extra territorial force, the general presumption is that they operate



alone on property within the state: *Stanley vs. The Wabash, etc., Railway Co.*, 100 Mo., 435; *Murrel vs. R. R. Co.*, 21 A. M. Eng. R. R. Cases, 48; *Rorer Interstate Laws*, 149-154.

It is not conceivable that the legislature supposed they were formulating a state policy respecting insurance on real property situated within the jurisdiction of a foreign sovereignty, subject to the legislation and laws thereof.

The question here presented is, to what laws did the parties to this policy intend that the matter of compensation in case of loss should be submitted? Courts, in considering questions like this, sometimes fail to observe the proper distinction between the *lex fori* and the *lex contractus* and that class of contracts properly determinable by what is termed the *lex loci solutionis*. Mr. Justice Mathews, with characteristic learning and perspicuity, has pointed out this distinction in *Pritchard vs. Norton*, 106 U. S., 124. After observing that the term *lex loci contractus* in common acceptance may have a double sense, as applied indifferently to the law of the place where the contract was entered into and to the place of performance, said: "When it is employed to describe the law of the seat of the obligation it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract as constituting its obligations."

The following propositions may be formulated from this opinion: It is a principle of universal justice that in every forum a contract is governed by the law with a view to which it is made, and, therefore, the mere place should not govern the transaction, when it appears that it is entered into with a direct reference to the law of another country. Second, that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter." Third, that it is to be remembered "that in obligations it is the will of the contracting parties and not the law which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves."

There is neither anything in the Missouri statute, nor under the general law, to prevent parties from making a contract solvable by the laws of Minnesota respecting property situated in that state: *Robinson vs. Bland*, 2 Burr, 1078; *Story's Conflict Laws*, 280-281. And whether they so intended, both the subject matter and the

contract itself are to be looked at: Justice Willes in *Lloyd vs. Guibert*, Law Rep., 1 Q. B., 120.

The house and lot were in the state of Minnesota. The only authorized agent of the defendant to solicit policies of insurance on such property and to countersign and deliver policies was located at St. Paul in that state. And I find posted on the face of the policy a receipt from the plaintiff to the defendant for a payment on a small loss sustained on this property under this policy in 1894, which speaks of this "policy No. 4054 issued at St. Paul, Minn., Agency." The policy insures "to an amount not exceeding" \$2,500, and then it expressly provides that:—

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with the proper deductions for depreciations however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ then by appraisers as hereinafter provided."

The plaintiff is especially to be presumed to know the law, as he is a lawyer of learning and experience. He knew when he accepted this policy that the last-named provision was inoperative under the statutes of Missouri as contrary to the local policy of the state. One of the canons of the law for ascertaining the mind—the understanding—of the parties as to what jurisdiction the contract is to be referred for solution is, that "the parties cannot be presumed to have contemplated the law which would defeat their engagements:" *Pritchard vs. Norton*, *supra*, page 137. As said by Judge Chitty in *re Missouri Steamship Company* (42 Chancery Division, 329), "the circumstances that the stipulations which the client asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country, affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed, and not to the law which disallowed, the stipulation. It is unreasonable to presume that the parties inserted in the contract stipulations which they intended should be nugatory and void."

At the time this policy was issued the statute of Minnesota (Vol. 1, Sec. 3200 et seq.) provided that, after January 1, 1890, "no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire-insurance policy on property in this state," etc., except in conformity with re-

quirements of its statute, which provided that the insurance commissioner should formulate a form of policy in conformity with that employed in the state of New York. This policy was on the form prepared by the insurance commissioner of that state, and was received by the plaintiff with the words: "Minnesota Standard Policy" printed in large type on the front of the policy when folded.

It is true, that so much of this policy as authorized said commissioner to prepare a form of policy, as near as may be, like that prescribed by the law of the state of New York, has been declared by the Supreme Court of Minnesota to be unconstitutional on the ground that it was a delegation of legislative power to the commissioner: *Anderson vs. Manchester Assurance Co.*, 59 Minn., 182. But this in no wise impairs the force of the argument that the parties to the contract, the one by employing and the other by accepting this form of policy, indicated their understanding that it was a Minnesota contract. In this connection, it is well enough to advert to the fact that at the trial the plaintiff sought to testify in his behalf that at the time he authorized Windmuller to send in his application for insurance, he stated to him, in effect, that he wanted a Missouri policy contract to prevent any trouble on the question of the law of its solution. This was excluded by the court for the reasons that the ground upon which such statements to agents are admissible being that it is the duty of the faithful agent to make known to his principal any material information or fact coming to him in the transaction of the business of his agency, the law presumes that he performs such duty, does not obtain in this case because Windmuller at the time was not the agent of the defendant commissioned to transact this business; and there is no pretense that he ever informed the company or Gilbert of such claimed statement; and because it was an attempt to interpolate into a contract of an antecedent statement inconsistent with that expressed in the instrument itself; and because when the plaintiff accepted the policy in its present form, he is presumed to have waived any such preference for a Missouri contract policy. For not only was it blazoned before his eyes when he accepted the policy that this is a Minnesota standard policy, but in the very body of the instrument, in large type, did it expressly declare that any loss by fire should be adjusted on the basis of the actual value of the property, as provided under the law of Minnesota and inadmissible under the law of Missouri.

With this stipulation in the policy he accepted it, and for over two years made no objection thereto; and when the loss occurred he declared his understanding of the contract to be that the provisions

respecting the valuation of the loss were binding, because he consented, after an unsuccessful parley for adjustment with the defendant, to submit to arbitration as provided in the policy. He selected his arbitrator, as did the defendant, who selected the umpire; and not until after these arbitrators had entered upon the discharge of their duties did the plaintiff protest that he made claim under the Missouri statute, and this, doubtless, because he had reason to fear the result of their finding, which placed a valuation lower than he claims. It is inadmissible to say that this action on his part is consistent with his present interpretation of the contract. There was no occasion for a submission to arbitration, if it was intended by plaintiff to be a Missouri contract.

When this policy was issued by the defendant, countersigned by its only recognized agent at St. Paul, insuring a house situated in Minnesota, and when it was accepted by the plaintiff, there was no fact or circumstances to give color to a supposition that the company was making a contract subject to the local insurance laws of the state of Missouri; nor did the plaintiff believe so for two years thereafter, and until after the time he elected to submit the matter to arbitration. Therefore, to hold the defendant amenable to the greater liability imposed by the Missouri statute would, in my judgment, be little less than a fraud on the defendant.

It results that the motion for a new trial should be sustained.

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## UNITED STATES CIRCUIT COURT.

EASTERN JUDICIAL DISTRICT OF MISSOURI, E. D.

CHARLES GIBSON, *Plaintiff*

*vs.*

ST. PAUL FIRE & MARINE INS. CO., *Defendant.\**

The facts in this case are substantially the same as those in the one which precedes it (which see), except that the agent of the Connecticut company in St. Paul was at the same time the secretary of this defendant company, and obtained from his Connecticut agency company \$2,500 and issued in his own Minnesota company \$2,500 on the Minnesota property and sent (both policies together) to his St. Louis agent (who was the broker in the other case) who countersigned this policy, and then delivered them both to plaintiff. This policy as well as the other was held for two years without objection and like the other was plainly stamped "Minnesota Standard Policy."

A further and special difference relied on in order to make this policy a Missouri contract, and subject to the valued-policy laws of that state, is the

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\* Decision rendered, Sept., 1896.

fact that it was countersigned by a Missouri agent, and so became a Missouri contract notwithstanding it was written in Minnesota and applied to property located in Minnesota, and not in Missouri.

It is held that this contract by its "four corners," taken in connection with the locus of the company and situs of the property, clearly evince that the defendant intended to issue a Minnesota policy, while the plaintiff by accepting it, and holding it two years, and then by recognizing the right of arbitration, placed the same interpretation upon it and should be estopped from now contending that it is a Missouri contract.

Motion for new trial accordingly sustained.

CAMPBELL & RYAN, *Attorneys for Plaintiff.*

BOYLE, PRIEST & LEHMAN and McDONALD & FAUNTLEROY, *Attorneys for Defendant.*

PHILIPS, J.

This case, for the purpose of trial, with consent of parties, was heard before a jury in connection with the case of this same Plaintiff vs. Connecticut Fire Ins. Co., of Hartford, in which an opinion has just been handed down. The facts in the two cases are substantially alike, except in the particulars noted.

The defendant company is a fire and marine insurance corporation organized under the laws of the state of Minnesota, with its principal business office at St. Paul in said state. C. B. Gilbert was, at the times hereinafter mentioned, the secretary of said company, located at St. Paul. Windmuller, the same person named in the opinion in the Connecticut company case, was at the times in question a member of the firm of Blossom, Windmuller & Kuehne, who were insurance agents at St. Louis, but were not authorized by the defendant company to solicit and make contracts of insurance on property situate in the state of Minnesota. The application for this insurance was brought about in an interview between Windmuller and plaintiff, in the manner stated in the case of this Plaintiff vs. Connecticut Company. The letter sent by Windmuller to Gilbert asked if he could place a risk on the house at Lake Minnetonka, Minn., covering the sum of \$5,000. Gilbert procured the policy from the Connecticut company for \$2,500, and placed the other \$2,500 in the defendant company, and after the policy was signed by the president of the company and by Gilbert as secretary, he transmitted it to Windmuller, or said firm, in the same letter inclosing the Connecticut policy, to be countersigned by said firm, and delivered to plaintiff, if acceptable. The plaintiff accepted the same without objection. Nothing was said between plaintiff and Windmuller respecting the amount of premium, at the time of the interview, respecting the application. The first premium was paid by plaintiff to Windmuller, and by him turned over to said firm, who accounted therefor to Gilbert.

The principal question, therefore, to be decided is, whether this transaction renders this policy subject to the provisions of the Missouri statute respecting insurance on real property. The chief difference between the facts in this case and those in the Connecticut policy consists in this, that the policy in question was issued by a Minnesota insurance company, and forwarded by its secretary to the firm of Blossom, Windmuller & Kuehne, to be countersigned by them as agents, and, then, by them delivered to the plaintiff. It is upon this feature of the case mainly that the plaintiff relies for invoking the general rule of law that, where an application for insurance is made to the local agent and accepted by the foreign company, and returned to the local agent, to be by him countersigned and delivered to the assured, when so signed and delivered, becomes a contract of the state where the agent is located.

If the subject of this insurance, real property, had been in Missouri, there would be some ground for contending that the policy is subject to the operation of the Missouri statute. But as the only thing relied upon to nullify the stipulations incorporated in this policy, for measuring the damages in case of loss by fire, are sections 5897 and 5898 R. S., Mo., if that statute does not apply, under all the facts and circumstances in evidence, the verdict ought to have been for the defendant. As shown in the opinion in the Connecticut case, by clear implication, the statute does not apply to a contract of insurance on real property situate in another state. As held in the Connecticut case, there is nothing in the Missouri statute nor general law to prevent the parties from contracting with reference to the local laws of the state of Minnesota, the situs of the subject of insurance, and as the *lex loci solutionis* for determining the extent of liability.

The contract, by its "four corners," taken in connection with the locus of the company and the situs of the property, clearly evince that the defendant intended to issue a Minnesota policy, while the plaintiff by accepting it, without objection, and, after holding it for two years, placing his own interpretation upon it as a Minnesota contract, by recognizing the right of arbitration to fix a less valuation than the amount of insurance, ought equally to be estopped from making the contention now that it is a Missouri contract. After being advised, as he was, by the indorsement on the policy that the defendant sent him a "Minnesota Standard Policy," and leaving the insurer for two years to rest thereon, the plaintiff in effect, gave the company no cause to put an end to the risk, as it was authorized to do by express provision of the policy, by giving five days notice thereof. Notwithstanding the plaintiff may have

suggested to Windmuller, when they were discussing the matter of insuring this property, that he desired a policy subject to the Missouri statute (Windmuller not then being the agent of defendant for making such contract respecting real property in the state of Minnesota, and not having informed Gilbert of such suggestion), by accepting a policy declaring on its face that it is a Minnesota Standard Policy, with a plain stipulation for adjustment of total loss in a manner not admissible under the Missouri statute, but permissible under the laws of Minnesota, where both the company and the property were located, he should be held to have waived his desire for a Missouri policy contract. It is a rule of law, founded in justice and fair play, that he who is silent when he should speak shall not be heard to speak when he should be silent.

The motion for a new trial is accordingly sustained.

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## SUPREME COURT OF CALIFORNIA.

ELLIS

*vs.*

MASSACHUSETTS MUT. LIFE INS. CO.\* }

The policy provided that if the premium was not paid when due, it should cease except as provided in the Mass. Act of 1861, to which it was subject; also that no claim should exist unless notice and proofs of death were given within two years. The Mass. Act among other things required notice and proofs of death to be submitted within ninety days.

*Held*, that the limitation of the Act was waived by the policy, although the non-forfeiture provisions of the act in case of non-payment of premium remained in full force.

FREEMAN & BATES, *for Appellant*.

MORRISON, STRATTON & FOERSTER, *for Respondent*.

SEARLS, C.

This is an action to recover upon an insurance policy issued by the defendant, a corporation organized and existing under and by virtue of the laws of the state of Massachusetts, on the 17th day of December, 1878, to William H. Ellis, of New Orleans, in the state of Louisiana, insuring the life of him, the said William H. Ellis, for \$2,000; loss payable to Leila Ellis, wife of the insured, and plaintiff herein. A demurrer was interposed to plaintiff's amended complaint, based upon the ground that said complaint does not state

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\* Decision rendered, Aug. 4, 1896.

facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and judgment rendered in favor of defendant. Plaintiff appeals.

The amended complaint shows that the annual premium was payable in quarterly installments, and was paid to and including the quarterly installment which fell due September 17, 1885. Thereafter no premiums were paid. The insured died at New Orleans in October, 1892. In July, 1894, plaintiff presented due notice and satisfactory proof of death to defendant, and defendant refused payment. Two of the provisions of the policy are as follows:—

Second. That this policy shall not take effect until the advance premium hereon shall have been paid during the lifetime of the person whose life is hereby insured, and that, if any subsequent premium or installment of premium on this policy shall not be paid on or before the day when due, then this policy shall cease and determine, except as provided in chapter 186, Laws of the Commonwealth of Massachusetts, approved April 10, 1861, under the provisions of which law this contract is made. (A copy of this law is printed on the third page of this policy.) Thirteenth. That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company, at the home office, in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured, and that, in accordance with the provisions of the General Statutes of the Commonwealth of Massachusetts (chapter 58, section 16), the time within which any suit shall be brought against the said company on any claim under this policy is hereby limited to two years from the time when the right of action accrues.

The statute of Massachusetts, approved April 10, 1861, is set forth in the complaint. Without quoting the statute at length, it is sufficient to say that the policy issued and was payable in the state of Massachusetts, and that by the statute referred to in the policy, and set out in the complaint (chapter 186), it is provided that no policy of insurance on life hereafter issued (after 1861) shall be forfeited or become void by the nonpayment of premium thereon, but in such cases the net value of the policy when the premium becomes due and is not paid shall be determined according to the "combined experience" or "actuaries" rate of mortality, with interest at 4 per cent per annum. Four-fifths of such net value, after deducting all indebtedness to the company, if any, shall be considered a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium. If the death of the insured occurs during the term of the insurance covered by the value of the policy as aforesaid, and if no other condition of the policy has been broken, except the nonpayment of premiums, the company shall be bound to pay the amount of the



policy the same as if there had been no lapse of premium, "provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease." It is further provided that the company may deduct from the amount due on the policy the premiums forborne, and 6 per cent interest thereon. The complaint shows that the net value of the policy at the date when the payment of premiums ceased constituted a sum which kept the policy alive up to December, 1895, and that the insured died in 1892. Plaintiff further shows, in apt words, that she was not aware of the death of the insured until June, 1894, and that she gave notice, etc., and in July, 1894, presented proofs, etc., to defendant. The court below held, in sustaining the demurrer, that under section 2 of chapter 186 of the Laws of the Commonwealth of Massachusetts, approved April 10, 1861, it was incumbent upon the beneficiary under the policy to give notice of the claim and proof of the death to the company within 90 days after the decease of the insured. The propriety of this ruling is the only question involved on the appeal. Appellant's contention is that "the defendant, in its policy, waived presentation of proof of death within the ninety days required by the statute of 1861." We proceed to the consideration of the question of waiver by the defendant.

The statute of 1861 simply provides that, in case of failure to pay the annual premiums, no forfeiture shall occur by reason thereof, but treats the sums already paid, after making the deductions therein provided for, as a premium to uphold the policy so long as its amount will serve such purpose. Broadly stated, it treats the net value of the policy at the date of default as a cash payment of that date on account of premiums, and the policy will not be forfeited until such payment is exhausted. This is, by the statute, termed "temporary insurance." If the death of the insured occur within this period of temporary insurance, and no other condition of the policy than the nonpayment of premium has been violated by the insured, "the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding, provided, however, that notice of the claim and proof of death shall be submitted to the company within ninety days," together with another proviso not important here. This requirement in reference to the time of notice and proof of death is imperative, and binding upon the insured and his beneficiaries. But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefited thereby. Did the insurers waive this clause in the

Massachusetts statute? We think this question should be answered in the affirmative. It inserted in its policy the following condition: "That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of the said company, at the home office, in Springfield, Massachusetts, within two years after the death of the person whose life is hereby insured." By every rule of construction in such cases, the effect of this clause was to give two years after the death within which to give notice and furnish the proof of death. If it was not intended to abrogate the proviso of the Massachusetts statute requiring such notice and proofs to be made within 90 days, then it is a snare and a delusion, well calculated to entrap the unwary, and lull them into fancied security until, all too late, they find themselves deceived, and beyond the pale of redress. It cannot properly be said that the term of two years is given to impart notice and make proofs of death in case premiums are all paid upon the policy, and that this is a case of special insurance, to which the two-year clause is not applicable, for the reasons: (1) The two-year clause is general, and not limited to any particular exigency; (2) the insurance, in case of nonpayment of premiums, is only special in the sense that the policy is kept alive only so long as the net value of the policy will continue to extinguish the premiums. The right to recover in such a case, if any, is upon the policy, and is "the same as if there had been no lapse of premium." To say that in such a case no recovery can be had without showing that notice and proofs of death were given within 90 days is to beg the very question in issue,—to assume there is no waiver, which is the question to be determined. The waiver of notice and proofs within 90 days, by fixing the period at 2 years, stands in lieu of the 90-day requirement, and, when consummated within 2 years, is as complete as it would have been, without the waiver, if performed within the 90 days. The defendant loses nothing by such waiver. Under the statute, when it pays the policy it is authorized to deduct the premiums which fell due during the time the net value of such policy stood as security therefor, and extending the time to make the proofs of death will frequently have the effect of deferring the day of payment to the advantage of the insurer. We recommend that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

We concur: Haynes, C.; Britt, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions of the court below to overrule the demurrer to the complaint.

## SUPREME COURT OF ILLINOIS.

FIREMEN'S INS. CO. }

vs. }

BARNSCH.\*

Where a policy purports to be signed by an agent in compliance with its requirements, no further proof aliunde of such execution is required in the absence of a denial properly verified by affidavit.

Where the action is brought by the insured, the fact that it was for the use of another and proof of the assignment of the policy are immaterial, where there is no evidence of a transfer of the property subsequent to the insurance.

W. J. AMMEN, *for Appellant.*

ARND, EVANS & ARND, *for Appellee.*

CARTER, J.

This was an action of assumpsit, brought against the Firemen's Ins. Co. on a policy of insurance issued by the defendant company to Augusta Barnsch, insuring her against loss or damage by fire for one year for the aggregate amount of \$1,600, to wit, \$1,500 on her two-story frame building at Whiting, Ind., and \$100 on her frame barn, situate in the rear of said premises. The buildings were destroyed by fire November 5, 1895. The suit is brought in the name of Augusta Barnsch, for the use of Charles Saunders, for the use of Henry Schrage. The declaration alleges that the policy was issued to Augusta Barnsch, and that she assigned it to Charles Saunders, and that the company assented to such assignment, and that Saunders assigned the policy to Henry Schrage, the company assenting thereto. The case was tried before the court and a jury, resulting in a verdict and judgment against the company for \$1,665; and, this judgment having been affirmed by the appellate court on appeal, the company prosecutes its further appeal to this court. No meritorious objection is made, but various technical reasons are assigned as grounds upon which it is claimed the judgment should be reversed.

The policy provided that it should not be valid unless countersigned by the authorized agent of the company at Hegewich, Ill. It did, however, purport on its face to have been so countersigned; but appellant contends that it was error to admit the policy in evidence without proof aliunde that it was countersigned by the agent of the company at Hegewich. We agree with appellee that such proof was unnecessary, because no plea verified by affidavit was filed

\* Decision rendered, May 12, 1896.

denying the execution of the policy. In *Home Flax Co. vs. Beebe* (48 Ill., 138), this court said: "The agreement purports to have been made by defendant in error, with the Home Flax Co., by T. Gray, their agent, and the company are sued upon it. If it was not their agreement, they should have attached to their plea an affidavit denying its execution. This was not done, and they must be taken as one of the contracting parties:" 2 Starr & C. Ann. St., p. 1798, c. 110, § 33; *Hunt vs. Weir*, 29 Ill., 83; *Richelieu Hotel Co. vs. International Military Encampment Co.*, 140 Ill., 248; *Dwight vs. Newell*, 15 Ill., 333. By its terms, it was not an instrument completely executed until countersigned by its agent; and, as it purported to be so countersigned, no further proof, under the issues, was necessary: *Illinois Mut. Fire Ins. Co. vs. Marseilles Mfg. Co.*, 1 Gilman, 236; *Bailey vs. Bank*, 127 Ill., 332.

It is next claimed that the court erred in admitting the assignments and the purported consent thereto by appellant's agent, without proof of execution. We agree with the conclusion reached by the appellate court that it does not concern appellant that the suit was brought in the name of the assured, for the use of others. Appellant was in no way injured by this proof: *Boone vs. Stone*, 3 Gilman, 537; *Zimmerman vs. Wead*, 18 Ill., 304; *Atkin vs. Moore*, 82 Ill., 240; *Hobson vs. McCambridge*, 130 Ill., 367; *Schott vs. Youree*, 142 Ill., 233; *Tedrick vs. Wells*, 152 Ill., 214. The policy admits that the property belonged to the plaintiff, and no further proof was in the first instance necessary.

Some question is raised as to the supposed variance between the name of the assured, "Augusta Barnsch," as alleged in the declaration and stated in the policy, and "Augusta Boornch," written as her signature to the assignment to the usee; but we regard it as wholly immaterial. The judgment of the appellate court is affirmed.

Judgment affirmed.

## SUPREME COURT OF CALIFORNIA.

JURGENS

vs.

NEW YORK LIFE INS. CO.\*

The policy provided that it should not be in force until payment of premium, and that no agent could extend the time of payment.

*Held*, That where the agent accepted the insured's note for the premium, and delivered the policy, the policy was in force, and, where an action was brought to recover the premium by the insured on the ground of false representations, no such recovery could be had without the consent of the beneficiary, or the making of the latter a party to the action.

VAN NESS & REDMAN, *for Appellant*.

E. J. McCUTCHEN, *for Respondent*.

TEMPLE, J.

The appeal is from a judgment of nonsuit, and from an order denying a new trial. The action was brought to recover \$1,462, paid as the first annual premium upon a policy of life insurance for \$25,000, plaintiff claiming that the contract of insurance had been rescinded by him. He claims to have rescinded because he was induced to receive the policy and pay the first premium by the false and fraudulent representations of defendant's agent, one Eaton. The policy issued to him was precisely such a policy as he had applied for in writing; but the written application was made out by Eaton, and Eaton had assured him and induced him to believe that the policy would be an endowment policy for \$25,000, which would be paid him at the end of 10 years, or, in case of his death within that period, to his wife, Katherine, whereas the policy delivered to him only entitled him to an endowment of three-tenths of the sum of \$25,000, or \$7,500. There was a similar misrepresentation in regard to the surrender value of the policy. In the written application of plaintiff he stated:

Inasmuch as only the officers of the home office of said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of said company, at the home office, in this application.

There was also a stipulation that the policy to be issued should not be in force until the premium was actually paid to the agent of

\* Decision rendered, Sept. 2, 1896.

the company, and accepted, during the life and good health of the insured. The application was referred to, and made part of, the policy. The application was made September 8, 1893. Eaton was a mere solicitor for the company, Mr. Hawes being the agent of defendant for California. To pay the premium, plaintiff executed a promissory note payable to his own order, indorsed in blank, and delivered it to Eaton. Eaton sold the note to the Central Bank of Oakland, and paid the money, less his commission, to defendant's agent, who on the 6th day of October sent the policy to plaintiff by Eaton. According to plaintiff's testimony, Eaton read, or pretended to read, a portion of the policy to him, and he then signed a statement which contained the following: "I find the policy is exactly as represented; and I can recommend your company as being first-class in every respect, and can recommend you and your company to my friends." The policy itself contained a provision that "no agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium," etc. The policy was delivered on Friday. On the following Wednesday, plaintiff complained to Eaton that it did not accord with his oral representations, and, at the suggestion of Eaton, called upon Hawes, defendant's agent. There he threw down the policy, and demanded the return of his note, on the ground that he had been defrauded, stating his grievance. He was informed then or subsequently that defendant did not have, and had never had, his note, and knew nothing of the representations made by Eaton. It does not appear that prior to this time any agent of defendant, other than Eaton, was aware that a note had been given. The contract itself provides that no agent is authorized to give credit, but I see no reason why Eaton might not, as agent for plaintiff, discount his note for him, and thus raise the money. If a discount was charged by the bank, it was probably deducted from Eaton's commissions. This was a private affair between Eaton and plaintiff. Plaintiff had stipulated in writing that no oral representations of Eaton should be regarded, and that the issuance of the policy, or the refusal of the risk, was based solely upon the written application and the report of the medical examiner.

Defendant contends that a rescission was not effected, because upon the delivery of the policy Mrs. Jurgens acquired a vested right, and no release from her was tendered. The general proposition involved in this contention is not disputed by appellant, but he contends that it has no application to this case. He contends that the doctrine has no application to cases in which a rescission may be compelled, and does not require the consent of the insurer. I can

discover no reason for such a distinction, and no authority is cited in its support. If plaintiff was entitled to rescind in consequence of the fraud of defendant, nevertheless it was incumbent upon him to restore to defendant everything of value which he had received, and to place defendant substantially in the position formerly occupied by it. An offer to rescind is an offer to release the opposite party from the obligations of the contract. If the obligations are not to plaintiff, he cannot make that offer. In this case plaintiff could not do so without the consent of Mrs. Jurgens. Plaintiff says, if the facts justified plaintiff in demanding a rescission, such facts would constitute a defense for the company against Mrs. Jurgens. This is not true. They could not be heard to plead their own wrong in defense. Only actual rescission could be relied upon as a defense, and the argument assumes the point at issue, that a legal rescission has been made. The obligations imposed by the contract upon the defendant were to the plaintiff and his wife, and both should join in demanding a rescission: *Trabandt vs. Insurance Co.*, 131 Mass., 167; *Insurance Co. vs. Wilson*, 111 Mass., 542.

Plaintiff also contends that, if the consent of Mrs. Jurgens is necessary to a rescission, then defendant by its fraud got itself into the trouble, and cannot object to a rescission, because plaintiff is unable to place it in statu quo; that is to say, he can recover from defendant the premium paid, although he gets for it and retains the entire benefit of the payment. For, of course, in the event of his death within the year, Mrs. Jurgens would collect \$25,000, the full amount of the policy. This would not be rescission. The contract did not oblige plaintiff to continue paying after the year, and if he did not the premium paid was only in consideration of the risk carried during the year. On the supposition made, defendant would carry that risk.

It is also contended by plaintiff that by the very terms of the contract the policy never was in force; therefore Mrs. Jurgens had no interest in it. A somewhat similar state of things existed in *Griffith vs. Insurance Co.*, 101 Cal., 627. The policy was issued by the same company and contained the same condition, to the effect that the policy shall not be in force until the payment of the premium during the life of the insured. There the agents, though forbidden to give credit, took the notes of the insured, as here. The court said: "It was, in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment." So, here, it does not appear that any agent

of the defendant—other than the solicitor, whose agency was of a very limited character—ever knew of the note. The money was not received by Mr. Hawes for two days after plaintiff demanded its return, but, for all that appears, he may have believed that the money was in the hands of Eaton. And whether it was or not, since Eaton had no authority to take the note, he was answerable to the company for so much cash. This question is also covered by the case of Griffith vs. Insurance Co., supra. It was there held that an express provision in the policy that the company shall not be liable until the premium is paid is waived by the unconditional delivery of the policy. It may be that, had Mrs. Jurgens refused to join in a rescission, plaintiff might still, on some terms, have procured a release from his contract; but, if he could, Mrs. Jurgens should have been a party to any action for that purpose. Appellant's counsel says that plaintiff cannot be compelled to bring a suit in such a manner that a judgment in his favor shall afford protection to the defendant. I understand that he is bound to do that very thing, though, if this were the only objection in this case, it might not now be available to the defendant. The judgment and order are affirmed. We concur: McFarland, J.; Henshaw, J.

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## SUPREME COURT OF NEBRASKA.

NORTH BRITISH & MERCANTILE INS. CO. }

vs. }

BOHN ET AL.\* }

A representation by two individuals that they were owners of the property sought to be insured, when in fact it was owned by a corporation of the capital stock of which they were the sole proprietors, *held* not such a misrepresentation as avoided the right of a mortgagee to assert its right under a "union-mortgage" clause attached by the insurer to the policy; the mortgagee having no knowledge of, or participation in, the said misrepresentation.

Under the circumstances above stated it was not prejudicial error to refuse to permit the plaintiff in error to show the insolvency of the corporation grantee, at the time either of the insurance effected or of the loss suffered.

A. S. CHURCHILL and GEO. A. DAY, *for Plaintiff in Error.*

B. G. BURBANK, CHAS. OFFUTT, and JAMES B. MEIKLE, *for Defendants in Error.*

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\* Decision rendered, Nov. 5, 1896. Syllabus by the Court.



RYAN, C.

In *Insurance Co. vs. Bohn* (Neb.), 67 N. W., 774, the facts involved in this case were stated, with the exceptions that the amount and exact date of insurance and the names of the insurer and its agent are not identical. These are, however, unimportant, for upon these slight differences no claim of rights is predicated by the plaintiff in error in this case. There are urged certain arguments, which, it is asserted, were not involved in *Insurance Co. vs. Bohn*, *supra*, and we shall content ourselves with reviewing these without a restatement of all the facts involved. It is urged that, as the original insurance was of the interest of Conrad and W. G. Bohn as sole owners, the subsequent transfer of the title by those parties to the Bohn Manufacturing Company operated to avoid the policy which formed the basis of this action. It is not necessary to determine what might be the rights of Conrad and W. G. Bohn to sue as individuals upon said policy, for the judgment in this case was by the district court ordered paid to the National Life Insurance Company of Montpelier, Vt., a party impleaded as plaintiff with said Conrad and W. G. Bohn. This company held a mortgage on the premises upon which stood the insured structures, as security for the payment of the sum of \$25,000, of which sum there still remains due more than \$20,000. When insurance was effected by Conrad and W. G. Bohn upon the property afterwards destroyed, the plaintiff in error, by attaching to the policy issued by it a separate mortgage slip, agreed that the loss, if any, should be paid to the mortgagee as its interest should appear. This policy was for the sum of \$1,500, which, so far as the proofs in this case show, was much less than the debt owed by Conrad and W. G. Bohn and secured by the aforesaid mortgage on the insured property. The mortgagee was neither aware of nor party to any misrepresentation as to the title of the property insured made by Conrad and W. G. Bohn, hence its right to recover was unaffected thereby, as has already been shown by the authorities cited in *Insurance Co. vs. Bohn*, 12 C. C. A., 531,—another case which arose out of the same loss. It is insisted that there was error in refusing to admit evidence of the insolvency of the Bohn Manufacturing Company. In explanation of this contention it should be stated that the defendants in error urged that the transfer of Conrad and W. G. Bohn to the Bohn Manufacturing Company could not lessen the solicitude of the grantors for the preservation of the property conveyed, for the reason that the stock of the manufacturing company was held entirely by Conrad and W. G. Bohn. To avoid this inference of their solicitude remaining unimpaired by the conveyance, plaintiff

in error sought and was refused permission to show the insolvency of the corporation, from which insolvency, it was claimed, it must result that whatever recovery should be had on account of loss by fire would first inure to the benefit of the creditors of the corporation. If the recovery in this case had been for the benefit of Conrad and W. G. Bohn, there would perhaps be force in this suggestion. The recovery was for the payment of the mortgage in accordance with the provisions of the "union-mortgage" slip; hence what might be the natural effect of a payment to the creditors of the Bohn Manufacturing Company, instead of to Conrad and W. G. Bohn, is a matter of no practical importance in this case. In this connection it may properly be remarked that these same considerations render unavailing the complaint, because of the refusal of the district court to permit proofs that upon the renewal of the policy a greater premium than was collected would have been exacted if the insurance company had been aware of the transfer of title. The jury found specially that the loss was total, and therefore the argument as to the failure to arbitrate and furnish an itemized appraisement of the property destroyed has no force. We cannot review the instructions either asked or refused, for there were several in each of these two classes, and in the motion for a new trial each class was grouped for the purposes of criticism, and in each class there were instructions which afforded no ground for complaint. There is found no error in the record, and the judgment of the district court is affirmed. Affirmed.

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## SUPREME COURT OF ILLINOIS.

COVENANT MUT. BEN. ASS'N

vs.

SEARS ET AL.\*

A certificate held by an unmarried man who died intestate provided that the benefit money should be paid "to his devisees as provided in last will and testament, or, in the event of their prior death, to the legal heir or devisees of the certificate holder." There was no will and no devisees.

*Held*, That the money should go to the heirs; the father, mother, and sisters.

McKENZIE & CALKINS, *for Appellant.*  
BENNETT & GREEN, *for Appellees.*

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Decision rendered, May 15, 1885.

SHELDON, J.

This was a bill in chancery, brought by the heirs of Edward J. Sears, deceased, consisting of his father, mother, and two sisters, against the Covenant Mutual Benefit Association, of Illinois, to recover the benefit money of \$5,000 agreed to be paid by a certificate of membership in said association issued to and held by said Sears at the time of his death. The circuit court decreed in favor of the complainants. The decree was affirmed by the appellate court for the second district, and an appeal then taken to this court. As declared by its character and by-laws, "the object and business of this association shall be to afford financial aid and assistance to the widows, orphans, heirs, or devisees of deceased members." The certificate of membership which was issued to the deceased in consideration of a membership fee of \$10 paid, and of the payment of such other accounts for mortuary assessments, expenses, and collection costs as might be required, constituted him a member of the association, with all the rights and privileges of the same, and provided that upon proof of his death, he having complied with the conditions of the certificate, an assessment should be levied upon the surviving members to the amount of the certificate (\$5,000), which "sum so collected on such assessments (less expenses and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit, to his devisees, as provided in last will and testament, or, in the event of their prior death, to the legal heir or devisees of the certificate holder." The deceased died intestate, never having been married, and leaving the complainants his only heirs.

It is admitted that there had been compliance on the part of the deceased with all the conditions of the certificate, and no question is made that, if devisees were here suing, they would be entitled to recover. But it is denied that heirs have any rightful claim to the money agreed to be paid by the certificate. The object of this association—the very end of its being—was to afford financial aid and assistance to the widows, orphans, heirs or devisees of its deceased members. This was done by means of the benefit money promised in members' certificates, which was paid over after their death. The deceased became a member for the sole purpose of securing the provision of this benefit money for one or more of said classes of persons which he might leave surviving him. The mortuary assessments, and other payments of money which he made, were for this purpose, and no other. It would be a very hard construction, and defeat of intention, to hold that the heirs, the only classes of the beneficiary persons the deceased left surviving him,

should not take any of the money promised by the certificate, and that all the payments of money made by the deceased should have been for no purpose, merely because he had never made a will and had devisees. Such a construction, surely, should not be adopted, unless it is compelled by language which clearly will not admit of any other interpretation. The certificate provides that, upon proof of the certificate holder's death, an assessment shall be levied on the members for the full amount of the certificate. This implies that the money so raised is to be paid over to some one. Then comes the promise of the certificate that the association will pay the sum so collected on such assessments as a benefit to the decedent's "devisees, as provided in last will and testament, or, in the event of their prior death, to the legal heir or devisees of the certificate holder." It is true, the letter is that, in the event of the prior death of the devisees, the money is to be paid to the heirs; but it is the meaning that the money was to be paid to the heirs only in the event of the prior death of devisees? The clear intent is that either devisees or the heirs—one or the other of them—should take. The certificate appears to assume that there was a will, and devisees under it, and so provides for payment to them, or, in the event of their prior death, to the heir of the certificate holder. It would seem to be great violence to intention that the money should not be paid over, but that it should be held by and go to the association while there were heirs to take it. The meaning evidently was that the money should go to devisees, if there were devisees to take it, and that, if there were not devisees to take it, then it should go to heirs. The circumstances of there having been a will, devisees under it, and their prior death, were not important. The essential thing was, there not being devisees to take, and not there having been devisees, and they having died. Non-existence, by the true meaning, was the same as prior death. The substantial promise was to pay to devisees if there were devisees to take, and, if not, then to pay to heirs. We think this the fair and reasonable construction of the agreement, which, in view of the purpose of the association, may well be adopted.

Objection is made that a will may hereafter appear, and the association be compelled to make repayment of the certificate to devisees. There is a possibility of this, but no reasonable probability. The proof is quite satisfactory that there was no will. If there were reasonable ground of apprehension on this score, it might be proper to require indemnity against such a contingency; but we do not think it called for in this case.

Objection is taken to the jurisdiction of the court; that there was an adequate remedy at law. The certificate of membership does not contain any contract to pay the beneficiaries \$5,000, or any sum, absolutely, but to levy assessments, ratably, upon all members holding certificates in force at the death of decedent, for an amount not less than the limit of the certificate, and to pay over the sum so collected on such assessments, less the collection costs. As the corporation is not organized for "pecuniary profit," has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in, by assessment, for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy, by directing a specific performance of the contract of the defendant by the levying of the proper assessments.

The judgment of the appellate court will be affirmed.

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## COURT OF APPEALS OF KENTUCKY.

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KENTON INS. CO. )

vs. )

WIGGINTON.\* )

1. Misrepresentations by the assured, unless material to the risk or fraudulent, will not affect the right of recovery upon a policy of insurance.
- The insured in this case stated, in good faith, that he was the owner in fee of the insured property. He was in fact the owner in fee of only one-fourth of the tract of land upon which the house was situated, and owned a life estate in the remainder. The house was erected by him as a residence for himself and family. *Held*, That although there has been no partition, the insured was entitled, as against his co-tenants, to that part of the land upon which the house was situated, and, therefore, his statement that he owned the property in fee does not make the policy void.
2. One of several tenants in common has the right to erect such buildings on the land as will enable him to live on it; and the improvements in such a case will be assigned in the partition to the tenant making them.
3. The fact that the insured was claiming to be the owner in fee of the entire tract of land, and that that question was in litigation, did not avoid the policy under a clause providing that if the title was in litigation the policy should be void, there being no question as to the title of the insured to one-fourth of the property.
4. Over-valuation by the assured will not avoid a policy of fire insurance unless made in bad faith.
5. Preliminary proof of loss will be treated as waived by an insurance company where its conduct was such as to induce delay, or to render the

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\* Opinion filed Dec. 5, 1899. From *Ky. L. Reporter*.

production of proof useless or unavailing, or as to induce in the mind of the insured a belief that no proofs would be required.

In this case the insured, immediately after the fire, applied to the local agent for blank forms of proof of loss, and was told by the agent that he had no blank forms, but would apply at the home office. The insured becoming restless at the delay in delivering to him the forms of proof, the local agent went to the home office and was there told that some one would be sent down to see about the matter or settle it, which was communicated to the insured. *Held*, That the preliminary proof of loss was waived by the company.

COLLINS & FENLEY, *for Appellant*.

GEO. C. DRANE and J. A. DONALDSON, *for Appellee*.

PRYOR, J.

The appellant, the Kenton Insurance Company, made a contract of insurance with the appellee, Wigginton, by which the company insured his dwelling house against loss or damage by fire for the period of three years, from the 2d day of November, 1886. The policy of insurance contains the usual stipulations with regard to notice and the preliminary proof as to the loss, as well as the representations by the insured that he was the owner in fee of the property.

The dwelling insured having been destroyed by fire, the appellant refused to pay the loss for the following reasons: First. It contends that no preliminary proof of loss was made and presented to the company as the contract of insurance required, and that being a condition precedent on the part of the insured, the recovery should have been denied. Second. The insured owned only an interest of one-fourth in the property, where he represented that he was the sole owner in fee. Third. The title to the property was in litigation in the Carroll Circuit Court when the insurance was effected by the appellee, and the contract of insurance making the policy void if that fact is not disclosed, no recovery should be had. The policy provides that no action shall be maintained until the proofs of loss are furnished, as required by the contract, and the application must disclose the true character of the title, and if incumbered or involved in litigation, such facts must be disclosed by the insured.

An examination of this record has satisfied us that no valid defense has been made out, and the absence of the preliminary proofs essential to the demand of payment from the company was caused by the conduct of the company or its agents, and for which the appellee is in nowise responsible. As soon as the fire occurred, and the appellee's property destroyed, he notified the local agent of the company, and asked him for the usual blank forms kept and furnished by such companies to the insured as a guide in proving the loss sustained, and in response was told that the agent had no blank forms, but would write or see the principal agent or the home office

on the subject. The principal office having been notified of the destruction of the property, and the appellee becoming restless at the delay in delivering to him the formula for making his preliminary proof, the local agent went to Covington, the place of the principal office, and was there told in effect that some one would be sent down to see about the matter or to settle it, all of which was communicated to Wigginton, who relied on the statements of the local agent that are not denied by the company, but admitted to be true. The home office knew that the written forms had been applied for by Wigginton (the appellee) at the office of the agent at Carrollton; had been written to by this agent to send the forms, and instead of doing so, or delivering them to the local agent who had gone to the home office to inquire about the delay, said to the agent: "We will send some one down to see about it," and this some one did come, but never saw the appellee or approached him on the subject, nor did he give to the latter the opportunity of seeing him, but left the town of Carrollton as if the matter were of no importance to the appellee or the company. The appellee began to comply with his contract the morning after the fire, and attempted to do everything that was necessary to notify the company of his loss, but delay after delay, resulting more from the action of the company than that of the appellee, prevented the proofs from being made within the thirty days; and that the appellee was lulled into security by the conduct of the company or its agents is too plain a proposition to be contradicted. There was not the shadow of a suspicion that the dwelling was burned for the purpose of obtaining the insurance, and the appellee, no doubt, a plain unsuspecting farmer, confiding in the statements of the local agent, and with the full belief that this company was preparing to adjust the loss, took no steps to present the proof, except in the manner stated, and is now met with the defense that the company was delaying payment for the want of the proof of loss, and the still further defense that no payment would have been made if the proof had been furnished, because the appellee was not the owner in fee of the property insured. The general doctrine in regard to such conduct on the part of insurance companies can be well applied in this case. "The preliminary proof of loss will be excused on the ground of waiver by the insurers, if their conduct is such as to induce delay or to render its production useless or unavailing, or to induce in the mind of the insured a belief that no proof will be required:" *May on Insurance*, 468.

It appears, from the application made by the appellee, that the building insured stood on a tract of land containing two hundred

and twenty-four acres, and in the answer propounded to a question as to the title, he stated that he was the fee simple owner, or rather the unconditional owner, of the entire tract. Whether any difference exists in a case like this in the meaning of the words "the owner in fee" and "unconditional owner" is not necessary to determine; and in considering the question of title, the case will be disposed of as if the appellee had represented to the agent that he was the owner in fee of the entire tract of land. He, in fact, owned but one-fourth of the whole tract in fee with a life estate in remainder, but was then claiming a fee in the whole, the sole question being involved in a litigation then pending as to the extent of his interest in the remainder, he claiming a fee, and the children of his wife by her first husband insisting that he had a life estate only. The agent, or rather Gullion, who was a sub-agent of the local agent, with whom the appellee made the contract, was fully cognizant of all the facts. It is said, however, that this sub-agent was not employed by the company but by the local agent, without any authority from the company to appoint him or to conduct its business in that mode.

These are doubtless the facts of the record, but the appellee nevertheless had not imposed on the company by perpetrating an actual fraud, but made his representations to one whom he believed was the agent and who knew the condition of the title. So neither Davis nor the agent of Davis were imposed on by the appellee, but the company, ignoring the authority of Gullion, the case must be determined on the materiality of the representation made as to the title and its effect on the company. So we find the appellee the owner of one-fourth of the entire land in fee, and a life estate in the balance, living on the land, and in a building erected out of his own means and necessary, and we might say indispensable, as a habitation for himself and family.

He is a tenant in common of the whole tract, and the dwelling insured built at his own expense (or remodeled an old one that was valueless) that cost him \$2,000.

It is not pretended that the land cannot be divided so as to include the improvement made by the appellee, and allot to him that portion of the land where he has lived since the year 1864. He was the owner in fee of the one-fourth interest, and, in good faith, believed that he held the fee to the whole tract, but this court held otherwise in the case of *Peak's heirs vs. Wigginton*, decided at the last term: 10 Ky. Law Rep., 922.

It is manifest that in a division of this land the building would have been assigned to the appellee without estimating its value. The old building was worthless, and the entire expense incurred by



the appellee in remodeling it, and the fact that his title is not purely legal, is no argument against the recovery. There was no incumbrance on this one-fourth interest or litigation in regard to it, and the tenant in common having the right to improve the land, and to erect such buildings as would enable him to live on it, if the other tenants get their part of the land in its improved state without regard to the improvements made by their co-tenant, no one will be heard to complain. The improvements in such a case as was held in *Nelson's heirs vs. Clay's heirs* (7 J. J. Marshall, 138), "will be assigned in the partition to the tenant making them."

It certainly could constitute no defense on the part of the appellant if, instead of a conveyance of record, the appellee had only a bond for title with all the purchase money paid. The representation as to the title to the entire tract was not fraudulent, but made in the best of faith, nor was it material to the risk, because the appellee was entitled to his one-fourth interest in fee including the dwelling insured. The appellee was the unconditional owner of this dwelling and the ground upon which it stood, free of any incumbrance, and the fact that he did not own the entire tract, although he may have so stated, could in no manner have affected the rights of the insurance company or misled its agent when taking the risk, and no court, it seems to us, should hold that the fee was not in the appellee for the reason that partition had not been made.

It is further claimed that the dwelling was not of the value placed upon it by the insured. The testimony on this fact shows that the building cost him \$2,000, and the valuation, at best, is a mere matter of opinion, as is evidenced by the conflicting statements of witnesses in the case, and, therefore, unless there is proof showing that the insured had purposely fixed a large estimate upon his property, with a view of obtaining that to which he is not entitled, the mere expression of an opinion as to value in the absence of bad faith can not be held to be either deceptive or fraudulent.

Under the statute of February 4, 1874, neither representations nor warranties affect the right of recovery, unless material to the risk or fraudulent; and where the property belongs to the insured, or if a joint owner, and between him and his co-tenants, he is entitled to the property insured, the mere fact that there has been no partition, or a partition without a conveyance, if otherwise free of incumbrance or lien, will constitute no defense by the company.

The best of faith has been shown in this entire transaction on the part of the appellee towards the appellant, and there is no reason upon any principle of law, equity, or justice for relieving the appellant from its liability. Judgment affirmed.

## UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

EARNSHAW

vs.

CALIFORNIA INS. CO.\*

Upon a marine insurance policy issued to "A. E., upon account of whom it may concern, in case of loss, to be paid to him or order," where the insurance was effected for the benefit of the libelant, the owner at the time, *held*, that the suit was rightly brought in the name of the libelant, who was the insured under the policy.

The libel should show insurable interest in a vessel at the time the policy purports to take effect.

It being settled in this circuit that seaworthiness is presumed, a libel on a marine policy need not allege seaworthiness. What need not be proved need not be averred. This rule promotes simplicity and certainty as to the real issue intended to be tried. The plea of unseaworthiness, if that issue is desired to be raised, comes more properly from the defense.

WING, SHOUDY & PUTNAM, *for Libelant.*

GEORGE A. BLACK, *for Respondent.*

BROWN, J.

The libel is filed to recover upon a maritime policy insuring "Alfred Earnshaw, on account of whom it may concern, in case of loss, to be paid to him or order." Exceptions are taken that the libel does not allege (1) any order or transfer from Earnshaw; nor (2) that the libelant had any interest in the policy when issued; nor (3) that the vessel was seaworthy.

1. The libel alleges that the libelant, at all times hereinafter mentioned, was the owner of the ship, and that "said insurance was made for and on behalf of the libelant." As the policy is expressed to be issued "on account of whom it may concern," the libelant, under that allegation of the libel, is the real party assured, if he was then the owner. Earnshaw is but the agent; and the action, in such case, may be brought in the name of the principal, without any written transfer, as was long since adjudged: *Sargent vs. Morris*, 3 Barn. & Ald., 277, 280; *Farrow vs. Insurance Co.*, 18 Pick., 53, and cases there cited; 1 Phil. Ins., 199. Subsequent provisions in this policy, moreover, expressly state that payments are to be made to the "assured," and the assured, under a policy in this form, is the person for whom the insurance was effected, i. e., the person who is the real party in interest. The word "him," in the phrase "him or

\* Decision rendered, Jan. 6, 1890. From *Federal Reporter*.

order," includes the "assured" as well as Earnshaw; and no written order or transfer is needed, except to enable some third party to claim payment. The principal may sue on such an insurance contract, made for his benefit: Story, Ag. §§ 160, 160a, 394.

2. I think the libel should show that the assured had an interest in the vessel when the policy was issued and purported to take effect. The word "hereinafter" does not strictly cover this point; doubtless by inadvertence.

3. It is the rule, in this circuit, at least, that in actions on marine policies of insurance the presumption is of the seaworthiness of the vessel, and that the onus of the defense of unseaworthiness is upon the underwriter: *Lunt vs. Insurance Co.*, 6 Fed. Rep., 562, and cases cited; *Batchelder vs. Insurance Co.*, 30 Fed. Rep., 459. See *Pickup vs. Insurance Co.*, L. R. 3 Q. B. Div., 594. The primary rule in pleading is that what must be averred must be proved; and, conversely, that what the law presumes and need not be proved, need not be averred; also, that the plaintiff need not aver what more properly comes from the other side: 1 Chit. Pl. \*221, \*222. When, then, it is determined that no proof of seaworthiness need be given, all reason for requiring an averment of seaworthiness in the libel disappears. The defendant if he wishes to raise that issue, can do so by his answer with equal convenience, and more properly; and this rule, in admiralty practice, tends to simplify the pleadings, to dispense with needless technicalities, and to promote certainty as to the real issues intended to be tried. All the references in adjudged cases to the need of averring seaworthiness proceed upon the supposed need of supplying some prima facie evidence of it. When the legal presumption dispenses with such proof, it should be held to dispense with the averment also; and, as I have said, this rule is a desirable and beneficial one in practice: *Guy vs. Insurance Co.*, 30 Fed. Rep., 695. The first and third exceptions are therefore overruled; the second, sustained.

## SUPREME COURT OF WISCONSIN.

RILEY  
 vs.  
 RILEY ET AL.\*

A mutual benefit certificate was payable to insured's wife, E., or to such other person as might be entitled to the insurance. The by-laws of the association declared that its object was to afford financial aid to the widows, orphans, and heirs of deceased members, or to such other person as might be designated by the insured member, and that on the death of a member his widow or designated heirs should receive the insurance. After the death of E., the beneficiary named in the certificate, the insured married plaintiff, but made no change as to the beneficiary.

*Held*, That, on the death of insured, plaintiff, and not the children of E., was entitled to the insurance. Following *Given vs. Insurance Co.*, 37 N. W. Rep., 817.

FINCHES, LYNDE & MILLER and E. P. SMITH, *for Appellants*.  
 LANDER & LANDER, *for Respondent*.

COLE, C. J.

We think the judgment in this case is correct, and must be affirmed. It is admitted that the insured, Robert Riley, at the time of his death was a member of the benefit association in good standing and not delinquent. He was entitled to all the rights and benefits of the association. He had taken a certificate of insurance payable to his wife, Elizabeth Riley, or to such other person as might be entitled to receive the insurance. The beneficiary died, leaving her husband surviving, and the defendants, her children by said Robert. In November, 1886, Robert married the plaintiff, and died in June, 1888, intestate. The question is, who is entitled to the insurance money,—the plaintiff, who is his widow, or the children by his first wife? The answer to this question depends upon the by-laws of the association. By article 11 of the by-laws it is provided that the business and object of the association are or should be to afford financial aid and benefit to the widows, orphans, and heirs of deceased members, or to such other persons as might be designated by the insured member, who might be approved by the board of directors. By section 5, art. 4, of the by-laws, it is further provided that, at the death of a member, his widow or designated heirs should receive the specified sum within 60 days after satisfactory proof of such death. In this case Riley made no change as to the beneficiary named in the certificate, but died leaving the

\* Decision rendered, Jan. 7, 1890. From *Northwestern Reporter*.

money to go according to the terms of the by-laws. The by-laws clearly gave it to the widow. It is so expressly stated, but the counsel for the appellants contends that the word "widow" in the by-laws was intended to refer to, and does actually mean, the first wife, if she survived her husband, where no other person as beneficiary was designated. We can perceive no valid reason for giving such a construction to the by-laws. Undeniably the plaintiff is Riley's widow, and it is the widow who is to have the avails of the policy, where the insured has given no other direction as to the person to whom it is to be paid. The declared object of the association is to afford financial aid to the widows and orphans; and the second wife, having lost her husband, may be, quite likely would be, as meritorious a person for assistance as the first wife, left a widow. Suppose the husband had survived both wives, having no children by the first wife, but leaving children by the second. Could it be claimed with any reason that these children would not be entitled to the insurance money? It might be argued, with as much consistency, that it was not intended the insurance should be paid to them, as it is now insisted that it should not be paid to the widow by a second marriage. Such a refinement upon language is not to be indulged in in the construction of these policies, which are usually drawn up by business men, who use language in its common meaning. The by-laws certainly designate the widow as the person who is to have the benefit of the insurance, where no other direction is made by the insured, and the term certainly includes the widow by a second marriage. It is said that it is hardly to be conceived that the husband, having the power of changing the beneficiary, did not exercise that power and change the beneficiary named in the certificate. But we must presume that he was familiar with the rules and by-laws of the association, and knew that, according to them, the insurance would go to his widow, and that this was what he desired. The inference is that he wished to make no other disposition of the fund, but that his widow should take it. This is the legitimate inference from his neglect to make a change as to the beneficiary. The case is really ruled by the decision in *Given vs. Insurance Co.* (71 Wis., 547); and it might have been sufficient merely to refer to that case, as ample authority to sustain the judgment of the court below. The counsel claims that the decision in that case does not rule this, but we see no ground for a distinction in the cases. There the by-laws provided that, on the death of a member, "the person designated before death, or his widow, child, or children; mother, sister, or sisters, etc., or as the case may be, and in the order named," should receive the insurance. By the

certificate the insurance was to be paid to "Sarah Given, my wife." Sarah Given died, her husband surviving her. He made no change as to the beneficiary, but married again. He afterwards died, leaving the plaintiff as his widow by the second marriage. He had two children by his first wife, and one by the second. It was held that the appointment of the first wife as beneficiary was revoked by her death, and that the widow by the second marriage was entitled to the insurance under the by-laws. So here the appointment of Elizabeth Riley as the beneficiary in this certificate was revoked by her death, and the insurance money, under the by-laws, is payable to the plaintiff. A mere reference to the by-laws is all that is necessary to show the correctness of this view. At the death of a member, his widow shall receive the specific amount of insurance money. We fail to appreciate the argument by which it is attempted to prove that the plaintiff is not the widow of Robert Riley. The judgment of the circuit court must be affirmed.

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## SUPREME COURT OF NEW HAMPSHIRE.

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PERRY

vs.

DWELLING-HOUSE INS. CO.\*

1. A policy written in Massachusetts by a company resident there and sent to its agent in New Hampshire becomes a New Hampshire contract upon delivery to the insured, and the rights of parties under it are to be determined by New Hampshire laws.
2. Insured's agreement that his statements in the application shall be promissory warranties is invalid under the New Hampshire statute.
3. The company's policy provision that it shall not be bound by any act done or statement made by or to any agent or other person, which is not contained in the application, is also invalid, it has no legal effect in New Hampshire.
4. A company is chargeable with its agent's knowledge of facts the same as if the facts were stated in the application.
5. The statements or conduct of an adjuster for an insurance company may operate as a waiver of the making of formal proof of loss within the time fixed in the policy, though contrary to the terms of the policy.
6. An action on an insurance policy is properly brought in the name of the insured property owner, though the policy is assigned to a mortgagee to the extent of her interest.

Assumpsit by George E. Perry against the Dwelling-House Ins. Co., upon a policy of insurance. Trial by jury. Verdict for the plaintiff. The home office of the defendant was in Boston, Mass. George M. Stevens & Son, insurance agents at Lancaster, N. H.,

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\* Decision rendered, July 29, 1892.

prepared the application and sent it to the defendant's home office, from which they subsequently received the policy, delivered it to the plaintiff, and collected the premium. The application disclosed a mortgage in favor of Mary Simpson, and the policy provided for the payment of the loss, if any, to her as mortgagee. There was a second mortgage, in favor of James Berry, which was not noted in the application or in the policy; but there was evidence that the plaintiff, when he made the application, informed Stevens & Son that Berry had a mortgage, and had told him to pay no attention to it, and the defendant made no claim that the plaintiff failed to have the existence of the Berry mortgage noted in the application and policy by reason of fraud. Stevens & Son filled out the application. The holder of the Berry mortgage testified that she did not propose to claim any of the insurance money. The policy provided that the company should not be liable to pay more than the actual cash value of the interest of the assured, after deducting the amount of incumbrances, unless it was made specifically payable, in whole or in part, to a mortgagee or incumbrancer; and, in the latter case, the amount of the incumbrance should not be deducted. It further provided that it should be absolutely void if there was any lien whatever except as stated in writing therein. It also provided that a claimant should forthwith give written notice of a loss, and within 30 days furnish proofs thereof, and specified what such proofs should contain. There was also a provision that no act or omission of the defendant, its officers, or agents, should be a waiver of strict compliance with the terms and conditions of the policy, or an extension of time for compliance, unless in express terms and in writing, signed by the president or secretary. The plaintiff notified Stevens & Son of the loss on the day after it occurred, and they at once notified the defendant. Some days later, one Melchert, the defendant's superintendent of agencies and adjuster, called on the plaintiff, by the defendant's direction, to investigate the loss. The plaintiff gave Melchert a list of the articles of personal property lost, so far as he could remember them, with the value of each article, according to his judgment. There was no serious controversy between them about items of loss or damage. The plaintiff testified that Melchert said he would carry the list to the defendant, and presumed that everything would be all right, but could not say certainly, as he was nothing but an agent; that Melchert said nothing about proofs of loss; and that he himself had no understanding about further proofs. Melchert gave a somewhat different account of this conversation. When the 30 days had nearly or quite expired, the plaintiff learned through Stevens & Son that the defendant claimed no

proofs of loss had been furnished, and he made and sent to the defendant, a few days after the expiration of the 30 days, a proof of loss, to which no objection was made at the trial, except that it was made too late, and that it was made upon a blank of another company, and purported to be addressed to that company, although it described the policy in suit. The remaining evidence, so far as material to an understanding of the decision, is stated in the opinion of the court.

Several special questions were submitted to the jury. To the question whether Stevens & Son prepared and forwarded the application, delivered the policy, and collected the premium, by authority of the defendant and as its agents, the answer was that they did. To the question where the contract of insurance was completed, whether in Massachusetts or in New Hampshire, the answer was that it was completed in New Hampshire. To the question whether the plaintiff informed Stevens & Son of the Berry mortgage, at the time of the application, the answer was that he did. To the question whether the defendant, within the 30 days after the loss, made such representations to the plaintiff, or so conducted in respect to proofs of loss, that the plaintiff understood therefrom, and had good reason to understand, that no proofs of loss, other than such as he furnished to the defendant within said 30 days, would be required of him, unless the defendant should notify him that it desired other or further proofs, the answer was in the affirmative, as also to the question whether the plaintiff relied upon such representations and conduct, and in consequence thereof omitted to furnish the formal proof of his loss within 30 days after it occurred. With respect to the last two questions, the court instructed the jury as follows: "The defendant is a corporation, and, as you know, a corporation can only act through its officers and agents. When I say in the question, 'Did the defendant within the thirty days after the fire, make such representations to the plaintiff?' I mean, did the corporation, through its authorized officers or agents, make such representations and so conduct in respect to proofs of loss, that it gave the plaintiff to understand that no further or other proofs would be required of him than those which he furnished at that time. You will remember that, shortly after the fire, Mr. Melchert, the superintendent of agencies and adjuster of this corporation, went to the plaintiff's place of residence, and had a conversation with him and his wife in regard to the loss. I am not going to rehearse it; but, according to your recollection of the evidence and your finding of the facts, what was said between Mr. Melchert and the plaintiff? Did Mr. Melchert give the plaintiff to understand, from what was said,



and the way the business was done, that the list which the plaintiff furnished to him at that time, and the information which he gave him, were all that would be required of him, unless he heard further from the defendant? You heard what Mr. Melchert said in relation to reporting to the corporation at Boston, and you have heard what has been said with reference to what was done by the corporation, through its officers, subsequent to that interview. You have heard all the evidence bearing upon this question and are prepared to answer it. What is the balance of evidence, as it lies in your minds? From what you have heard upon the stand, did the defendant, through its authorized officers and agents, give the plaintiff to understand that no further proofs of his loss would be required of him, beyond what he had furnished, unless the defendant let him know in some way that it desired further or other proofs? If you find that they did, then the next question will be, did the plaintiff rely upon such representations, and, in consequence of them, omit to furnish the formal proofs which the policy required? Perhaps it may be interesting for you to know the way in which these questions of fact bear upon the case. If the defendant did make representations to the plaintiff, giving him to understand that the information he had furnished was satisfactory, unless some further information was called for, it is not at liberty, as we sometimes say, to go back on those representations. If it was allowed now to withdraw them, and to insist upon strict compliance with the letter of its original contract, you will see that such course would do a great wrong to the plaintiff, provided you answer this question in the affirmative. If you answer it in the negative, of course, such wrong would not be done." The defendant excepted to this part of the charge. The jury further found, in answer to special questions, that the proof was furnished within a reasonable time after the plaintiff was informed that the defendant would require formal proof, and that the defendant understood it was intended by the plaintiff to be the proof of his loss under the policy in suit.

At the close of the plaintiff's evidence, the defendant moved for a nonsuit, because there were two mortgages, when the plaintiff represented in the application that there was only one; because no written notice of the loss was given; because the formal proof was not furnished within 30 days, and the proof subsequently furnished did not purport to be for the defendant; because the plaintiff is not entitled to recover for Mary Simpson's interest; because the plaintiff is not entitled to recover for any interest in the buildings, represented by the Berry mortgage. The motion was denied, and the defendant excepted. At the close of the evidence, the defendant

moved for judgment on the same grounds on which it had moved for a nonsuit, and also on the ground that there was no waiver of proof of loss, within the terms of the policy. The motion was denied, and the defendant excepted. The defendant also excepted to the special questions, on the ground that there was no competent evidence bearing on them. The court ruled that, upon the facts, the plaintiff was entitled to recover, and directed the jury to return a general verdict for the plaintiff for the amount of damages to which he was entitled under the policy, which they did, and the defendant moved to set aside this verdict for errors in the foregoing rulings.

DREW & JORDAN, W. P. BUCKLEY, and BINGHAM & BINGHAM, *for Plaintiff.*

EVERETT FLETCHER and OSSIAN RAY, *for Defendant.*

CARPENTER, J.

On the question of agency, the defendant's previous course of dealing with Stevens & Son was competent evidence: *Kent vs. Tyson* 20 N. H., 121; *State vs. Foster*, 23 N. H., 348, 353; *Prescott vs. Flinn*, 9 Bing., 19. It is established by the verdict that Stevens & Son, in preparing and forwarding the application, in delivering the policy to the plaintiff, and in receiving the premium, were the defendant's agents. The defendant approved the application, executed a policy, and sent it to Stevens & Son, with instructions, express or implied, to deliver it to the plaintiff and collect the premium. There was no evidence that, prior to its delivery, the plaintiff had notice, by mail or otherwise, that his application for insurance was accepted. Upon these facts, the contract was made and concluded by the delivery and acceptance of the policy, not because of its delivery, but because, until that moment, the plaintiff had no notice of the acceptance of his application. Prior to that time, the plaintiff was at liberty to revoke his application, and the defendant to withdraw its acceptance and countermand its instructions for the delivery of the policy. A proposition does not become a contract until the maker or his agent is notified of its acceptance: *Beckwith vs. Cheever*, 21 N. H., 41; *Stebbins vs. Insurance Co.*, 60 N. H., 65, 70; *Dickinson vs. Dodds*, 2 Ch. Div., 463.

It being determined that Stevens & Son were the defendant's agents, there was no evidence tending to show that the contract was made in Massachusetts. It is, therefore, not necessary to consider whether the court erred in instructing the jury, or in denying the instructions requested, on the question whether the contract was completed in that state or in New Hampshire. The validity, con-

struction, and effect of the contract, and the rights of the parties under it, are to be determined by the laws of this state. "Chapter one hundred and seventy-two of the General Laws shall be a part of every contract of insurance to which said chapter is applicable; and said chapter and this act shall be plainly printed in every such contract. No waiver of any part of said chapter or of this act shall be set up by the insurer, and any stipulation of the contract in conflict with this act shall be void:" Laws 1879, c. 13, § 1. Chapter 172, as amended, provides, among other things, that "no policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made;" that "all statements of description or value in an application or policy of insurance, are representations and not warranties; erroneous descriptions or statements of value or title by the insured do not prevent his recovering on his policy, unless the jury find that the difference between the property as described and as it really existed contributed to the loss or materially increased the risk; \* \* \* nor shall any misrepresentation of the title or interest of the insured in the whole or a part of the property insured, real or personal, unless material or fraudulent, prevent his recovering on his policy to the extent of his insurable interest;" and that, "if any company shall issue any policy, upon an application prepared by a third person assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application:" Gen. Laws, c. 172, §§ 2, 3; Laws 1885, c. 73, § 1.

By the statute, the plaintiff's agreement that his statements in the application "shall be deemed and taken to be promissory warranties," and that the defendant "shall not be bound by any act done or statement made by or to any agent or other person, which is not contained in the application," is made invalid. It has no legal effect. The jury found that the plaintiff, at the time of the application, informed Stevens & Son of the Berry mortgage. The defendant is chargeable under the statute, and would be if there were no statute, with its agents' knowledge of its existence, as if the fact were stated in the application. The statute is in this respect merely declaratory of the common law: *Marshall vs. Insurance Co.*, 27 N. H., 157; *Campbell vs. Insurance Co.*, 37 N. H., 35; *Clark vs. Insurance Co.*, 40 N. H., 333; *Patten vs. Insurance Co.*, 40 N. H., 375, 381-383; *Leach vs. Insurance Co.*, 58 N. H., 245; *Eastman vs. Association*, 65 N. H., 176. But the issue submitted to the jury, whether the plaintiff, at the time of the application, informed Stevens & Son of the mortgage, was immaterial. Had the

jury found the other way on that question, the result would be the same. "The defendant made no claim that the plaintiff failed to have the existence of the Berry mortgage noted in the application and policy by reason of fraud." In other words, it conceded that the omission was an innocent mistake. Under the statute, a policy is not avoided by such an error in the applicant's statement of his title: *Tuck vs. Insurance Co.*, 56 N. H., 326, 331; *Leach vs. Insurance Co.*, 58 N. H., 245.

There was competent evidence tending to show that the defendant waived the proofs of loss required by the policy, and the question was properly submitted to the jury. The instructions given them were correct. To permit the defendant to avail itself of the plaintiff's omission to make the proofs of loss, which it had induced him to abstain from furnishing, would do him a great wrong, and it was not improper so to inform the jury.

Although the policy was payable, in case of loss, to the mortgagee, Mary Simpson, to the extent of her mortgage debt, the action was properly brought in the name of the plaintiff: *Folsom vs. Insurance Co.*, 59 N. H., 54; *Hall vs. Association*, 64 N. H., 405.

Judgment on the verdict.

Chase, J., did not sit. The others concurred.

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## SUPREME COURT OF MICHIGAN.

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MERRETT

vs.

PREFERRED MASONIC MUT. ACC. ASS'N OF AMERICA.\* }

Where, in an action on an accident-insurance policy to recover for the death of the assured, there is but little evidence to justify a jury in deciding which one of a half dozen or more possible theories as to the cause of death is the correct one, but what evidence there is supports the theory of suicide rather than accidental death, a verdict for plaintiff must be set aside.

FRANK T. LODGE, *for Appellant.*

WOOD & BIRD, *for Appellee.*

HOOKE, J.

Deceased, a painter, employing men, got up early to commence a job. While his wife was preparing breakfast, he went to the privy, where he was soon after found dead, upon the floor, by his wife, who testified that she found a rope about three feet long, with a knot in

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\* Decision rendered, Jan. 5, 1894.

it, the knot being under his neck. Other testimony showed that the neck was bruised or discolored, and there was a three-cornered bruise upon the right temple. A brick was kept in the privy, which was there at the time, to keep the door shut. The door was shut when he was found. Some witnesses testified that there was a discolored ring around his neck. Others did not see this. The privy was eight or ten rods from the house, and there was no evidence that any other person was seen upon the premises. Evidence was offered showing that a short time previous he had been struck over the eye by a person who used brass knuckles, by which blow he was seriously injured. Witnesses differed as to which side of the face this injury was upon. An autopsy showed ecchymosis of the brain. There appears to have been no investigation of other organs than the brain. The size of the privy was six by five feet, and the distance from seat to door was twenty-two inches. Plaintiff's theory seems to be that the blow over the eye caused death. If this be accepted as true, we must then look for the cause of the blow. Among the possible theories are the following : (1) That some person struck him. (2) That he struck himself with the brick, with suicidal intent. (3) That he fell upon the brick (a) after hanging himself; (b) by falling in a faint; (c) by falling in a fit of apoplexy; (d) by falling from heart failure. While these are all within the bounds of reasonable conjecture, there is but little evidence in the case to justify a jury in deciding which was the cause. What there is favors the theory that he attempted his own life by strangulation, or by striking himself with the brick, or both, and perhaps falling upon the brick. Of a half dozen or more possible theories, the jury have found one inconsistent with what little evidence there is, and based a verdict upon it. Until there was some evidence tending to show that death resulted from accident, rather than design, or from natural causes, such as apoplexy or heart failure, there was nothing to go to a jury. There was not a *prima facie* case of accidental death. The burden of proving accidental death is upon a plaintiff. Until some proof is offered tending to establish one of several equally reasonable theories, some consistent with the theory of accidental death, and some inconsistent with it, a case is not made out. As this disposes of the case, other questions need not be discussed. The judgment must be reversed, and no new trial ordered. The other justices concurred.

UNITED STATES CIRCUIT COURT OF APPEALS.  
EIGHTH CIRCUIT.

NORWICH UNION FIRE INS. SOCIETY

*vs.*

STANDARD OIL CO. ET AL.\*

An insurance company subrogated to the rights of the assured by paying a loss caused by the wrong of a third person cannot maintain an action against the latter in its own name, if the loss exceeds the amount of the insurance paid, but in such case the action must be brought in the name of the insured.

This was an action by the Norwich Union Fire Insurance Society, of Norwich, England, against the Standard Oil Company and the Goodlander Mill Company, to recover the amount of certain insurance paid by the plaintiff to the defendant mill company, upon the ground that the property was burned through the culpable negligence of the defendant oil company. A demurrer to the complaint was sustained, the court (June 6, 1892) rendering the following opinion:

RINER, D. J.

"This case is before the court on demurrer to the plaintiff's petition. It is alleged in the petition that in the year 1887 the Norwich Fire Insurance Society issued a policy of insurance, in the sum of \$3,000, to the Goodlander Mill Company,—a corporation organized under the laws of Kansas, and doing business at Ft. Scott; that the insurance was upon certain wheat owned by the mill company. The petition further shows that the German Fire Insurance Company had also issued a policy of insurance in the same amount—\$3,000—to the mill company, upon wheat. The last-mentioned policy having been assigned to the plaintiff in this case, plaintiff brings this suit to recover the amount of both policies, —\$6,000. The petition further shows that after the issuance of the policies of insurance the wheat was destroyed by fire, and that these insurance companies paid the loss in the amount of their respective policies, \$3,000 each, and took an assignment in writing of whatever claim the mill company might have against the defendant because of the loss to the amount of their policies. It is further alleged that the fire occurred by reason of the negligence of the defendant, the Standard Oil Company. The facts stated in the petition are to the

\* Decision rendered, Jan. 29, 1894. From *Federal Reporter*.

effect that the defendant shipped a tank car of petroleum from Lima, O., consigned to the gas company at Ft. Scott, which car was placed upon a side track near the mill and elevator of the Goodlander Mill Company, and that the employes of the gas company attempted to unload the car, but, because of the defective construction of the car, the oil escaped, took fire, and the mill and its contents were destroyed. It appears upon the face of the petition that the wheat destroyed by fire was of the value of \$20,000, and that there were other policies of insurance upon the wheat, in addition to those upon which this suit is based. The written assignment given by the Goodlander Mill Company to the plaintiff in this case and to the German Fire Insurance Company fixes the value of the wheat destroyed at \$40,000. While this assignment is not in the body of the petition, a copy of it is attached to, and made a part of, the petition. Hence, it is clearly shown by the petition that the amount here sued for is but a small part of the loss actually sustained by the Goodlander Mill Company in the destruction of its property by the fire alleged to have been caused by the defendant's negligence.

"The question, therefore, raised by the demurrer, is whether or not the plaintiff can maintain an action in its own name against the party through whose negligence the fire is alleged to have occurred, when the petition shows that the whole loss was far in excess of the amount covered by the policies of insurance which are made the basis of this action. In other words, the Goodlander Mill Company having sustained the loss of its property by and through the negligence of the defendant, and the insurance companies having paid the amount of their policies, thereby becoming subrogated to the rights of the Goodlander Mill Company, to the value of their policies, can they maintain an action in their own name, when it appears upon the face of the petition that their claim is but a small part of the loss for which the Standard Oil Company is liable to the Goodlander Mill Company, if liable at all? I think it must be conceded that but one wrong is shown by the petition in this case, and that that wrong is done to and suffered by but one party,—the Goodlander Mill Company,—and that, if the mill company had brought the suit, it would have been required to include its entire claim in one cause of action. The mill company having but one cause of action against the defendant, can that cause of action be divided among the parties who, by payment of policies of insurance, become subrogated to its rights to the extent of their policies, and a number of causes of action be thus made out of the one cause originally existing in favor of the mill company? The wrong complained of is

the destruction of the mill company's property, and the right of action exists, if at all, because of the negligence of the defendants in using a defective car. Thus, originally, there was but one cause of action and but one liability. The defendant was liable for but one thing, namely, its act of negligence. Its act was but one wrong, but one tort, and for that wrong the mill company had its cause of action, but was obliged to embrace its entire claim in one action. While it is true that the plaintiff is subrogated to the rights of the mill company against the wrongdoer, to the extent of the money paid upon its policies, yet it can have no greater rights than the mill company originally had. The mill company could not have divided its cause of action, and brought a dozen suits for the purpose of recovering for the one wrong; and I think, within all of the cases, that the parties cannot, by taking the course pursued in this case, divide a single cause of action, and bring a dozen or more suits to recover on a single cause of action. If the plaintiff is allowed to maintain this action, then each insurance company holding a policy on this property could maintain a separate action for the amount of its policy, and if the policies, altogether, did not amount to the value of the property, the mill company could still maintain an additional action for the balance; thus dividing the single cause of action existing in favor of the mill company into a dozen or more suits, and requiring the defendant to defend in a dozen or more suits, to have the one question determined, namely, whether or not its negligence caused the loss, for upon this question alone depends the right of recovery in favor of any of the parties in interest, whether their interest be by way of subrogation or otherwise. The Supreme Court of Illinois, in discussing this question, says: 'The wrongdoer is liable to the owner of the property for the injury he has done him, and although a wrongdoer, it is still his right to have the loss adjusted in a single suit.' This, I think, is a clear statement of the rule. By taking this course the question of the liability of the defendant can be determined in a single suit; and if, in the trial of that action, it shall be determined that liability exists, then, when the judgment is obtained, the court can direct how the proceeds of that judgment shall be divided among the parties claiming an interest in it, thus avoiding a multiplicity of suits. This rule, it seems to me, is reasonably and fully supported by authority both in England and this country: See *Ætna Ins. Co. vs. Hannibal & St. J. R. Co.*, 3 Dill., 1, Fed. Cas., No. 96; *Hall vs. Railroad Co.*, 13 Wall., 367; *Insurance Co. vs. Frost*, 37 Ill., 334; *Hart vs. Railroad Corp.*, 13 Metc. (Mass.), 99; *Baird vs. United States*, 96 U. S., 430; *Marine Ins. Co. vs. St. Louis, I. M. & S. Ry.*



Co., 41 Fed., 643. In the case last cited, Judge Caldwell states the rule as follows: 'Where the value of the property exceeds the insurance money paid, then the suit must be brought in the name of the assured,'—and cites cases in 3 Dill. as authority upon that question.

"I do not deem it necessary to discuss the second proposition suggested at the argument, viz., that the action must be brought in the name of the real party in interest. This question was disposed of in the case of *Ætna Ins. Co. vs. Hannibal & St. J. R. Co.*, 3 Dill., 1, Fed. Cas., No. 96. The demurrer will be sustained."

Plaintiff sued out a writ of error, and the judgment of the circuit court is now affirmed.

The Goodlander Mill Company owned a mill at Ft. Scott, Kan., which, together with its contents, including \$60,000 worth of wheat, was destroyed by fire on the 19th day of November, 1887. The plaintiff in error had issued to the mill company a policy of insurance for \$3,000 on the wheat in the mill. This policy was in force when the wheat was burned, and the plaintiff paid the amount thereof to the mill company, and brings this action against the Standard Oil Company to recover the amount paid to the mill company, upon the ground that the wheat was burned through the culpable negligence of the oil company. The complaint avers that the value of the wheat burned was \$60,000, and that, "in addition to the policy taken out in the plaintiff company, there were ten other concurrent fire-insurance policies taken out in other companies, equaling three-fourths of the value of the wheat, and also other policies on the buildings in which the said wheat was contained." It is further averred in the complaint that the plaintiff requested the mill company to join it as a party plaintiff in this suit, which it refused to do, whereupon the plaintiff made it a defendant, and that prior to the commencement of this suit the mill company brought an action against the Standard Oil Company, which was then pending, to recover the value of the mill and its contents, upon the ground that the negligence of the oil company occasioned the loss, but that the mill company did not, in that action, seek to recover the amount paid to it by the plaintiff in satisfaction of its policy. There was a demurrer to the complaint, which was sustained, and the plaintiff sued out this writ of error. Judge Riner's opinion sustaining the demurrer is reported *supra*.

Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

E. F. WARE (Charles S. Gleed, James Willis Gleed, D. E. Palmer, and C. Hamilton, on brief), *for Plaintiff in Error*.

A. A. HARRIS and OLIVER H. DEAN (William Warner, William D. McLeod, and Henry E. Harris, on brief), *for Standard Oil Company, Defendant in Error*.

CALDWELL, C. J. (after stating the facts as above), delivered the opinion of the court.

The circuit court sustained the demurrer to the complaint on the ground that the plaintiff could not maintain the action in its own name, and the correctness of this ruling is the only question we find it necessary to consider.

When an insurance company pays to the assured the amount of a loss of the property insured, it is subrogated, in a corresponding amount, to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed: *St. Louis, I. M. & S. Ry. Co. vs. Commercial Union Ins. Co.*, 139 U. S., 223, 235, 11 Sup. Ct., 554, and cases cited; *Marine Ins. Co. vs. St. Louis, I. M. & S. Ry. Co.*, 41 Fed., 643. But the rule seems to be well settled that, when the value of the property exceeds the insurance money paid, the suit must be brought in the name of the assured: *Ætna Ins. Co. vs. Hannibal & St. J. R. Co.*, 3 Dill., 1, Fed. Cas., No. 96; *Assurance Co. vs. Sainsbury*, 3 Doug., 245; *Insurance Co. vs. Boshier*, 39 Me., 253; *Hart vs. Railroad Corp.*, 13 Metc. (Mass.), 99; *Connecticut, etc., Ins. Co. vs. New York, etc., R. Co.*, 25 Conn., 265, 278; *Insurance Co. vs. Frost*, 37 Ill., 333; *Fland. Ins.*, pp. 360, 481, 591; *Marine Ins. Co. vs. St. Louis, I. M. & S. Ry. Co.*, *supra*. In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee; and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss: *Hart vs. Railroad Corp.*, *supra*; *Hall vs. Railroad Co.*, 13 Wall., 367. In support of this rule it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability. "If," says Judge Dillon in *Ætna Ins. Co. vs. Hannibal & St. J. R. Co.*, *supra*, "one insurer may sue, then, if there are a dozen, each may

sue; and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since both in Great Britain and in this country."

The learned counsel for the plaintiff in error challenges the soundness of this rule, and contends with much force that the rule that a wrongdoer who injures many people by the same act is liable to each person separately for the injury done to each should be applied to this class of cases. It is said, "The convenience of the innocent injured man to sue and get reparation is paramount to the inconvenience of the wrongdoer who suffers from a multiplicity of suitors." It would serve no useful purpose to repeat here the reasoning of the courts in answer to this contention. The subject is fully gone over in the authorities we have cited.

The rule that, where the property exceeds in value the amount insured, the suit must be in the name of the assured, seems not to rest so much upon the necessity or desirability of exempting the wrongdoer from a multiplicity of suits as upon the peculiar nature of the relation existing between the assured and the insurer. It is held by the Supreme Judicial Court of Massachusetts (*Hart vs. Railroad Corp.*, *supra*) and by the Supreme Court of the United States (*Hall vs. Railroad Co.*, *supra*) that in respect to the ownership of the property, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for its loss. When the insurer pays the assured the full value of the property destroyed, the insurer may maintain an action in his own name against one responsible for its loss, because, by operation of law, the whole beneficial right to indemnity from the wrongdoer has been vested in the insurer. He is, therefore, the real and only party in interest, and, under the Code, the proper party to bring the suit. But, when the value of the property destroyed exceeds the insurance money paid, the beneficial right to indemnity from the wrongdoer remains in the assured, for the whole value of the property,—for the unpaid balance due to himself, as well as for the amount paid by the insurer, as to which last sum he is chargeable as a trustee.

It will be observed that in this case ten other insurance companies have issued separate policies on the property, and that the aggregate amount of all the policies only equals three-fourths of the value of the property, and that the assured has brought suit against the oil company for the value of the property destroyed. If the contention of the plaintiff in error is sound, then the eleven insurance

companies and the assured can each maintain a separate action against the alleged wrongdoer. We are cited to no case which supports this contention, and we do not think one can be found. The allegation of the complaint that the mill company, in its action against the oil company, makes no claim for the amount of insurance paid by the plaintiff, does not alter the case; for, if this were done at the request of the plaintiff, it cannot complain, and if it were done by the mill company on its own motion, and it recovers in the action, it will hold an amount of the recovery equal to the insurance paid as trustee for the plaintiff.

The judgment of the circuit court is affirmed.

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UNITED STATES CIRCUIT COURT OF APPEALS.  
SECOND CIRCUIT.

HICKS ET AL.

vs.

NATIONAL LIFE INS. CO.\*

A policy applied for in New York and delivered there, and the premiums paid there, is a New York contract notwithstanding it is issued and signed in another state by a company resident in another state. Such a policy is dominated by New York statute law, and although forfeited by its own terms, is not forfeited until the New York law is complied with. Notice as under such law must have been mailed to the insured by the New York agent of the company. Omission of such notice leaves the policy intact for thirty days notwithstanding the premium has not been paid.

Where policies have been pledged as collaterals for a loan, a tender by plaintiffs of the amount due extinguishes the title of the lender, and vests the same in plaintiffs; and if the company issuing the policy obtains it from such lender, with knowledge of the facts, it acquires no better rights than the lender had, and is still liable in an action for conversion.

The plaintiffs in error were the plaintiffs in the court below, and brought the action to recover the amount of ten endowment bonds, in substance policies of insurance, for \$1,000 each, issued by the defendant March 2, 1888, payable at the expiration of twenty years to Walter Rae, or, in case of his death before that time, to his legal representatives, in sixty days after presentation of satisfactory proofs of his death. Rae died December 10, 1891. Proofs of his death were duly served upon the defendant, and the sixty days having expired, and payment been refused by the defendant, the suit was brought. It was alleged in defense that the policies had become forfeited and void, according to their conditions, by reason of the nonpayment of installments of annual premiums which became due and payable upon the 2d day of December, 1891. Evidence was introduced by the plaintiffs upon the trial for the purpose of showing that there had been a course of previous dealings between the defendant and the assured which amounted to a waiver of strict performance of

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\* Decision rendered, Feb. 27, 1894.

the condition, and authorized the assured to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The plaintiffs also insisted that there was not a forfeiture of the policies, because the defendant had not complied with a statute of this state enacted in 1877, which declares that no life-insurance company doing business in the state of New York shall have power to forfeit any policy thereafter issued, by reason of nonpayment of any annual premium or interest, or any part thereof, except as follows: "Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid, by the company, or by an agent of such company, or person appointed by it, to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when a premium will fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty, days, prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for." At the time of issuing the policies, and from thence until after the death of the assured, the defendant was doing business as a life-insurance company in this state, and had an agent and an office at the city of New York. The assured was a resident of New Jersey, and effected the insurance by delivering through his agent an application at New York City to the general agent of the defendant, and receiving the policies there from the general agent. On the 2d day of November, 1891, the agent of the defendant mailed at New York City a notice properly addressed to the assured at his place of residence, which was as follows:—

"You are hereby notified that a premium of \$116 will fall due December 2d, 1891, on contract No. 31756/60 & 31803/7 issued by the National Life Ins. Co., of Montpelier, Vt., provided all previous premiums have been paid and said contract is otherwise in force, and that unless the premium is paid when due, the policy, and all payments thereon, will become forfeited and void. This notice will not affect the provisions in said contract for 'cash surrender value,' 'extended' or 'paid up' insurance. This premium is payable at the home office, but, for the convenience of the assured, payment may be made, on or before the day when due, by currency, draft, check, or post-office order, to

"Joseph Wells, General Agent,  
"151 Broadway, New York."

It also appeared upon the trial that, at the time of the death of the assured, one Wells held the policies by an assignment made to him in July, 1891, as

collateral security for a loan made by him at that time to the assured. After the death of the assured, his executors tendered to Wells the amount due upon this loan, and tendered to the defendant the amount due it for unpaid premiums upon the policies. Wells, however, refused to accept the tender, and, for a consideration paid to him by the defendant, surrendered the policies to the defendant. The defendant knew at the time that the plaintiffs had tendered to Wells the amount due on the loan. At the close of the evidence the trial judge directed the jury to render a verdict for the defendant, and granted the plaintiffs an exception. Error is assigned of this ruling.

RAPHAEL J. MOSES, Jr., *for Plaintiffs in Error.*

I. NEWTON WILLIAMS, *for Defendant in Error.*

Before Wallace and Lacombe, Circuit Judges.

WALLACE, C. J., (after stating the facts) as above, delivered the opinion of the court.

We do not deem it necessary to consider the question whether the evidence respecting the prior course of dealings between the assured and the insurer was sufficient to authorize a finding by the jury that strict performance of the condition for the payment of the premiums had been waived. We think the statutory conditions had not been fulfilled which were an indispensable preliminary to the right of the defendant to treat the policies as forfeited; and, this being so, the plaintiffs were entitled to enforce the policies, whether there had or had not been a waiver.

If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of *Assurance Soc. vs. Clements*, 140 U. S., 226, 11 Sup. Ct., 822. The delivery of the policies in the present case was made in New York City to an agent of the assured, and, in legal effect, was as if the assured had been personally present, and received them. Then, and not before, the policies took effect.

The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the state treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through nonpayment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice: *Carter vs. Insurance Co.*, 110 N. Y., 15, 17 N. E., 396; *Phelan vs. Insurance Co.*, 113 N. Y., 147, 20 N. E., 827; *Baxter vs. Insurance*

Co., 119 N. Y., 450, 23 N. E., 1048; *McDougall vs. Assurance Soc.*, 135 N. Y., 551, 32 N. E., 251; *De Frece vs. Insurance Co.*, 136 N. Y., 144, 32 N. E., 556. The statute declares, in substance, that no policy shall be forfeited for default in the payment of premium until a notice shall have been served by mail upon the assured, calling his attention to the day when a payment has fallen or will fall due, and to the consequences of a default. The notice must state that, unless the premium shall be paid within thirty days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have thirty days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited "until the expiration of thirty days after the mailing of such notice." The proviso authorizing an advance notice to be given is not intended to curtail the privilege of the assured, but gives the insurance company the option of serving the notice with the same effect as though served subsequently to a default; but it provides that this notice shall be served at least thirty, and not more than sixty, days prior to the day when the premium is payable.

The notice in the present case, having been given before the time when the premium was payable by the contract, should have been served at least thirty days prior to the 2d day of December. If, according to the meaning of the statute, the mailing of that notice upon the 2d day of November was not a notice of at least thirty days, the notice was insufficient. It has always been the rule in New York, in applying statutes in which a computation of time is to be made from the day on which an act is to be done, to exclude the day. Thus, in *Small vs. Edrick* (5 Wend., 137), the statute was that a notice should be served "at least fourteen days before the first day of the court," and the notice was served on the 9th day of November, the 23d day of the same month being the first day of the court; and it was held that this was a notice of only thirteen days. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of the contract or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time, and so be excluded from the computation." *Cornell vs. Moulton*, 3 Denio, 16. The principle of computation is thus expressed in *Sheets vs. Selden's Lessee*, 2 Wall., 177:—

"The general current of the modern authorities upon the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day

named, is to exclude the day thus designated, and to include the last day of the specified period."

Excluding, as must be done according to the authorities, the day of mailing in the computation, in the present case the notice was served by the defendant twenty-nine days, and not "at least thirty," prior to the time when it should have been in order to effectuate the forfeiture. The defendant is in no better position than it would be if no notice had been mailed.

It is insisted for the defendant in error that the trial judge should have directed a verdict for the defendant because, the policies having been pledged to Wells and by him surrendered to the defendant, the plaintiffs could not maintain an action at law for the moneys due upon them. There is no merit in this position. Upon the tender to Wells of the amount due him upon the loan for which he held the policies as collateral his title was extinguished and immediately vested in the plaintiffs, and he would have been liable for the value of the policies in an action of conversion. The defendant acquired no better rights by obtaining a surrender from him, with knowledge of the facts, than he himself had: *Talty vs. Trust Co.*, 93 U. S., 321. The judgment is reversed.

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## UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

BRADY

vs.

UNITED LIFE INS. ASS'N.\*

An application for life insurance, which was agreed to be a part of the contract, warranted the answers of the assured to questions asked therein to be "full, true, and complete," and the policy was conditioned to be void if they were not so. One of the questions demanded the name and address of each physician who had attended the assured within a given period; and the answer gave the name and address of a single physician. As a matter of fact three physicians had attended the assured within the period named.

*Held*, That the answer was untrue and, being a breach of the warranty, vitiated the policy and destroyed the right to recover thereunder.

E. F. COLE, for Plaintiff in Error.

GEO. E. TERRY (Harry Wilber, of counsel), for Defendant in Error.

Before Wallace, Lacombe, and Shipman, Circuit Judges.

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\* Decision rendered, Feb. 27, 1894. From *Federal Reporter*.



WALLACE, C. J.

The assignments of error impugn the ruling of the trial judge in instructing the jury to find a verdict for the defendant. If the trial judge correctly instructed the jury to render a verdict for the defendant, upon the ground that there was a warranty by the assured of the truth of the answers made in his application for insurance, and upon the uncontradicted evidence one of the answers was untrue when made, it is unnecessary to consider whether the truth of other representations was, upon the evidence, a question of fact for the jury. The policy was issued October 2, 1891, upon the application of Michael Sinnott, made a few days earlier, and insured his life. It recites that the insurance was made "in consideration of the answers, statements, and agreements contained in the application which are hereby made a part of this contract." The application commences with the following recital:—

I, Michael Sinnott, residing at Waterbury, county of New Haven, and state of Connecticut, do hereby make application to the United Life Insurance Association for membership and a policy of insurance upon my life, and as a consideration therefor, I warrant the statements and answers as written in said application to be full, complete, and true.

It contained, among others, the following inquiries and answers:—

Q. Has the applicant ever had any illness, local disease, injury, mental or nervous disease or infirmity? If yes, state nature, date, duration, and severity of attack. A. About one year ago lost appetite for short time but has had no trouble since. Q. How long since you consulted, or were attended, by a physician? A. About a year ago. Q. State name and address of such physician. A. J. F. Hayes, M. D. Q. For what disease or ailment? A. Indigestion. Q. Give name and address of each physician who has prescribed for or attended you within past five years, and for what disease or ailment, and date. A. J. F. Hayes, M. D., Waterbury, Conn.

It concludes as follows:—

It is hereby agreed that the answers and statements in this application, whether written by the applicant or not, are warranted to be full, complete, and true, and that this agreement, together with this application, are hereby made part of any policy that may be issued thereon, and that if any answers or statements made are not full, complete, and true, or if any condition or agreement shall not be fulfilled as required by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association.

It appeared upon the trial that Hayes was the medical examiner for the defendant who examined Sinnott at the time the insurance was applied for. He had attended Sinnott professionally within the year preceding the application. It also appeared by undisputed testimony upon the trial that in November, 1889, the assured was sufficiently ill to desire the services of a physician, and Dr. Lopez

was called, and attended him professionally. He became dissatisfied with Dr. Lopez. Dr. Lopez was discharged, and on the same day another physician, Dr. Axtelle, was called, who, on that day, and on several other occasions during that and the succeeding month, visited and attended him professionally. Testimony was given tending to show that, at the time of these visits, he had heart disease, enlargement of the liver, and dropsy; but there was also testimony tending to show that he never had any serious illness. He died December 31, 1891.

It is a settled rule in the law of life insurance that answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. By the present contract it was explicitly provided that all the answers were warranted to be full, complete, and true. Its language, unlike that of the contract which was considered in *Moulor vs. Insurance Co.* (111 U. S., 335, 4 Sup. Ct., 466), is plain, unequivocal, and leaves no room for interpretation. It is a contract which must be enforced according to its terms, like those which were considered in *Jeffries vs. Insurance Co.*, 22 Wall., 47, and *Insurance Co. vs. France*, 91 U. S., 510. A true answer to the inquiry as to the name and address of each physician who had attended the applicant within the past five years would have afforded the insurer a valuable source of information in regard to the previous history and physical condition of the applicant. The inquiry called for the statement of a fact within the knowledge of the applicant, and not for one which might be merely a matter of opinion, in respect to which he might be mistaken. The answer was not incomplete or imperfect, but was untrue. It permitted no other inference than that Dr. Hayes was the only physician who had prescribed for or attended the applicant during the period covered by the inquiry. If the case had been submitted to the jury upon the issue whether that answer was true, and there had been a verdict for the plaintiff, the verdict would have been so manifestly unsupported by evidence that it would have been the duty of the court, in the exercise of a sound judicial discretion to set it aside. Consequently, the trial judge properly withdrew the case from the consideration of the jury, and directed a verdict for the defendant: *North Pennsylvania R. Co. vs. Commercial Nat. Bank*, 123 U. S., 727, 8 Sup. Ct., 266; *Railroad Co. vs. Converse*, 139 U. S., 469, 11 Sup. Ct., 569. The judgment is affirmed.

## SUPREME COURT OF ARKANSAS.

PROVIDENT SAV. LIFE ASSUR. SOC. }

vs.

REUTLINGER.\* }

The application and policy contained the usual strict provisions in regard to warranty. One of the questions propounded by the medical examiner to the applicant was, "When and by what physician were you last attended, and for what complaint?" To which applicant replied, "Never called a doctor in his life." It appeared in the evidence that about three weeks before the application was made the insured had been attended by a regular physician upon six successive days.

*Held*, That the answers were warranties, and must be literally true, and that the fact of medical attendance and its concealment was a breach of warranty, and voided the policy.

ROSE, HEMINGWAY & ROSE, *for Appellant.*

CARUTH & ERB and MORRIS M. COHN, *for Appellee.*

BATTLE, J.

Appellee commenced this action against the Provident Savings Life Assurance Society, of New York, upon a policy of insurance which was issued by it to her for \$7,000 upon the life of her husband, Solomon Reutlinger, he having died. It resulted in a verdict and judgment in her favor. The defendant appealed.

The policy begins as follows: "In consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which are a part of this contract," etc. The application which is referred to in the policy was signed by the appellee and her husband, and contains the following language: "We further declare and warrant, jointly and severally, that all the foregoing statements and representations, as well as those made or to be made to the medical examiner, or in any certificate of health hereafter given to the society by me, are and shall be true, and shall be the basis of the contract with the society if a policy be issued or renewed thereon, and that if any untrue or fraudulent statement or representation shall have been made, or if at any time any covenant, condition, or agreement herein shall be violated, said policy and insurance shall be null, void, and of no effect."

Among the questions propounded by the medical examiner to the insured was the following: "When and by what physician were you last attended, and for what complaint?" to which he replied,

\* Decision rendered, March 10, 1894.

"Never called a doctor in his life." Following the questions and answers in the medical examination, which was reduced to writing, are the following words in large type: "I hereby declare that I have read and understood all the above questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true, and that I am the same person described as above." And just beneath these words is the signature of Solomon Reutlinger, the insured.

The appellant, in its answer, among other things set out the warranties contained in the application and the aforementioned question and answer, and stated that about three weeks before the application was made the insured had been attended by a regular physician upon six successive days, and that, by reason of the false answer the policy was void. The evidence adduced at the trial tended to prove these allegations.

The main questions in the case are: Was the answer to the question an absolute warranty, or in the nature of a representation? If a warranty, was there a breach of it?

As a general rule a warranty is a stipulation expressly set out, or by inference incorporated, in the policy, whereby the assured agrees "that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done." Its purpose is to define the limits of the obligation assumed by the insurer, and it is a condition which must be strictly complied with, or literally fulfilled, before the right to recovery on the policy can accrue. It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so. Lord Eldon says: "It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract; that the matter is such as it is represented to be. The materiality or immateriality signifies nothing. The only question is as to the mere fact."

On the other hand, representations are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contract because they are untrue, unless they are material to the risks, and need only be substantially true. They render the policy void on the ground of fraud, "while a noncompliance with a warranty operates as an express breach of the contract."

Statements or agreements of the insured which are inserted or referred to in a policy are not always warranties. Whether they be warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation they bear to other parts of the policy or application. All reasonable doubts as to whether they be warranties or not should be resolved in favor of the assured: *Insurance Co. vs. Rogers*, 119 Ill., 474; *Fitch vs. Insurance Co.*, 59 N. Y., 557; *Moulor vs. Insurance Co.*, 111 U. S., 385, 4 Sup. Ct., 466; *Campbell vs. Insurance Co.*, 98 Mass., 389; *Insurance Co. vs. Johnston*, 80 Ala., 467, 2 South., 125; *National Bank vs. Insurance Co.*, 95 U. S., 678.

Parties to contracts for life insurance have the right to stipulate that the indemnity shall be recoverable only on the conditions or contingencies agreed upon by them. When entered into, they should be construed and enforced according to the intent of the parties. In arriving at that intention, the nature of the contract and the object to be attained should be considered. Doubtful words should be so construed as to give to each its due force in the furtherance of the main purpose of the contract. If any interpretation of the contract is so absurd and unreasonable as to raise the presumption that such a result could not have been within the intention of the parties, it should be discarded, and one adopted more consistent with reason and probability.

The Supreme Court of Pennsylvania expresses our view as to the construction of contracts of insurance in *Association vs. Gillespie* (110 Pa. St., 84, 1 Atl., 340), in this language: "While, however, the insured is held for the exact truth of his warranty, as a condition of his recovery, it must first be ascertained, under the ordinary rules of construction, what the thing is that is warranted; and, this being ascertained, the insured is held to a full and literal performance of it. But the words of a warranty or of a contract of insurance must receive a reasonable interpretation. When the words of any contract have a clear meaning, consistent with and relevant to its object and purpose, the intention of the parties, in the absence of fraud or mistake, cannot be shown to override the meaning. But if the words employed, in their liberal or unrestricted sense, are inconsistent with the main and obvious purpose of the instrument, or are foreign to the purpose of its provisions, they may, if reasonably susceptible, receive such interpretation as accords with the object in view and the clear intent of the parties. If the natural interpretation, looking to the other provisions of the contract, and to its general object and scope, would lead to an absurd and

unreasonable conclusion, as such a result cannot be presumed to have been within the intention of the parties, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability."

Where questions propounded to an applicant for insurance upon his life as to his physical condition are in such terms as include the most trivial ailments or injuries, they should be interpreted as referring only to such illness or injuries as affect the risk to be assumed, unless they are in words which exclude such interpretation. The presumption is that trivial ailments or injuries are not within the contemplation of the parties, and that the questions, in the absence of words, directing attention to them, are not asked with the view or purpose of ascertaining the existence of the same. The answers of the applicant should be interpreted in the same manner as the question eliciting them; that is to say, as responsive to the questions in the sense in which they are asked: *Association vs. Gillespie*, 110 Pa. St., 84, 1 Atl., 340; *Cushman vs. Insurance Co.*, 70 N. Y., 72; *Wilkinson vs. Insurance Co.*, 30 Iowa, 119; *Insurance Co. vs. Wilkinson*, 13 Wall., 222; *Connecticut Mut. Life Ins. Co. vs. Union Trust Co.*, 112 U. S., 250, 5 Sup. Ct., 119; *Bancroft vs. Association*, 120 N. Y., 14, 23 N. E., 997.

In *Cushman vs. Insurance Co.* (70 N. Y., 72), "it was decided that the application for the insurance was a part of the policy, and that the answers to the questions therein contained were therefore warranties." It was claimed that there was a breach of warranty in answering "No" to the question in the application whether the applicant "had ever had disease of the liver." In speaking of this question, the court said: "In construing contracts, words must have the sense in which the parties used them, and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the question inserted in the application, the defendant was seeking for information bearing upon the risk which it was to take,—the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances, having no bearing upon general health or continuance of life. Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So most, if not all, persons will have at times congestion of the liver, causing slight functional derangement and temporary illness, and yet in the contemplation of parties entering into contracts of life insurance, and having regard to general health

and the continuance of life, it may safely be said that in such cases there is no disease of the liver."

In *Wilkinson vs. Insurance Co.* (30 Iowa, 119), the assured, in reply to the question, "Has the party ever met with any accidental or serious personal injury?" answered, "No." She had about four years before that fallen from a tree, but received no serious injury. In commenting on this question and answer, the court said: "The defendant claims that if the insured ever met with 'any accidental \* \* \* injury,' that will bar a recovery, because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would, or might possibly, have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm in infancy, to a cut upon the thumb or finger in youth, to a stumble and falling or the sprain of a joint in a more advanced age. The idea is that such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language which would make the word "any" an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the courts, the law, the defendant itself, and its business. The language of the question must have a fair construction, and, in the words of our statute, '\* \* \* that sense is to prevail against either party in which he had reason to suppose the other understood.'"

In *Insurance Co. vs. Wilkinson* (13 Wall., 222), Mr. Justice Miller, in construing the same question and answer in a policy of life insurance, said: "The court said to the jury that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the nondisclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the nondisclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent. \* \* \* When the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they

to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw the most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed. Looking then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them."

The answer to the question propounded to the applicant for insurance in the case before us was clearly made a warranty. Was there a breach of warranty? Upon this question the trial court instructed the jury as follows:—

"That the answers of Solomon Reutlinger in the application were warranties, and that, if they believed the statement that he had never called a doctor in his life was untrue, they would find for defendant; but, in determining the meaning of the question to which said answer was made, they will have to find, in order to find a verdict for the defendant, that said Solomon Reutlinger had called a physician, or some one had called a physician for him, for some complaint that was serious in its nature, and affected his constitution or general health.

"The jury are instructed that the question, 'When and by what physician were you last attended, and for what complaint?' as used in the application, had reference to a serious sickness or disease, such as affected seriously his constitution or general health; and that if they believe from the evidence that the deceased had not been, prior to the application, attended by a physician for such a serious illness, but had been attended for some temporary ailment, the jury should find for the plaintiff.

"If the jury believe from the evidence that, prior to the time of the application for the policy herein sued upon, the assured, now deceased, was not waited upon by a physician for a sickness or a disease of a serious nature, such as indicated in the first instruction, then his answer to the question, 'When and by what physician were you last attended, and for what complaint?' that 'he never called a doctor in his life,' is not untrue within the legal meaning of the said application; and the plaintiff is entitled to recover, although said deceased may have been called upon by a



physician for some temporary ailment or indisposition, not functional or organic in its nature, or affecting his general health."

The court evidently attempted to enforce the rule we have stated, but erred as to the purpose and meaning of the question, and, in so doing, misapplied the rule. In the application of Reutlinger the following clause appears: "All provisions of law forbidding any physician who may have attended me from disclosing any or all information which he acquired by such attendance are hereby expressly waived." In his examination by the medical examiner he was asked the question, "Have you ever had any serious illness or personal injury, or ever undergone any surgical operation?" He answered, "No." He was asked if he ever had any one of forty-seven different diseases, and he answered, "No." After this, he was asked to give the name and residence of his medical attendant, and he answered that he had no physician. He was then asked, "When and by what physician were you last attended, and for what complaint?" To which he answered, "Never called a doctor in his life." In the last-mentioned interrogatory two questions were combined in one. He was asked, (1) "When and by what physician were you last attended?" (2) If so, "for what complaint?" The object of asking "for what complaint" was not to ascertain if he ever had any serious illness or personal injury. He had already answered a question propounded for that purpose in the negative. If such had been the object, it was wholly unnecessary to ask in connection with it, "When and by what physician were you last attended?" The question takes for granted that, if he had been attended by a physician, it was in a case of sickness; and the words "for what complaint" were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. The obvious purpose of it was to ascertain the name of a person from whom information affecting the risk of insuring the life of Reutlinger could be derived. In furtherance of this purpose, he had agreed in his application that any physician who had attended him might disclose any or all information which he acquired by such attendance. The answer given, if it be correctly written, clearly indicates that Reutlinger so understood the question. It did not aver a condition of health, or that it was not requisite or proper to request the attendance of a physician. It averred that he had never called a physician to attend him in sickness. He warranted this statement to be true, and the evidence adduced at the trial of this case tended to prove that it was untrue,—a breach of warranty.

In *Cobb vs. Association* (153 Mass., 176, 26 N. E., 230), the court held that "an applicant for benefit insurance, agreeing that the contract shall be avoided if the answers made by him in his application are not true, makes their truth the basis of the contract." In the application, two questions were propounded to the applicant, as follows: (1) "Have you personally consulted a physician, been prescribed for or specifically treated within the last ten years?" (2) "If so, give dates, and for what diseases." To the first he answered, "No," and to the second no answer was made. The court said: "While the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remains unanswered, is: 'If so, give dates, and for what diseases.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he had answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this.

"In *Insurance Co. vs. McTague* (49 N. J. Law, 587, 9 Atl., 766), it was held that where the applicant stated that he had not consulted a physician or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court say: 'That the representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted the averment, whether the consultation and prescription related to real disease or an apprehension of disease.'"

*Insurance Co. v. Trefz* (104 U. S., 197), is cited by appellee to sustain the instructions of the trial court, but it does not. In that case the following question was propounded to the applicant for life insurance: "Whether now or formerly, when and how long,

and to what degree, subject to or at all affected by any of the following diseases and infirmities." (Here followed a long list, in alphabetical order, of disorders, beginning with "apoplexy" and ending with "yellow fever," and including "diseases of the brain, diseases of the heart.") The answer was, "Never sick." The court said: "It is matter of law that the answer, 'Never sick,' in the connection in which it was used in the application, must be taken to mean, not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true." And it further said: "It is unquestionable law that in such a case as the present the answer must be true to justify a recovery, without regard to these considerations; and, for a lack of substantial truth, it is no valid excuse that the party giving the answer did not understand, from ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury. The language used was: 'But if you believe from the testimony that the insured, whether wilfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the husband and wife entered into on the ground that it would be a hardship to the widow.' And in another part of the charge the court said: 'If they are in any respect untrue, they avoid the contract, and prevent a recovery upon the policies.' The question, then, for the jury was this: Was the answer of Trefz to the question whether he had ever had any of the enumerated diseases—'Never sick'—true or untrue? And undoubtedly it was material, and even necessary, to inquire what was the meaning of that answer. And to ascertain its meaning—the meaning the law will affix to it—it is perfectly proper to determine the sense in which the words were used by the speaker; the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by Mr. Justice Swayne, in *Insurance Co. vs. Gridley* (100 U. S., 614), 'The object of all symbols is to convey the meaning of those who use them, and, when that can be ascertained, it is conclusive.'"

The trial court instructed the jury as to what they might consider in determining whether the answer of Reutlinger was correctly written down by the medical examiner. Upon this branch of the case we deem it sufficient to say: When a medical examiner,

authorized by an insurance company to fill up blanks for answers to questions to be propounded to applicants for insurance in a medical examination, or to fill them up is within the apparent scope of his authority, does so by writing false answers, and thereafter procures the signature of the applicant thereto, after he had given correct answers to the questions, and the company afterwards receives the premiums, and issues a policy, the company will, upon the death of the insured, be estopped from insisting on the falsity of the answers, although warranted to be true: *Insurance Co. vs. Brodie*, 52 Ark., 11, 11 S. W., 1016; *Flynn vs. Insurance Co.*, 78 N. Y., 568; *Grattan vs. Insurance Co.*, 80 N. Y., 281, 92 N. Y., 274; *Insurance Co. vs. McMurdy*, 89 Pa. St., 363; *Pudritzky vs. Supreme Lodge*, 76 Mich., 428, 43 N. W., 373; *Insurance Co. vs. Hazlewood*, 75 Tex., 348, 12 S. W., 621; 1 May, Ins. (3d Ed.), § 303; *Cook, Life Ins.*, § 21, and cases cited. "This rule is, however, subject to the obvious limitation that if the applicant, knowing the presence of the untrue answer by having read it or otherwise, afterward certifies to its truth, the insurer may set up the untruth:" *Grattan vs. Insurance Co.*, 92 N. Y., 274, 283. If, after the delivery of the policy, he discovers that a fraud has been perpetrated on him and the company by means of the false answers, it would be his duty to make the fact known to the company. "He could not hold the policy without approving the action of the agent, and thus becoming a participant in the fraud committed. \* \* \* The consequences of that approval cannot after his death be avoided:" *Insurance Co. vs. Fletcher*, 117 U. S., 519, 6 Sup. Ct., 837. Reversed and remanded for a new trial.

Mansfield, J., did not sit in this case.

## APPELLATE COURT OF INDIANA.

UNION CENT. LIFE INS. CO. )

vs.

WOODS.\* }

An endowment policy provided that the balance of the year's premium and all other indebtedness of the assured should be first deducted in making payment at maturity of the policy. The man died before the expiration of the endowment term. Meantime he had obtained a loan of \$2,300 from the company, but this loan and a premium note were merged into a judgment and secured by a mortgage on other property of assured, leaving, however, an unpaid balance after foreclosure proceedings. The policy was also jointly assigned by Woods and his wife. *Held*, That the assignment was invalid and the wife could recover the full amount of the policy less unpaid premiums, if any.

*Held*, That while the policy was an Ohio contract the assignment was an Indiana contract and governed by the law of the latter state.

*Held*, That an assignment of a policy is not a chattel mortgage and, even if it were in Ohio, this assignment was made in Indiana and is void under the laws of that state.

HOLSTEIN & BARRETT, *for Appellant*.

M. W. FIELDS, L. C. EMBREE, and J. W. EWING, *for Appellee*.

REINHARD, J.

The appellee sued the appellant in the Gibson Circuit Court to recover the proceeds for an insurance policy on the life of her deceased husband, of which policy she was the alleged beneficiary. The venue of the cause was changed to the Knox Circuit Court. The appellant filed an answer in eleven paragraphs, to each of which a demurrer was sustained, and, upon appellant's refusal to plead further, judgment was rendered in favor of the appellee for \$2,994.78. The ruling of the court upon the demurrer is the only error relied upon.

Some of the paragraphs of the answer are in the nature of set-offs, based upon a provision in the policy which permits the appellant to deduct certain indebtedness from the insurance money. The provision just referred to reads as follows: "In case of the death of the insured prior to the maturity of this policy, the same being in force, the company will pay the amount herein named within sixty days after receipt of notice and satisfactory proof of death, the balance of the year's premium, if any, and all other indebtedness, being first deducted." It is alleged in the paragraphs referred to

\* Decision rendered, April 20, 1894.

that at the time of death of the insured, Isaac Woods, he was indebted to the company for borrowed money in an amount equaling that of the insurance, and it is asked that this debt be set off against and deducted from the amount of the insurance designated in the policy. The policy provides that the company, in consideration of "the annual payment of the sum of \$161.04 at the home office of the company, on or before the 19th day of October, at noon, in every year, during the term of fifteen years, does insure the life of Isaac Woods, of Princeton, in the county of Gibson, state of Indiana, in the sum of \$3,000 for the term of his natural life, or until prior maturity, for the benefit of the insured if living at the maturity of this policy. In case of the death of the insured prior to such maturity, said amount of insurance shall be payable to Mary E. Woods, his wife, if living; otherwise to the executors, administrators, or assigns of the insured." Whether the appellant was entitled to set off the amount loaned the insured in his lifetime depends upon the terms of the contract and the meaning of the language, "all other indebtedness," therein contained. The facts pleaded show that the loan of \$2,300 by the company to the insured did not take place until some time after the issuing of the policy, and that it was effected partly to enable the insured to pay the premiums and to revive the policy which he had suffered to lapse when the loan was made, though the greater portion was not for that purpose. We see no valid reason why an insurance company and an applicant for life insurance may not enter into a binding agreement to the effect that the company will undertake to loan the insured a sum of money, as well as to insure his life, and that the loaned money is to be deducted from the proceeds of the policy at the time of the maturity thereof. Such a contract is not in violation of the principle of indemnity upon which insurance is generally based, for the money may be needed for the payment of premiums and other purposes to enable the insured to secure the full benefit of such insurance. Hence, if the contract in suit had provided in terms for a loan of money and a repayment of the same out of the proceeds of the insurance, we think such a provision would be binding upon all parties, although the policy be written for the sole benefit of the wife. It is true that in ordinary life insurance, where the wife of the insured is the beneficiary, the title of the policy vests in her immediately upon execution and delivery thereof, and no arrangement between the company and the insured, affecting the interest of the wife in the insurance money, which is not provided for by the terms of the policy itself, will be binding upon her: *Harley vs. Heist*, 86 Ind., 196; *Pence vs. Makepeace*, 65 Ind., 345;

Bliss, Ins. (2d Ed.), p. 517, § 818. We think it is otherwise, however, where the policy expressly provides for a restriction or limitation of the wife's interest, or makes it depend upon a future contingency, such as an arrangement for a loan of money from the company to the husband, and a repayment of the same out of the proceeds of the policy when due. Whatever may be considered the true consideration underlying the insurance, the wife cannot be said to possess a greater interest in the policy than is given her by the terms thereof. When she acquires the title to the same, upon execution and delivery, she takes such title burdened with all its conditions and limitations. She can receive no more insurance, in other words, than the insured has contracted for in her behalf. If the insured has, therefore, stipulated for a loan to himself, to be paid out of the insurance money when it becomes due, by an acceptance of the policy, she assents to the deduction of such loan from such proceeds, and she cannot afterwards be heard to deny the company's right to make such deduction. It is not claimed, however, in the present case, that the policy in terms provides for a loan of money to the insured, and the repayment of the same out of the insurance money; nor is there, in point of fact, such a stipulation. What the appellant does contend is that the provision in the policy permitting the company to deduct from the amount of the insurance money the balance of the year's premiums "and all other indebtedness" is broad enough to confer upon the company the right to make such a loan to the insured, and secure itself by withholding an equal amount from the proceeds of the policy at maturity. It must be conceded, we think, that if the policy was one the ownership of which was and remained in the insured to the time of his death, he was at liberty to use and dispose of the same in any manner that seemed proper to him. He could pledge it as security for his individual debts, and could in various ways incumber or divest his interest therein at pleasure. He could contract with the company for a loan of money, and would have the right to assign the policy to the company to secure the loan. But, even if he did not make such an assignment, we are inclined to the view that, if the policy was legally his property, or the title was such that he could pledge or assign the policy, he could contract for any legitimate indebtedness to the company subsequently to the execution of the policy, and that the provision to deduct "all other indebtedness" would entitle such company to deduct such loan from the insurance; as in that case it is easily seen that the parties could be held to have contemplated just such an arrangement, and thus provided for it in the contract of insurance.

The policy contains the statement that it is written "for the benefit of the insured, if living at the maturity" thereof. The word "maturity" here obviously refers to the maturing of the policy during the lifetime of the insured. It provides that, if the premiums were paid during the term of fifteen years, and other conditions complied with, and the insured was then living, the insurance should be paid to Isaac Woods. If, however, the latter should die during the fifteen years, such insurance was to become payable to Mary E. Woods, his wife, if living; otherwise to the executors, administrators, or assigns of the insured. It is insisted on behalf of the appellant that the policy was one of endowment. "An endowment policy is an insurance into which enters the element of life. In one respect it is a contract payable in the event of a continuance of life; in another, in the event of death before the period specified." And. Law Dict., p. 401. Endowment insurance provides for the payment of the sum insured to the person insured if he live to a certain time, or, if he die before that time, to some other person nominated in the policy: Bliss, Ins. (2d Ed.), p. 6, § 6. Such a policy is, in many of its characteristics respecting the rights of the parties under it, different from an ordinary life policy procured by a husband for the sole benefit of his wife. In a policy of the kind last mentioned the wife acquires the absolute title upon its execution, and she becomes its owner, the same as if it were a note or other chose in action payable to her, and hence no act of her husband or the insurance company, without her concurrence or assent, can deprive her of such title to or interest in the policy if its conditions have been complied with; while, if the policy be one of endowment, payable to the husband if living at the end of the endowment period, or to the wife if the insured should die during such period and she be then living, the title to the policy does not vest absolutely in the wife upon the execution of the policy, nor, indeed, until the husband's death during such period, and the husband retains at least a qualified interest in and title to the policy during his lifetime. Assuming that the policy in suit is one of endowment, payable to the husband if living at its maturity, and to the wife in case of his death during the period of endowment, the question arises, in whom was the title to the policy at the time of its execution and delivery? The appellant's position is that in such a case the wife acquires no interest in the policy whatever unless or until the husband dies during the period of the endowment, and that the husband, as the insured and primary beneficiary, has the absolute control of the policy as long as he lives, and may dispose of the same as he may deem proper. On the other hand, the appellee contends that, as soon as the policy



was executed and delivered, she acquired such an interest in the same as prevented the insured from transferring, incumbering, or in any manner affecting the insurance adversely to her; and that, inasmuch as the policy was not subject to transfer or incumbrance of any kind by the husband, the "indebtedness" spoken of in the policy could not have referred to a loan, as the parties cannot be presumed to have contemplated a restriction of the contractual rights of the wife, in the absence of an express stipulation to that effect. The question is one of importance, and not free from difficulty. We have given it a careful consideration, and, after an examination of the authorities cited by counsel, and such others as we were able to find, we have been led to conclude that the law upon this question is with the appellee. In a certain sense, it is true, she may be said to have no interest in the policy until her husband's death, for it is upon this contingency that her interest depends; but, in another sense, she does have an interest in the policy from the time of its delivery, although it be only a contingent interest, and one which may or may not become absolute. Of this interest, contingent though it may be, she cannot be divested without her consent. Had the insured lived until after the maturity of the policy, a disposition of or incumbrance upon the policy or the insurance might have been valid as against him, but he had neither the right nor the power to divest his wife of that interest with which, by his previous act, the law had invested her. When the policy was executed and delivered, its title vested, not in Isaac Woods alone, but in him and the appellee both. Each had only a conditional title, depending upon the contingencies provided for in the contract of insurance. The title of each was in the whole policy, and so remained until after the time the loan was made to Isaac Woods by the appellant, though it is also true that under the terms of the policy the interest of the appellee might, in a certain contingency, have become divested subsequently, upon the happening of the event mentioned in the policy: *Insurance Co. vs. Palmer*, 42 Conn., 60. In the case of *Fowler vs. Butterly* (78 N. Y., 68), the policy was on the life of the insured "until the 6th day of September, 1882, or until his decease, in case of his death before that time." In the latter event, the proceeds of the policy were to be paid to the wife of the insured, if living; otherwise to his daughter. By the terms of the policy, the insured would have been entitled to receive the money had he lived until after its maturity, but in case of his death during the endowment period the insurance was to go to his wife if living. The insured having died during the endowment period, suit was brought upon the policy. It was shown that the insured in life

had assigned the policy, in which assignment the wife had attempted to join. The assignment by her was held void, as not having been duly executed. The assignment by the husband was held not to convey the title, the wife having, upon the delivery of the policy, acquired a direct interest in the same, which could be transferred only by an assignment duly executed. These cases, we think, are in point, and they meet with our approval. The authorities relied upon by appellant's counsel do not support their position. The case of *Insurance Co. vs. Armstrong* (117 U. S., 591, 6 Sup. Ct., 877) is certainly far from it. In that case the insurance was payable to the assured or his assigns on the 8th day of December, 1897, or, if he should die before that time, to his legal representatives. It was held that an assignment of the policy by the insured passed the title to the assignee, the insured having died in 1878. The manifest purpose of such insurance could be for the benefit of the insured only. It was a chose in action, owned by him, and which he had a right to alienate at pleasure, under proper circumstances. The text quoted by counsel for appellant from *May on Insurance* (section 390) does not support their contention, although it would seem, at first blush, to do so. That author says, in speaking of an endowment policy such as the one in the present case: "The wife's rights do not attach till the death of the husband within the time limited." The "rights" here spoken of, have reference, we think, to her rights in the money, the proceeds of the policy. This is true in a sense, and in a similar sense the husband's rights do not attach until the period of endowment has expired. Both the context and cases cited by the author convince us that the contention of the appellee's counsel as to the application of the sentence that the interest does not attach till the happening of the event provided for is the correct one. At all events, the text as interpreted by appellant's counsel does not commend itself to our approval, and is not supported by authority. We are of the opinion that none of the authorities relied upon sustain the appellant upon this point, but, if they did, we should nevertheless be inclined to follow the cases holding the opposite view, as they are, it seems to us, grounded upon sound principles, and sustained by reason and judgment. If, therefore, Isaac Woods had no power or right to dispose of the policy in suit by assignment or pledge, it cannot be held that the parties to the original contract of insurance could have contemplated a loan from the company to said Woods upon the faith and credit of the policy.

The only provision under which the right to the set-off is claimed, as we have seen, is the one which allows the company to deduct from the proceeds of the policy "the balance of the year's premium, if

any, and all other indebtedness to the company." In giving construction to contracts containing ambiguous language the courts will look to the situation and acts of the parties and the end sought to be accomplished. The application for the insurance discloses that the name of the person in whose favor the insurance was to be effected was Mary E. Woods, and that she was the wife of the applicant. The policy shows that she was a beneficiary, and that, in case of Isaac Wood's death during the period of endowment, she alone was entitled to the insurance. We think it manifest from these facts that the purpose of the insurance was indemnity to the wife in case she should outlive her husband during the fifteen years. To hold that under these circumstances the parties intended by their contract to provide for a loan to Isaac Woods would be doing violence to the evident purpose of the insurance. Unquestionably the parties must be deemed to have meant something by the insertion of the provision permitting the deduction of "all other indebtedness." One class of indebtedness that was to be deducted was clearly expressed in the contract, viz: "the balance of the year's premium." What was the intention of the parties that should be deducted in addition to the balance of the year's premium left unpaid? It can certainly not be true that the parties contemplated any other indebtedness than that connected with the subject of insurance with reference to which they were contracting. The indebtedness that must naturally have been anticipated between the insurer and insured was such as arose from the premiums upon which the insurance was based, and it is our opinion that this is the kind of indebtedness meant by the term employed in the policy. This does not necessarily mean cash premiums which had become due. But the parties had a right to arrange for the payment of the premiums by note or notes, and, as the giving and acceptance of such would continue the policy in force notwithstanding the indebtedness for such premiums, it is easy to conceive how the insured might be indebted to the company for such premiums at the time of his death or the maturity of the policy. It seems to us that this construction is the more rational one, and clearly tends to carry out the evident purpose of the contract, while it fully secures the appellant in all its rights within the letter and spirit of the same. Moreover, in adopting this construction we do no more than to give effect to the rule so universally recognized and followed by the courts of this country that, where indemnity is the object for which the insurance is effected, the contract must be liberally construed to that end; and, when the language of the policy is equally susceptible of two interpretations, the one giving greater indemnity and sustaining the

claim will be adopted: *May, Ins.* (3d Ed.), §§ 174, 175. Our conclusion upon this question is that the court correctly sustained the demurrer to those answers which attempted to set off the unpaid balance of the judgment held by the appellant against Isaac Woods against the appellee's claim on the policy in suit.

Other paragraphs of the answer are based upon the alleged assignment of the policy by Isaac Woods and his wife, Mary E. Woods, the appellee, to the appellant company, to secure the debt of Isaac Woods to the company. For the reasons heretofore stated, we think the assignment of Isaac Woods was void; and, as to the assignment of the appellee, she being a married woman, and the assignment being to secure a debt of her husband, it was void also: *Rev. St. 1894, § 5964* (*Rev. St. 1881, § 5119*). It is, however, contended on behalf of the appellant that under the averments of the eleventh paragraph of the answer the assignment must be held sufficient, "upon the theory that, the policy being an Ohio contract, and the assignment being a mere incident to the policy, both the policy and assignment are to be construed according to the laws of Ohio; and, further, that the assignment is a chattel mortgage of the insurance money, the situs of which is in Cincinnati, Ohio; and that the assignment is therefore to be construed by the laws of Ohio, and that by the laws of that state the assignment is valid." It is true that the policy itself is an Ohio contract, and governed by the laws of that state. But this rule has no application to the contract of assignment, which, though made by indorsement on the policy, is yet a separate and distinct contract from that of the policy. An insurance policy is a chose in action, for a chose in action is an instrument upon which may be founded a right of proceeding in a court to procure the payment of money: *Vawter vs. Griffin*, 40 Ind., 593, 601. The policy being a chose in action, it may be assigned in the same manner as a note, bill of exchange, or account. The assignment transfers the ownership or interest of the assignor. In the case of a note or bill of exchange governed by the law merchant, the assignor, in addition to transferring his interest in the debt, impliedly obligates himself that the instrument is genuine; that he is the owner of the same, and that the maker will pay it when due. An assignment of a policy, like an assignment of an open account, does nothing more than to transfer the property. The assignment of a chose in action is governed by the law of the place where the assignment is made: *Rose vs. Bank*, 15 Ind., 292, 20 Ind., 94. Under the rules of the common law the assignment or transfer of a chose in action was forbidden as in violation of the law against maintenance and champerty, and because the vendor could not sell

a thing he did not then really have, but which he only expected to obtain at some future time: Co. Litt., 266a. But this ancient rule has long since been disregarded in the courts of equity; and not only choses in action, but mere possibilities, expectancies, and things in esse may be assigned, and such assignments will be enforced in equity, and the assignee will acquire the property by the assignment: 1 Am. & Eng. Enc. Law, 827. Our statute recognizes the right of assignment of any claim or chose in action, not only in writing, but by simple delivery of the thing assigned; but, unless the assignment is by indorsement in writing, the assignor must be made a party defendant in a suit by the assignee upon the claim: Rev. St. 1894, § 277 (Rev. St. 1881, § 276); *Lyman vs. King*, 9 Ind., 3; *Cole vs. Bank*, 60 Ind., 350; *Strong vs. Downing*, 34 Ind., 300. We do not think that in this state an assignment of a policy of insurance is governed by any rule of law different from those obtaining in cases of assignment of choses in action generally. The validity of any contract must depend upon the law of the place where it is made. If the appellant has any assignment, it must be by reason of the contract by which the same was effected. That contract was made in Indiana, and not in Ohio.

The case of *Lee vs. Abdy* (17 Q. B. Div., 309), is precisely analogous. In that case the suit was by the assignee of a life policy issued by an English company. The assignment was made at Cape Colony, where the assignor and assignee both resided at the time. By the laws of Cape Colony the assignment was void, though valid under the law of the place where the policy was issued. It was held that the law of Cape Colony governed, as the contract of assignment was made there; and the assignment was, therefore, adjudged to be void. To the same effect is *Prentice vs. Steele* (4 Mont. Law Rep., 319), where it was expressly decided that the assignment of a life policy, which is a chose in action, is governed by the law of the place where it (the assignment) was made, and not by the law of the place where the policy was issued, or the insurance is payable. And to the same effect is *Miller vs. Campbell* (N. Y. App., 35 N. E., 651), where a Massachusetts corporation had issued an endowment policy insuring a husband's life for fifteen years, payable to the wife if living, in case of the husband's death during the endowment period, which was assigned by the husband and wife, who resided in New York. It was held that the laws of New York governed the validity of the assignment. We hold, therefore, that the law of Indiana controls the assignment in suit, and by that law the assignment is void.

It is next contended, as we have seen, that the assignment of the policy constitutes a chattel mortgage for the security of Isaac

Wood's debt to the company, and that, as the chattel which was mortgaged—the insurance money—was in the state of Ohio, where a married woman may become surety for her husband, the law of Ohio must govern, and the assignment or mortgage must be held valid. The contention is based upon the clause in the assignment which undertakes to set over the policy, “and all sum or sums of money that may become due by virtue thereof,” etc. Counsel for appellant insist that chattel mortgages are governed by the same rules of interpretation as to their validity, nature, and obligation as contracts relating to and affecting the title of real estate;” and that the appellant, not having sought this forum to enforce the contract, but having been brought here by the appellee in invitum, “the appellee will not be allowed to use the courts of this state to enforce the policy against the defendant, and to repudiate her mortgage of that policy to the defendant.” If we should concede that the attempted assignment of the policy amounts to a mortgage on personal property in Ohio, and that the same law must be applied as if it were a mortgage on land in Ohio, and that the appellant is entitled to have the controversy settled by the interpretation of the courts of that jurisdiction, we apprehend the appellant would fare no better, for in a very recent case decided by the supreme court of that state it was held that a mortgage executed in Indiana by a married woman domiciled in this state, on real estate in Ohio, to secure an obligation as surety, to be performed in Indiana, where she is without capacity to make such a contract, is void in Ohio as well as in Indiana: *Evans vs. Beaver* (Ohio Sup.) 33 N. E., 643. But we need not decide what would be the proper rule if the transaction in question were a mortgage. It is not a mortgage, and the words quoted above do not stamp it with that character. In the written transfer itself it is denominated an “assignment” four times, and what it undertakes to do is to “assign, set over, and transfer” the policy. The appellee and her husband owned a chose in action represented by the policy. This chose in action was for money to become due in Ohio. We apprehend that, if a person residing in Indiana holds a note or claim against a citizen or corporation in Ohio, and attempts by indorsement to “assign, set over, and transfer” such note or claim “and all sums of money that may become due by virtue thereof,” it would hardly be claimed that this was a mortgage on the money to become due in Ohio; and that, although the transfer of the note might be void, so as to retain the legal title of the same in the assignor, yet an interest in the money in Ohio would be conveyed to the assignee. We regard the position of appellant's counsel that the attempted transfer of the policy, though

void as an assignment, is still valid as a chattel mortgage, as utterly untenable. It is the policy that constitutes the chose in action attempted to be transferred, and the situs of the policy is the domicile of the owner, and by the laws of the place where the transfer was made or attempted to be made the contract must be controlled: *Crouse vs. Insurance Co. (Conn.)*, 14 Atl., 82.

The third and last defense set up by the appellant is contained in the remaining paragraphs of the answer, and presents the question whether the company may, after failure of the insured to pay the premium, enforce its collection, and also insist upon a forfeiture of the policy, when the policy provides for a forfeiture upon failure to pay such premiums when due, and that the default in payment shall entitle the company to treat the premiums as earned. It is disclosed by the pleadings, and conceded in argument by appellant's counsel, that the premium note for the nonpayment of which the forfeiture is claimed was afterwards merged into a judgment taken by the company against Isaac Woods, in which other notes due the company for a loan were also involved, and that more than enough of the judgment to cover the note in question was subsequently made out of the said Isaac Woods' property which had been mortgaged to secure the same and said other notes, although it is averred in some of the paragraphs that the money collected was applied by the company to the payment of the loan. The parties doubtless had a right, by the insurance contract, to provide for a forfeiture of the policy by reason of failure to pay the premiums, or any of them. The appellant had the right to insist upon this condition in the policy, and to claim a forfeiture upon failure of the insured to comply with the same. But it is also the settled law that the right to insist upon a forfeiture may be waived by the insurer, and that such waiver may be manifested through the conduct as well as through the words of the insurer: *Insurance Co. vs. Tomlinson*, 125 Ind., 84, 25 N. E., 126. Forfeitures are not favored, and the law will be strictly construed to defeat them, although they will be upheld if the conditions underlying them are strictly complied with by the insurance company. In the present case the company had received the premium, had enforced its collection by suit when the insured died, for it is not insisted that the appellant had the right to apply the money realized on the foreclosure proceedings to the extinguishment of the \$2,300 loan, which was not yet due, in preference to the premium debt, then past due. The failure to declare a forfeiture was not a waiver, as the policy provides that, upon failure of the insured to comply with any condition in the policy, the same was to become null and void, without any action on the part of the company, or notice to the

insured or beneficiary. But we are of the opinion that the enforced collection of the premium after forfeiture, or what would have been a forfeiture, constituted a waiver, and this is true, we think, notwithstanding a provision in the policy that the premium thus collected should be considered as having been earned: *Insurance Co. vs. Custer*, 128 Ind., 25, 27 N. E., 124; *Insurance Co. vs. Tomlinson*, supra; *Insurance Co. vs. French*, 30 Ohio St., 240. From what we have said it must be apparent that our views of the law coincide throughout with those of the court below, and that, in our judgment, no error was committed in sustaining the demurrer to the several paragraphs of the answer. Judgment affirmed.

DAVIS, C. J.

I am not able to agree with the majority of the court in this case. Under the terms of the policy, and on account of the failure to pay the first-year annual premium, the policy became forfeited. The loan was thereupon made, by the terms of which a part of the money borrowed was applied to the payment of the annual premiums due and to become due, and in consideration of which the forfeiture of the policy was waived by the company. The policy expressly provides for the payment of the amount therein named, "the balance of the year's premium, if any, and all other indebtedness to the company, being first deducted." The rights of Mrs. Woods are subject to all the terms and conditions of the contract. It is the reasonable and fair presumption that the loan was made with reference to the provision above quoted. Justice and equity, under the circumstances disclosed in the answer, would seem to dictate that the balance only should be paid to her, after deducting the indebtedness. If the loan was not made in good faith in the due, ordinary, and regular course of business, a different question would be presented. It is a matter of common knowledge, of which courts will take judicial notice, that insurance companies make a business of loaning money. The words "all other indebtedness" referred to something other than unpaid premiums, in my opinion. In the line of legitimate business, I do not know what indebtedness could have been in contemplation of the parties aside from premiums and loans. The company certainly had the right to provide for the deduction of any unpaid premiums from the amount of the insurance, and I fail to see why such contract should not be made for the deduction of any loan which might thereafter be made to the insured by the company, in the usual and ordinary course of business. The hasty observations I have made are intended to apply only to the contract in question in the light of the facts and circumstances of this particular case.



## SUPREME COURT OF MISSISSIPPI.

JACOBS

vs.

NEW YORK LIFE INS. CO.\* }

1. An order sustaining a demurrer to a declaration, though not expressly dismissing the action, is a final judgment, and appealable, when leave to amend is not obtained during the term.
2. An insurance company is not liable where the application provides that there shall be no liability until it is approved and accepted, and the applicant dies pending its consideration.

On motion to dismiss appeal for want of jurisdiction in court.

MAYES & HARRIS, *for Appellant.*

J. S. SEXTON, *for Appellee.*

CAMPBELL, C. J.

The motion will be denied. The order, as entered on the minutes of the circuit court, sustaining the demurrer to the declaration, although not expressing that the action was thereby dismissed, was in substance and effect, a judgment that the plaintiff take nothing, and that defendant go hence without pay: 5 Am. & Eng. Enc. Law, 562. It is not the duty of the court to offer the plaintiff leave to amend when a demurrer is sustained to the declaration. If desired, it must be asked for, and, if leave to amend is not obtained during the term, the judgment is final, and the case disposed of, so that costs may be taxed, and an appeal may be prosecuted from the judgment as final. Motion denied.

## ON THE MERITS.

There is no escape from the plain stipulation of the contract "that, if said application is not approved and accepted, said company shall incur no liability thereunder," and the fact that said application was not approved and accepted, but the applicant died while the company was considering the application. It had incurred no liability and cannot be held bound as if it had. We have examined the cases cited for the appellant, but they fall far short of maintaining the liability of the company. The denial of all liability by the company, on the facts of this case, does not need the support of adjudications, and we have not examined any, preferring to rest with perfect confidence on the unmistakable meaning of the written agreement, which no number of books or extent of ingenious argument could change so as to create liability, except on the terms it expresses. Affirmed.

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\* Decision rendered, Feb. 19, 1894. From *Southern Reporter*.

## LOWER COURT DECISIONS.

### PLACE OF PAYMENT.—PROOF OF DEATH.—STATE LAWS.

*Court of Civil Appeals of Texas.*

MANHATTAN LIFE INS. CO.

vs.

FIELDS.\*

1. Where an insurance company, for a long time, notifies the insured to pay the premiums at a certain Texas bank, a clause in the policy requiring all premiums to be paid at the company's office in New York City is waived.
2. A tender of a premium to the bank on the day before it fell due prevents a forfeiture of the policy, though the bank has made an assignment, and its business is being carried on by its assignee, if the company has not notified the insured to cease paying to the bank.
3. In an action on a life-insurance policy, where there is no conflict in the evidence as to the death of the insured, it is not error for the court, in charging the jury, to assume that the death has been proved.
4. The laws of the state in which an insurance company is chartered apply to its contracts made outside the state.
5. Rev. St., art. 2953, which provides a penalty for a failure on the part of insurance companies to pay a loss within the time specified in a policy, is not unconstitutional, as being special legislation.

C. A. KELLER and LEO TARLETON, *for Appellant.*  
JAMES RALEY, *for Appellee.*

FLY, J.

Suit was instituted by appellee for \$1,250, claimed to be due for insurance on the life of her husband, Henry Fields, who was dead. The case was tried before a jury, and resulted in a verdict for appellee for the amount of the policy. We find the following facts from the record: (1) On the 9th day of October, 1888, appellant, in consideration of the quarterly payment of \$16.84 by Henry Fields, insured his life for \$1,250, there being a stipulation in the policy that the premiums must be paid in New York City. (2) All the premiums, by direction of the agent of the appellant, were, however, paid in San Antonio, Tex. All from October 9, 1889, up to and including October 9, 1890, were paid and received at the Maverick Bank, in San Antonio. (3) The last premium on the insurance policy before the death of Henry Fields became due January 9, 1891; and on the 7th and 8th of January, 1891, the premium was tendered to the Maverick Bank, the agent of appellant, but was not accepted. (4) No notice was given Henry Fields that the Maverick Bank was not the agent, still, of appellant; and there

\* Decision rendered, March 7, 1894. From *Southwestern Reporter*.

was no other person in Texas, known to Henry Fields, who was authorized to receive the premiums. (5) Henry Fields died on the 18th day of January, 1891; and satisfactory proof was made of his death, and demand made for the insurance money, payment of which was refused by appellant.

The petition alleges that the party insured, Henry Fields, had performed all the conditions of the policy, except the condition requiring payment of the premiums in New York, which condition had been waived by the insurance company. It also alleged that all the premiums had been paid at the Maverick Bank, in the city of San Antonio, which bank was the agent of appellant to collect premiums, save and except the premium due January 9, 1891, which had been tendered to said bank, when due, but was not accepted by the bank. The petition also alleges that the laws of New York, under which the insurance company was incorporated, require, before the forfeiture of an insurance policy on account of nonpayment of a premium can take place, that notice must be given the insured, not less than thirty days before the premium is due, stating when and where the premium must be paid, and that this notice had not been given. The petition is not open to the objections urged to it by appellant in the first and third assignments of error. The petition, on its face, shows a good cause of action. Appellant had for a long time been in the habit of notifying the insured to pay at the Maverick Bank, in San Antonio, and he had made his payments there. This action on the part of appellant was, to all intents and purposes, a waiver of the clause in the policy requiring the payment of premiums in New York; and, without a notice on the part of appellant that payment would be accepted in no other place but New York, the insured had the right to suppose that payments would be made at the usual place: *Greenwood vs. Insurance Co.*, 27 Mo. App., 401. It is provided by article 2943a, Sayles Civ. St., which became a law in 1879, that any person who shall receive or collect or transmit any premium of insurance shall be considered the agent of the insurance company for whom he acts. The Maverick Bank, being the collector for appellant, would be its agent, to whom a tender of the premiums could be properly made until the agency was revoked, and notice given of the revocation to the insured. A parol waiver of the stipulations in an insurance policy can be made, in the face of a stipulation that no waiver can take place without it being in writing. An insurance policy stands on no higher or more hallowed ground than any other contract, and is not like unto the laws of the Medes and Persians,—unchanging and unchangeable. If the parties to it evince a desire to waive and

set aside one or more of its stipulations, they have the power to do it: *Cohen vs. Insurance Co.*, 67 Tex., 325, 3 S. W., 296; *Insurance Co. vs. Brown*, 82 Tex., 631, 18 S. W., 731; *De Frece vs. Insurance Co.* (N. Y. App.), 32 N. E., 556; *Coburn vs. Investment Co.* (Minn.), 54 N. W., 373; *Stauffer vs. Insurance Co.* (Pa. Sup.), 24 Atl., 754. It would open up the avenue to fraud, in a ruinous shape, if the proposition were entertained that an insurance company could for years receive the payment of its premiums at a designated place, and then, all at once, without notice to the insured, withdraw the right to pay at any but a certain place. It would dig a perfect pitfall to catch the feet of the unsuspecting and unwary. Under the conditions existing, if no previous notice of a change were given by the insurance company to Henry Fields, the place of payment of the premium due on January 9, 1891, was at the Maverick Bank, in the city of San Antonio. The fact that the banker had made an assignment before that date was not a notice to Henry Fields that the premiums were not still to be paid at that place. The assignee is shown to have continued the business; and it is clearly shown that the bank was still open on January 9, 1891, and that payment was tendered there on the 7th and 8th of January. The last notice that S. H. Brown, the clerk of appellant in New York, sent out to Fields, was just like the others, and was sent to him in care of the Maverick Bank; and, while there is no absolute proof that Henry Fields received this notice, yet, if he had, it would not have given him any notice that the place of payment of the premium was changed. If Reinhardt sent the notice, as he swears he did, from Dallas, there is no proof that Fields ever received it; it having been directed to Fields, at San Antonio, without giving his street or number, and not in care of the well-known bank through which he had theretofore received his mail. It seems that Fields had lived for years at 211 Star Street, and this fact was known to Reinhardt. The question of whether the notice of change of place of payment was given was one of fact, for the jury to determine, and it was submitted to them under an appropriate instruction by the judge. Forfeitures are odious to the law, and it is only when the evidence is clear that there has been a failure to perform the stipulations of the insurance policy through or by reason of no fault or neglect upon the part of the insurance company that a forfeiture will be tolerated or permitted: *May, Ins.*, p. 434, § 361. When the place of payment designated in the policy was changed, as it was, undoubtedly, by accepting payment of every premium in San Antonio, the insured was not called on to take the money to any other place than the one designated in San Antonio. It is insisted by appellant

that when the money was not received by Menger, at the Maverick Bank, it should have been forwarded to New York. If it had been forwarded on that date, it would not have reached New York for several days; and, under the construction insisted on by appellant, the forfeiture would have already occurred. The money was forwarded to New York in a very few days after the 9th of January, and was refused because the policy had been forfeited by nonpayment on January 9, 1891. If a tender of the money at the usual place of payment did not prevent the lapsing of the policy, starting it to New York or Dallas could not have done it.

All of the assignments, up to the eleventh, are directed against the petition, but we consider none of them well taken. How the pleading in regard to the statute of New York could have in any way injured appellant, when proof of the statute was not permitted, cannot be readily understood. We are of the opinion, however, that the laws of New York would apply to contracts made by insurance companies chartered under its laws, whether the contracts be made in New York, or any other state of the Union: *Rue vs. Railway Co.*, 74 Tex., 475, 8 S. W., 533.

There was no conflict whatever in the testimony about the death of Henry Fields, and it was not improper for the court, in its charge, to assume that the death had been proved.

The twelfth and thirteen assignments of error are hypocritical and untenable. The fourth paragraph of the charge, which is criticised, we believe to be the law of the case, and, under the facts of the case, could in no manner have resulted in injury to appellant. The date when the premium became due, and must be paid, was January 9th; but this was a date fixed for the convenience of the insured, and the tender of the premium on the 7th and 8th, we think, was sufficient. In the letters declaring the policy forfeited, it was placed on the ground that the premium had not been paid, and not because it had been tendered before January 9th, and there is no pleading setting up any such defense. We are of the opinion that the charge made a fair presentment of the case to the jury, and there was no error in refusing the charges requested. It becomes unnecessary to notice the cross assignments of error. The facts were before the jury, and the contested points being fairly presented to them, and there being testimony to sustain the verdict, we do not feel disposed to disturb the judgment. It is affirmed.

ON REHEARING.

(May 2, 1894.)

The petition is now subject to the exceptions urged, but, in view of another trial, we suggest a more specific allegation as to where,

when, and to whom the tender of the premium was made. The allegations should clearly show that the tender was made to the person to whom payment was usually made, and that he still had control of the bank, at the same place.

There can be a waiver of the requirement that the premiums should be paid in New York, and the waiver can be shown by circumstances: *Greenwood vs. Insurance Co.*, 27 Mo. App., 401; *Insurance Co. vs. Brown*, 82 Tex., 631, 18 S. W., 713; *Cohen vs. Insurance Co.*, 67 Tex., 325, 3 S. W., 296.

When a letter is properly addressed, prepaid, and mailed, the presumption will be that the person to whom it was written received it, if there is a mail delivery, and the person to whom the letter is written has a settled business address, but this presumption is, of course, subject to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case: *Whart. Ev.*, § 1323. The question of delivery was a question of fact, and was properly presented to the jury by the charge in this case.

The printed statutes of New York, purporting to have been issued under the authority of that state, should be received as evidence: *Sayles' Civ. St.*, art. 2250; *Moseby vs. Burrow*, 52 Tex., 396.

The laws of New York would apply to contracts made by insurance companies chartered under its laws, whether the contracts were made in New York, or any other state of the Union: *Rue vs. Railway Co.*, 74 Tex., 475, S. S. W., 533.

Appellee presents a motion for rehearing, in which it is insisted that this court pass on a cross assignment which presents the question of the constitutionality of article 2953 of the Revised Statutes, which provides a penalty for a failure on the part of insurance companies to pay a loss within the time specified in the policy. This statute was held unconstitutional by the district court. The law does not belong to the class of special laws denounced by the constitution: *Railway Co. vs. Ellis* (Tex. Sup.), 18 S. W., 723; 3 Am. & Eng. Enc. Law, p. 697. Laws similar to this, in providing penalties for failure of a duty enjoined, have never been questioned in this state: *Rev. St.*, arts. 4840, 4843. Appellees should have been permitted to prove what was a reasonable fee in the case, and, in the event of a recovery of the insurance money, should recover 12 per cent damages on the same, together with the attorneys' fees. For the error of the court in excluding testimony in regard to attorneys' fees, and in holding article 2953 of the Revised Statutes unconstitutional, the judgment will be reversed, and the cause remanded.

## MISCELLANY.

Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### ACCIDENT LLOYDS DEFINED.

In *State ex rel. Richards, Atty.-Gen'l. vs. Ackerman*, in the Supreme Court of Ohio, Mar. 13, 1894, it was held that the Guaranty & Accident Lloyds, New York, as organized, consisting of C. F. Ackerman and ninety-nine other persons, transacting the business of guaranty and accident insurance in Ohio under the above name, were unlawfully exercising a franchise within the meaning of subdivision 1 of section 6760 of the Revised Statutes, and were acting as a corporation within the meaning of subdivision 3 of that section; and that under either count they may be ousted from transacting the business of insurance within the state of Ohio.

### LAWS OF SISTER STATES.

The Supreme Court of Washington, Mar. 13, 1894, in the case of *Wood et al. vs. Cascade F. & M. Ins. Co.*, held that the laws of the state of New York making null and void all policies issued to residents of that state on property therein by companies that have not complied with the laws of New York were effective in Washington, and the policy of the Cascade Co., although duly signed by its president and secretary and countersigned by its general agent in Chicago, but procured by an unauthorized agent or broker in New York, was void.

### IRON HALL.

John Fawcett brought suit against The Supreme Sitting of the Order of the Iron Hall for the appointment of a receiver for the property of defendant in Connecticut. In the decision of this case, the Supreme Court of Errors of Connecticut, Mar. 6, 1894, in the case entitled *Fawcett vs. Supreme Sitting of the Order of Iron Hall*, developed several interesting points as follows:—

1. A corporation, one of the objects of which was to establish a benefit fund from which members of its local branches might receive a sum not exceeding \$1,000 at the end of seven years, including payment for sickness in the meantime, issued certificates to such members as elected to participate in such fund, agreeing to pay a sum not exceeding \$1,000, in accordance with the laws of the corporation. These laws provided for the payment of assessments by the members, to be collected by the local branches, which should at once forward 80 per cent thereof to the corporation, and keep the remaining 20 per cent as a reserve fund, and, after it had accumulated for a certain time, send one-seventh of it each year to the corporation, to be used in payment of benefits. *Held*, That though the contract of the member was with the corporation, and though the reserve fund held by the branches was to be used for the payment of certificates as they matured, without regard to the particular branch to which the holders belonged, still, the corporation having become insolvent, and a receiver being appointed of all its estate, by a court of the state under

which it was incorporated, the courts of this state are not bound to turn over to him the reserve funds held by the branches in this state, and which have been given to a receiver of the corporation's property in this state, but, the foreign receiver having claimed the fund for distribution among general creditors of the corporation, without any distinction in favor of certificate holders, and the certificate holders of this state having elected to treat their contracts as rescinded and demand a return of what they had paid thereon, the fund should be retained and distributed among them, though the corporation was entitled to do business in this state, and there was no fraud in its original purposes or in its dealings in this state.

2. Where a corporation issues certificates providing that the holder shall be entitled to receive from its benefit fund a sum not exceeding \$1,000, in accordance with its laws, which provide that members may participate in its benefit fund to an amount not to exceed \$1,000, to be paid at the end of seven years, on payment of \$2.50 on each assessment, but does not make provision as to the number of assessments that shall be made, it cannot be said as a matter of law to be guilty of fraud, in offering more than its assessments justify, though it uses a seal with the figures "\$1,000" and the words "in seven years."

3. A corporation, with an insurance feature consisting of the participation in a benefit fund by those members of its local branches who pay assessments, whose constitution declares "secret work" to be one of its functions, and whose branches are to meet with a "watchman" at the outer and a "vidette" at the inner door, is within Gen. St., § 2903, excepting every "secret or fraternal society" from the prohibition of section 2892 against the doing of business within the state, without authority from the insurance commissioner, by foreign corporations organized for the purpose of furnishing insurance on the assessment plan.

#### BENEFIT ASSOCIATION.—DISTRIBUTION AMONG MEMBERS.

Where the members of a benefit association receive certificates, maturing in twenty-eight years, binding each member to continue his certificate in force for that time, and to pay any assessments that may be made, and providing that, if the member shall comply with all the requirements of the association, he shall, at the end of three and one-half years from date of his certificate, receive a sum not exceeding one-eighth of the sum mentioned therein, and shall, at the end of each succeeding three and one-half years receive a like amount, the funds of the association, on its making an assignment four years after organization, will be distributed among the members in proportion to the amounts paid in by them, though a part only of the certificates have run three and one-half years. This was the decision of the Supreme Court of Pennsylvania, Feb. 12, 1894, in re Order of Fraternal Guardians' Estate; appeal of Sheeler et al.

#### WAIVER OF DOCTOR'S CERTIFICATE.

While mutual benefit associations are in some respects unlike insurance companies there is every reason for holding them to the rules applicable to notice and proof of loss under ordinary insurance policies. Where an association retains without objection an application for sick benefits, accompanied by proofs of disability, it waives verification of the physician's certificate: *Stambler vs. Order of Pente*, Supreme Court of Pa., Jan. 22, 1894.

#### BENEVOLENT SOCIETIES.—POWERS OF SUBORDINATE LODGE.—APPROPRIATION OF FUNDS.

A subordinate lodge of an order, the aim of which is "to unite fraternally all acceptable persons," may appropriate, for the support of a lodge to be organized under the same jurisdiction, part of a fund raised among its members by contribution, out of which its general expenses and sick benefits are pay-



able, if such appropriation is not prohibited by its by-laws or the general laws of the order. Such was the decision of the Court of Chancery of New Jersey, Feb. 26, 1894, in the case of *Lady Lincoln Lodge vs. Faist et al.*

#### RECOVERY OF PREMIUMS.

In the case of *Ward vs. Tucker* in the Supreme Court of Washington, 1894, the following five points were made:—

1. Where it is the custom for marine insurance brokers to buy the insurance and deliver policies to the insured on their own account, a broker can recover of the insured the premiums on policies procured by him, though he has not paid such premiums to the insurer.

2. Where a marine insurance broker in the state of Washington procures for a customer insurance in a foreign state and country, recovery of the premiums cannot be defeated because the insurers are not authorized to do business in Washington.

3. In an action to recover premiums on insurance policies, the burden is on defendant to show that the policies were not what they purported to be.

4. An insurance broker may recover of the assured the expense of the telegrams relating to the insurance sent at the latter's request, without proof that they were received by the parties to whom they were sent.

5. Where premiums are payable in English money, a witness may testify as to the result of calculations made by him to find the equivalent in money of the United States.

#### HEIRS.—STATUTORY.

Under the statute laws of New Jersey "heirs" are those who under the statute of distributions are beneficially entitled to the personal property of the assured. These include the widow as well as the children. This rule applies to wills, and in the case of *Leavitt et al. vs. Dunn*, in the New Jersey Court of Errors and Appeals, Feb. 26, 1894, it was made to apply to life insurances also.

#### OLD MARINE DECISIONS.

During the summer and fall of 1888 the District and Circuit Courts of New York passed upon a number of marine cases of which we give the following brief sketches:—

*La Scala et al. vs. The Serapis. La Scala et al. vs. McIntyre et al.* District Court, E. D. New York. July 27, 1888.

1. SHIPPING—CHARTER-PARTY—AGENT'S COMMISSION. Where a ship's charter provided that the steamer was to be consigned to charterer's agents at ports of loading, paying one commission of 2½ per cent to charterer's order at the first loading port, and to be reported at the custom house by the said agents on customary terms, *held*, the agents were not entitled to a commission at a port of discharge.

2. ADMIRALTY—PRACTICE—MOTION TO DISMISS LIBEL—HEARING—EVIDENCE. Where a motion to dismiss a libel is heard without objection, and the charter-party is presented to the court and commented on by counsel, no question being raised as to its terms, and is also referred to in the answers to the interrogatories, libelants are not entitled to have the question determined according to the allegations of the libel, irrespective of the provisions of the charter-party.

*The Steamship Samana vs. The Erin.* District Court, E. D. New York. October 15, 1888.

SALVAGE—DISABLED STEAMER—DANGEROUS CURRENT—TOWAGE—VALUES—AWARD. The steamship *E.*, when about fifty miles north of the east end of the island of Cuba, lost her propeller key, and was thus deprived of motive power. The weather was fine, and the vessel was in the track of ships, but there was not

wind enough to enable her, by her sails, to stem a current which there sets towards the rocky coast at the rate of one to two and a half knots an hour. A signal of distress, set by the E., was observed by the steamship S., which altered her course, and bore down to the E., and the masters of the two vessels entered into an agreement in writing that the E. should be towed into port, and the compensation left to the agents of the vessels, either at New York or Boston. The S. thereupon put out a hawser to the E., and with some difficulty towed her safely to her destination, a distance of two hundred and forty miles. The S. was not damaged in any way by the towage, but was delayed one day in her arrival at her destination. Her value was \$50,000. The E. with her stores was worth \$26,000. The claimants of the E. offered \$1,000 as compensation for the service, claiming that it was simple towage. *Held*, That the service was a salvage service, and \$4,000 a proper salvage award.

*Deyo et al. vs. The Oswego et al.* Circuit Court, S. D. New York. October 15, 1888.

**COLLISION—EVIDENCE—SUFFICIENCY.** A hole was stove in the side of libelants' canal boat, when she was laid alongside of the bulkhead, East River. The libelants, without offering direct evidence, contended that the hole was caused by a blow from the Oswego while backing in, by a stroke from her fenders while both boats were lying alongside. Several other theories were within the possibilities. Three witnesses testified with great positiveness that the Oswego did not touch the canal boat, nor even come near enough to her to admit of using the rope fender which one witness had in his hand. *Held*, That the finding of the district court would not be disturbed, and the libel should be dismissed.

*New Haven Steamboat Co. vs. The Mayor, etc.* District Court, S. D. New York. October 3, 1888.

1. **COLLISION—MEASURE OF DAMAGES—SURVEY AND SUPERINTENDENCE.** The cost of surveying the injuries done to a vessel by collision, and of superintending the repairs, when necessary to the economical prosecution of the work, is allowable as an item of the collision damages. A superintendence on behalf of the libellant and a separate superintendence in the interests of the insurer are, however, unnecessary, and the charge for but one will be allowed.

2. **SAME—DEMURRAGE—SPARE BOAT—AMENDMENT OF LIBEL.** A ship owner is entitled to demurrage for the period during which his boat, injured by collision, is being repaired, though a spare boat, belonging to the same owner, is used as a substitute during the detention. Amendment of libel to increase claim for demurrage denied, when the facts were known, and the claim as pleaded had been twice before verified on oath, and the amendment was not asked till after trial and apportionment of damages.

3. **SAME—WAGES OF CREW.** The wages of crew, necessarily kept on the injured vessel while she is repairing, are also part of the damage.

*L'Hommedieu vs. The Carondelet.* District Court, E. D. New York. November 13, 1888.

**SALVAGE—STEAMSHIP AT WHARF—BURNING LIGHTER—TOWAGE INTO STREAM—TENDER.** A steamer was lying at a wharf, with steam up, when a lighter near by caught fire. A tug, at the request of the master of the steamer, took her into the stream, and held her there until the burning lighter had been removed, when she took her back to the wharf; the whole service occupying an hour and a half. Fifty dollars was tendered by the steamer as compensation for the service. *Held*, That, while the service was a salvage service, the peril of the steamer had been so small that \$50 was a sufficient compensation; that libellant should therefore have a decree for the \$50 paid into court, and costs up to that time.

*Heye vs. North German Lloyd.* Circuit Court, S. D. New York. November 14, 1888.

**SHIPPING—GENERAL AVERAGE—BAGGAGE.** A passenger's baggage, stowed in the baggage compartment of a steamship, and damaged by water in an attempt

to extinguish a fire which threatened the safety of the vessel, is a subject of average contribution.

Bonanno vs. The Boskenna Bay. Graziano vs. Same. Mirto vs. Same. Westervelt vs. Same. Saitta vs. Same. Mercadante vs. Same. Sgobel et al. vs. Same. Foti vs. Same. District Court, S. D. New York. November 24, 1888.

1. SHIPPING—CARRIAGE OF GOODS—GREEN FRUIT—FROST—DELIVERY—NOTICE. Previous rulings in The Boskenna Bay, 22 Fed. Rep., 662, followed.

2. NAME—BILL OF LADING—STIPULATION. The provision of the bill of lading that the ship may discharge fruit when she is ready, and that the goods shall thereafter be at the consignee's risk, is a reasonable stipulation, and valid, so far as to permit the discharge of so much green fruit as can be removed by the consignee during the day out of danger from frost at night, providing the consignee is given timely notice of the discharge and opportunity to take care of his goods; not otherwise.

3. SAME. On further hearing in behalf of the above libelants, upon satisfactory proof that five of them had such timely notice, *held*, ship not liable for damage to their goods by frost during the night following the discharge; as to the three others, no such proof appearing, the ship was held liable.

Kainer et al. vs. The Bergenseren et al. District Court, S. D. New York. November 22, 1888.

SHIPPING—CARRIAGE OF GOODS—PERILS OF THE SEA. Provisions stowed in a water-ballast tank were found damaged in several feet of water, which had made its way into the tank either by some improper opening of the water pipe that led to the tank, or else through an empty rivet hole in the bulkhead communicating with the fire room. The passage was stormy; but, it being found that the accumulation of water in the fire room arose mainly from the inexperience and mistake of the second engineer in charge, *held* that, even if the water in the tank came through the rivet hole, as the defendants contended, the ship was liable, both for the latent defect of the rivet hole, having reference to its relation to the stowage of cargo, and for the inexperience and mistake of the second engineer; neither being sea perils within the exceptions of the bill of lading.

Hills et al. vs. Mackill et al. District Court, S. D. New York. November 24, 1888.

1. SHIPPING—CARRIAGE OF GOODS—NEGLIGENT STOWAGE. It is the ship's duty to take all the precautions that experience shows to be necessary to avoid injuries to cargo liable to arise on the voyage. If the best customary means are not employed, it is at her risk.

2. SAME—MOVABLE BULKHEADS—COAL DUST. On a voyage from Messina, filberts in bags were stowed against a movable wooden bulkhead separating the compartment from the coal bunkers, through which an extraordinary amount of coal dust penetrated, and injured the nuts. The bulkhead was covered by Chinese matting, which is often used for such purposes; but canvas is equally used, and is better, because tighter. *Held*, That coal dust is not a sea peril, and that the ship was liable for the damage, for not using canvas as the best protection, as well as for putting the bags next to the bulkhead, instead of other cargo less liable to be injured.

3. SAME—DUTY OF CONSIGNEE—OVERHAULING DAMAGED CARGO. Consignees are not bound to overhaul and repair damaged goods for the ship's benefit, rather than sell them at auction as damaged goods, where the ship's agents have opportunity to do the same work.

Windmuller et al. vs. The Thomas Melville et al. Circuit Court, S. D. New York. October 15, 1888.

1. SHIPPING—CARRIAGE OF GOODS—INJURIES TO CARGO—PLEADING AND PROOF. Upon a libel for damage alleging "that by reason of the neglect and failure of the said master \* \* \* to properly stow the said merchandise, and of the improper, unsafe, and unseaworthy condition of the said steamer, and by

want of proper care of the said master, \* \* \* and by reason of the improper and insufficient dunnage of the merchandise, and the unsafe and leaky condition of the deck of said steamer, on said voyage, the said merchandise was damaged," no recovery can be had for damage by coal dust not resulting from improper stowage.

2. ADMIRALTY—APPEAL—REVIEW. Where the evidence is conflicting, and no new evidence is introduced, the circuit court will not, on appeal of a libel for damage, review the finding of the district court.

#### REGISTERED TONNAGE.—BREACH OF WARRANTY.

In the old case of *Reck vs. Phoenix Ins. Co.*, N. Y. Supreme Court, Gen'l Term, First Dept., Nov. 7, 1889, a vessel, formerly an American ship, was registered at the New York Custom House, with a tonnage of 916 $\frac{1}{4}$  tons. It was afterwards placed under the Hanoverian flag, and registered at 792 tons. When lost it was carrying 901 tons. *Held*, That the warranty referred to the tonnage which appeared on the papers under which it was then sailing, and not to the tonnage contained in a register which had been abandoned, and as she was carrying more than the register at the home port the warranty was broken.

The words "registered tonnage," as used in a warranty against overloading, refer to the number of tons of weight which the ship could carry as entered upon the official records at her home port as her tonnage.

#### LOANS.—BONUS.—USURY.

In *Washington Life vs. Lane et al.*, in the New Jersey Court of Chancery, April 15, 1889, it was held that the taking of a bonus for a loan from the borrower by the lender's agent without the lender's knowledge or participation, does not render the loan usurious. Also, that a condition precedent that a borrower shall take out a policy with the lender is valid. This case was appealed by Lane and the N. J. Court of Errors and Appeals affirmed the decision unanimously, Feb. 20, 1890.

#### WORK UPON BUILDING.

In an action upon an insurance policy on an unfinished house, the property was described in the policy "to be occupied as a residence when completed." It further provided in consideration of a further premium "permission is hereby granted to mechanics to work in and around the building for ninety days from date." It also provided that such working would vitiate the policy, unless permission was endorsed in writing upon the policy. The insured was himself a carpenter, and worked upon the building far beyond the ninety-day limit. *Held*, That the latter time governed and there could be no recovery. *Theodore V. Smith, Adm'r, Respondent, vs. German-American Ins. Co., Appellant.* N. Y. Supreme Court, Gen'l Term, Third Dept. Filed Dec. 11, 1889.

#### SALE OF MUTUAL BENEFIT CERTIFICATES.—WILLS.

In *Stoelker vs. Thornton et al.*, Supreme Court of Alabama, Nov. 7, 1889, the following points were made:—

1. Where the rules of a mutual benefit society forbid the transfer of its benefit certificates for a valuable consideration, a contract for the sale of such certificate to one who has no insurable interest in the life of the assured is void under that rule, as well as being against public policy.

2. Though such a sale be against public policy, that, as a matter of contract right, is a question between the society and the purchaser, and, where the society recognizes its validity by issuing a new certificate, in which the pur-

chaser is named as the beneficiary, and upon the death of the assured pays the money due under the certificate to such purchaser, no stranger or volunteer can assail the validity of the payment.

3. As the benefit of policies of life insurance may be freely disposed of by will, a will making such disposition, being valid in other respects, is in no wise affected by the fact that it effects the result attempted to be carried out before its execution by illegal contracts for the sale of such policies.

#### INDUSTRIAL INSURANCE REINSTATEMENT.

In *Anderson vs. John Hancock Mutual Life Ins. Co.*, City Court of Brooklyn, Nov. 15, 1889, it was held that a verdict below in favor of plaintiff would not be disturbed where collector had for a long time neglected to call for the premiums on a child's policy and the mother went to the office of the company's agent and paid up in full to date. She signed a paper which she supposed was a receipt for the money but which was not read or explained to her as being a certificate that the child was in good health when in point of fact the child was sick, but she did not read or write English and was ignorant of the contents of the paper.

#### MUTUAL BENEFIT.—REINSTATEMENT.—WAIVER OF PROOFS.

In *Millard vs. Supreme Council Amer. Legion of Honor*, Supreme Court of Cal., Nov. 29, 1889, the cause was an action by the beneficiary, on a certificate of mutual-benefit insurance: The court found that at the time when the certificate was issued to decedent he had become a member of the association, and had complied with all its requirements; that members could only know of the levy of an assessment by notice served on them; that decedent, on the day he was notified of his suspension for nonpayment of a delinquent assessment, of which he had had no notice, paid the same, and all prior assessments due, and a subsequent one which had not yet become delinquent; that thereafter, when all assessments had been paid, and accepted by the association, decedent gave notice of the substitution of plaintiff for the original beneficiary, in the regular manner; that only one meeting having taken place since decedent's suspension, at which no action was taken in reference thereto, he was not reinstated into full membership until shortly after this notice and shortly before his death. *Held*, That there was a sufficient finding that decedent was a "member in good standing" at the time of his notice.

The beneficiary was not required to furnish proof of death by the certificate or by-laws, the former merely requiring "satisfactory evidence of the death of said companion," and proof of death was required to be furnished to the supreme council only by the council of which decedent was a member. *Held*, That a finding of satisfactory proof of death by the beneficiary was immaterial, and had been waived by defendant in denying all liability on the certificate.

#### MARINE.—NEGLIGENCE OF INSURED.—POLICY EXEMPTIONS.

In the case of "*The Ontario*," in the U. S. District Court, E. D. Michigan, Jan. 2, 1889, the court furnished the following synopsis:

Under a marine policy exempting the underwriter from liability for "all perils, losses, misfortunes, or expenses consequent upon or arising from, or caused by, . . . the want of ordinary care and skill in navigating said vessel," the insured cannot recover general average expenses incurred in rescuing the vessel from a peril brought about by negligence in her navigation.

Where a vessel was negligently run ashore, and, a storm coming on, was voluntarily scuttled to save her from total loss, and other general average expenses were subsequently incurred, *held*, that the stranding, and not the storm, was the proximate cause of the loss.

## DEMURRER.—PLEADING.

Pierson et al. vs. Springfield F. & M. Ins. Co., Superior Court of Delaware, November, 1885.

1. A demurrer, in whatever stage of the pleadings it is taken reaches back in its effect through the whole record, and in general attaches ultimately on the first substantial defect in the pleadings on whichever side it may have occurred.

2. In an action on an insurance policy conditioned on notice and proofs of loss being given by insured, and payable sixty days "after" the notice and proofs of loss are received by insurer, a complaint which fails to show that notice and proofs of loss were served sixty days before commencement of the action is demurrable.

3. Such defect is not cured by pleading over, though the complaint alleges that plaintiff has complied with all the conditions of the policy.

## FINALITY OF A DECISION.—CORRESPONDENCE OF BROKERS.

In the Supreme Court of Illinois, May 15, 1885, in the case of the Sun Mut. Ins. Co. vs. Saginaw Barrel Co. it was decided that even where there is no conflict in the testimony, the decision of the Illinois Appellate Court is final as to questions of fact.

Where, in an action on an insurance policy, the question at issue is whether certain insurance brokers were authorized to receive payment of a certain premium for the defendant company, the correspondence between said brokers and the company is admissible in evidence for the purpose of showing their previous relations and methods of doing business with each other.

## ASSIGNMENT OF FIRE POLICY.

In Lynde vs. Newark Fire Ins. Co., Supreme Judicial Court of Mass., Feb. 27, 1885, it was decided that the policy by its terms prohibits a transfer as collateral security for a debt, even though the insured property be mortgaged; and the assignee cannot recover.

## WIFE CANNOT ASSIGN.—FATHER CANNOT ASSIGN A PAID-UP.

In the old case of Pratt et al. vs. Globe Mutual Life, decided by the Supreme Court of Tennessee, Nov. 6, 1875, the following points were made:—

1. Under Acts N. Y., 1840, which provide that, in case the wife survive the husband, the amount payable to her by the terms of an insurance policy shall be payable to her for her own use, free from all claims against the husband, a wife cannot assign to a creditor of the husband her interest in a paid-up insurance policy running to the benefit of herself and children.

2. A father, as guardian of his children, cannot assign a paid-up insurance policy running to their benefit.

3. Where a contract of assignment of an insurance policy is consummated in New York, and the assignors reside in Tennessee, the *lex loci contractus* governs.

1897.]

*Commercial Union Ass'e Co. wa. Norwood.*

377

*Miscellaneous Decisions.*



## SUPREME COURT OF KANSAS.

COMMERCIAL UNION ASSURANCE CO. }

vs. }

O. F. &amp; E. R. NORWOOD.\*

1. A provision in a policy of insurance that "this entire policy unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," is valid and enforceable when not waived or abrogated in any manner.
2. Where there is endorsed on a policy containing such a provision, written consent for the procurement of a stated amount of additional insurance, the procurement of insurance in excess of the amount authorized will void the policy.
3. Where such a policy of insurance is endorsed with permission for \$32,500 additional and concurrent insurance, and other insurance to the amount of \$35,800 is taken out, \$16,000 of which was procured after the date of the policy in controversy, and all in force at the time of the loss, it is incompetent for the purpose of avoiding the forfeiture of the policy to show a parol agreement between the agent of the insurance company and the insured made prior to the date of the policy that the assured should be permitted to carry policies to the amount of \$40,000, such evidence being solely for the purpose of varying the terms of the written contract, made in pursuance of the prior agreement.

Statement of facts by ALLEN, J.

This action was brought by O. F. and E. R. Norwood, partners, against the Commercial Union Assurance Co., Limited, of London, England, on a \$2,500 policy of insurance on a stock of merchandise in Larned, Kan. Attached to the plaintiffs' petition is a copy of the policy, which contains this provision:—

This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.

A copy of the proofs of loss, furnished by the plaintiffs to the defendant, was also attached to the petition, from which it appears that a slip was attached to the policy, reading as follows:—

\$32,500 additional insurance allowed in form and concurrent herewith. This slip is attached to and forms a part of Policy No. 100,115, of the Commercial Union Assurance Co., of London, England. Larned, Kan., Nov., 1891.

J. H. Ormaudy, Agent.

The proofs also show that at the time of the fire there was other insurance on the property to the amount of \$35,800 under thirteen policies issued by other companies at various dates from October 1,

\* Decision rendered, Jan 11, 1897. Syllabus by the Court.

1892, to January 26, 1893. The property was totally destroyed by fire on the 7th of February, 1892.

The defendant answered, alleging for a third defense, that the policy contained the provision above copied, and averred that the amount of concurrent insurance was expressly limited by the endorsement on the policy to \$32,500; that the plaintiffs procured other insurance in excess of the amount permitted, and that the policy was thereby rendered void. To this answer the plaintiff replied "that they contracted with the agent of the defendant, authorized by the defendant so to contract, for said insurance under a statement and agreement made at the time and concurrent with said contract and a part thereof; that the total insurance, including the policy issued by the defendant, upon the property insured of the plaintiffs, should amount in the aggregate to the sum of \$40,000; and that the policy of the defendant to be issued to the plaintiffs should contain an agreement for such additional and concurrent insurance as that the policy to be issued by the defendant would amount in the aggregate to the sum of \$40,000; and, that thereafter, and upon the receipt of said policy, the plaintiffs, relying upon said contract and agreement so made as aforesaid, received and accepted said policy from the defendant upon the belief that said agreement had been fully carried out, and that said policy permitted concurrent and additional insurance so as aforesaid agreed upon, and so relying on such contract and agreement the plaintiffs wholly neglected and failed to read said policy until after the occurrence of the fire, which destroyed the property covered thereby; that, by reason thereof, and of the facts aforesaid, the defendant ought not now to be permitted to assert as a defense in this action the facts set forth in the third defense contained in said answer, for that it is estopped to deny its liability on the grounds and for the reasons therein stated."

The defendant demurred to this part of the reply, which demurrer was overruled. The case was tried to a jury. O. F. Norwood, one of the plaintiffs, testified that in the fall of 1890, he purchased the stock of goods, and made arrangements with Mr. Ormandy and Mr. Charles for insurance on them to the amount of \$40,000, and that he took out policies to that amount running for one year.

Q. This policy is dated 21st of November, 1891. Prior to that time what, if any, talk had you with Mr. Ormandy—this same man who signed this policy—as to insurance from that fall on, or from the time your other policies expired, which had been taken out in 1890? A. Mr. Ormandy came into the store, and wanted to know about the insurance; he came into the store and wanted to know if

he could have the insurance again, and I told him he could; and I wanted permission to carry \$40,000 of insurance on the stock.

Q. What further was said about how much he was to carry, or how much anyone else was to carry? A. I asked him then, after Smith had been there to see me, I asked him whether we had better let Smith have \$10,000, and he said, Very well, let him have \$10,000.

Q. What amount did he say he would take, if any? A. \$30,000.

Q. What arrangement, if any, was made as to how these policies were to be issued by him? A. I told him I wanted him to scatter them out, so as not to let the premiums all come due at once. I told him I wanted the premiums to come due in, say two, three and four weeks, such like, so I wouldn't have the premiums to pay all at once.

Q. You may state if he delivered you any policy of insurance afterward. A. Yes, sir, he did.

Q. State from whom you received this policy in suit. A. J. H. Ormandy.

Q. You may state whether at the time you received it, you read its terms and conditions or not. A. I did not.

Q. You may state what you did with it when you received it. A. I put it in the safe with some others that I had there.

Q. When you told Mr. Ormandy that you wanted \$40,000 of insurance for the succeeding year in the fall of 1891, what did he say about writing that much insurance on the stock? A. He said that we could have it; that he would make the policies out to that effect; that we should be permitted to carry the \$40,000 on the stock.

Q. You may state if you knew at the time you received this policy that the policy, by its terms, limited the concurrent insurance to \$32,500. A. No, sir, I did not.

He further testified that he had no further conversation with Ormandy with reference to the amount of insurance, and that Ormandy brought in the policies from time to time, and that he thought he got ten policies through him.

The jury were instructed that if they found that Ormandy was the general agent of the company, and that the plaintiffs had no notice of any limitation on his authority, "that if the said Ormandy agreed with the plaintiffs to issue to them policies of insurance to the extent of \$30,000 upon the property covered by the policy in controversy, and that such policies should show the right to have the total insurance upon such property to the amount of \$40,000; and if you should further find that pursuant to such agreement the policy in question was issued, and that plaintiffs received the same without knowledge of the fact that the additional insurance provided therein was limited to an amount much less than the amount

of insurance upon said property; and that they, relying on said agreement, received said policy, and paid the defendant, through its said agent, Ormandy, the premium charged, then and in such case you are instructed that the fact that there was \$37,500 of a total insurance upon the property covered by said policy, would not avoid said policy, notwithstanding the conditions therein contained."

The jury rendered a general verdict in favor of the plaintiffs for the full amount of the policy, and also returned answers to special questions, finding, among other things, that the value of the goods destroyed was \$50,000; and that the total amount of insurance, at the time of the fire, was \$38,300.

Judgment was entered on the verdict, and the defendant brings the case to this court.

SYLVESTER G. WILLIAMS and ELRICK C. COLE, *Attorneys for Plaintiffs in Error.*

C. N. STERRY, W. H. VERNON and GEORGE W. FINNEY, *Attorneys for Defendant in Error.*

Opinion of the court by ALLEN, J.

The pleadings, evidence, and instructions in this case squarely present the question, whether a prior parol agreement made with the general agent of an insurance company concerning the amount of concurrent insurance to be carried on the property insured, controls and defeats the express terms of the policy. It appears, without dispute, that one of the conditions of the policy was, that it should be void if the insured should procure any other insurance on the property without the consent of the insurer, and that consent was endorsed on the policy for \$32,500 only, of concurrent insurance. The prior parol agreement with Ormandy, with reference to the total amount of insurance to be carried on the property, and the fact that the plaintiffs had neglected to read the policy before the fire, are alone relied on to avoid the condition above mentioned. There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements is inadmissible to contradict or vary the terms of a written contract: *Drake vs. Dodsworth*, 4 Kan., 159; *Cornell vs. Railway Co.*, 25 Kan., 613; *Brenner vs. Luth*, 28 Kan., 581; *Hopkins vs. Railway Co.*, 29 Kan., 544; *Wind Mill Co. vs. Piercy*, 41 Kan., 763; *Willard vs. Ostrander*, 46 Kan., 591; *Safe and Lock Co. vs. Huston*, 55 Kan., 104.

Provisions in policies of insurance providing that the policies shall be void if other insurance be taken without the consent of the in-

surer are valid: 2 May on Insurance, § 364. And subsequent insurance, taken out without the consent, either expressed or implied, of the insurer, avoids the policy: *Allen vs. Insurance Co.*, 31 American Reports, 243; *Funk vs. Insurance Ass'n*, 29 Minn., 347; *Bard vs. Insurance Co.*, 153 Pa. St., 257. And taking insurance in excess of the amount consented to avoids the policy: *Allen vs. Insurance Co.*, 123 N. Y., 6; *Union National Bank vs. German Ins. Co.*, 71 Fed. Rep., 475. Counsel for the defendant in error do not question these propositions, but they insist that the company had notice of the intention to take out insurance to the amount of \$40,000, and expressly assented thereto, and that it is estopped from denying liability by the parol agreement made with Ormandy, as agent. The cases of *American Central Ins. Co. vs. McLanathan* (11 Kan., 549); *Continental Ins. Co. vs. Pearce* (39 Kan., 396); *Home Ins. Co. vs. Wood* (47 Kan., 521), and numerous other cases decided by courts of other states, are cited in support of this position. We are entirely satisfied with the law as declared in all the cases heretofore decided by this court, cited on behalf of the defendants in error.

The difficulty in this case is, that there is no proof, either of the existence of insurance on the property in excess of the amount authorized at the time the policy was issued, or that the company, or its agent, was informed at any time before the fire of the full amount of insurance taken out. It appears that of the policies mentioned in the proofs of loss, five policies, aggregating \$17,300, were issued prior to the one sued on; that another for \$2,500 was issued on the same day, and that all the others bear date subsequent to the one issued by the defendant. Although it is shown that the plaintiffs had carried \$40,000 insurance during the preceding year, it nowhere appears from the evidence whether the whole or any part of the old insurance was still in force when this policy was issued. It was incumbent on the plaintiffs, when seeking to charge the insurance company with knowledge that the property was insured at the time the policy was issued, to an amount exceeding that authorized by the consent endorsed on it, to prove the fact. This was not done, and, so far as we are informed by the evidence in the record, the whole amount of concurrent insurance, at the time this policy was issued, was \$19,800. Although Norwood testified that he got ten policies from Ormandy, the agent of the defendant, it does not definitely appear that the last one received from him rendered the whole amount of insurance on the property more than \$35,000. It cannot be said then, that at the time the policy was issued, either the company, or its agent, Ormandy, had notice of the existence of so much insurance as would avoid the policy, nor can it be said that at any

subsequent time, Ormandy knew that the condition of the policy had been violated, and received or even retained the premium paid on it. There is, therefore, no element of estoppel in the case. The plaintiffs rested on the bare proposition that Ormandy had verbally agreed, prior to the date of the policy, that there should be \$40,000 insurance on the property. Afterward, when the written contract was made, the total insurance was limited to \$35,000. Do the prior parol negotiations control, or the subsequent written contract? Unquestionably the latter.

We have carefully considered the case of *Firemen's Fund Ins. Co. vs. Norwood* (69 Fed. Rep., 71), which arose on one of the policies of insurance on this same stock of goods, issued on the 5th of November, 1891. We find ourselves unable to concur in the conclusion reached by that eminent court that, "by delivering the policies with knowledge, through their agent, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up after a loss." We think there is a clear distinction between a case where there is knowledge of the existence of a fact which would avoid the policy and this, in which it is merely claimed that there was a prior agreement contradicting the terms of the written contract as to the amount of insurance the party should be permitted to carry. We are better satisfied with the reasoning of Judge Sanborn, in his dissenting opinion, than with the views of the majority of the court.

In the case of *Union National Bank vs. German Ins. Co.* (71 Fed. Rep., 473), it was held, that "parol negotiations leading up to a written contract of insurance are merged in the contract, which can not be controlled by parol evidence of the understanding of the parties." If it were claimed that the endorsement on the policy was a mistake, under proper averments and proof, it might have been corrected, and the policy enforced according to the real agreement and intent of the parties. But no such claim is made in this case. The plaintiffs maintained from first to last that the prior parol agreement overturned the written contract on which they based their suit. This position is untenable.

The judgment is reversed and a new trial ordered, all the justices concurring.

## SUPREME COURT OF WASHINGTON.

WASHINGTON NAT. BANK, OF SEATTLE,

vs.

SMITH ET AL. (AMERICAN CENT. INS. CO., OF ST. LOUIS,  
ET AL., GARNISHEES. THOMSON, Intervener.)\*

Where a mortgagee is authorized under the mortgage to insure in case of failure by the mortgagor, and to charge the expense to the latter, such insurance by the mortgagee in the name of the mortgagor, with loss payable to the mortgagee, will be presumed to have been procured in accordance with the mortgage. The intention of the mortgagee to insure for her own benefit will not affect the case, where no notice was given to the mortgagor.

Where the policy included machinery not covered by the mortgage, the mortgagee had no interest in claims arising on account of such machinery.

Where machinery was put in a mill and a chattel mortgage given therefor, and was not so attached as to make the intention appear to be to make it a permanent part of the building, it will not be treated as a fixture.

SMITH & COLE, *for Appellant.*

BOYER & GUIE and DONWORTH & HOWE, *for Respondent.*

HOYT, C. J.

The intervener and appellant was the owner and holder of a certain mortgage made by the defendant, E. D. Smith, and Margaret B. Smith, his wife. This mortgage was in the usual form of a real estate mortgage, and the property covered thereby was not so described as to include anything not a part of the real estate. Default having been made in the conditions of the mortgage, appellant commenced proceedings to foreclose it, pending which she caused insurance policies to be issued upon the mill building situated on the land covered by the mortgage and certain machinery situated therein. The property, including said machinery, was partially destroyed by fire, and the amount of the loss under such policies of insurance adjusted. Thereafter the plaintiff caused the defendant insurance companies to be summoned as garnishees of the mortgagors, and sought to secure the application of the money due therefrom to the payment of a judgment which it had against the mortgagors. The appellant was allowed to intervene in these garnishee proceedings, and thereafter such agreements and stipulations were entered into between all the parties that substantially the only question left for the determination of the court was as to whether the money to be paid for the partial destruction of certain

\* Decision rendered, July 13, 1896.

machinery in the mill was the property of the mortgagors or of the mortgagee.

There was another question left open which appellant has suggested was so decided as to entitle her to a reversal of the judgment. This question grew out of the claim that it was not shown that a sufficient amount of the loss as adjusted was paid on account of the machinery (which, it was claimed, was personal property, and not a part of the real estate) to pay the amount adjudged to be due the plaintiff. But, under the stipulations of the parties and the circumstances surrounding the case at the time such stipulations were entered into, we are satisfied that there is nothing in this claim, and it requires no further consideration at our hands.

The intervener and appellant founds her right to the money to be paid by the insurance companies for the partial destruction of the machinery in question upon two propositions: One. That the contracts of insurance were solely between herself and the insurance companies, and the mortgagors in no sense parties thereto, nor interested therein; that, for that reason, any money to be paid upon such contracts would belong to her, and not to the mortgagors. The policies were taken out in the name of E. D. Smith, one of the mortgagors; and, the other mortgagor being his wife, they must receive the same construction as they would if taken out in the names of both of the mortgagors. They were in the usual form of such contracts between an insurance company, on the one part, and the insured upon the other; and thereby such mortgagors were insured to a certain amount against damage by fire to the property in question. The only evidence of the interest of the mortgagee was a statement indorsed upon each of the policies, to the effect that the loss, if any, should be paid to the appellant mortgagee as her interest might appear. Under the terms of the mortgage, it was the duty of the mortgagors to keep the buildings situated upon the premises covered by the mortgage insured in the sum of \$40,000; and thereunder it was the right of the mortgagee, if the mortgagors did not do this, to herself cause it to be done, at the expense of the mortgagors, the repayment of the premium paid by her for that purpose to be secured under the mortgage. Such being the conditions of the mortgage, the reasonable and ordinary interpretation of the action of the appellant in taking out the policies of insurance would be that she was acting thereunder, and that the premium which she might have paid in so doing was or might have been charged to the mortgagors, and collected in addition to the amount due under the terms of the mortgage. If this was the effect of her taking out the policies of insurance, there would be no ground for the contention



that she had any interest therein, excepting as mortgagee of the property covered by the mortgage; and it would follow that if she had no interest in the machinery which was damaged, as mortgagee, she would have no interest in the moneys to be paid by the insurance companies on account of such damage. The policies of insurance under these circumstances would have been for the sole benefit of the mortgagors, excepting in so far as they were qualified by the statements indorsed thereon that the loss, if any, should be payable to the appellant mortgagee as her interest should appear; and, if she had no interest as such mortgagee in the machinery damaged, she would have no interest in the moneys to be paid under said policies on account of such damages.

But it is contended on the part of the appellant, and proof tending to establish such contention was introduced at the trial, that, as a matter of fact, the policies of insurance were not taken out under the conditions of the mortgage which authorized the mortgagee to keep the property insured if the mortgagors failed to do so; that, on the contrary, the policies were taken out for the sole benefit of the appellant; that the premium was paid by her; and that she had not charged, nor did she at any time intend to charge, the same against the mortgagors, to be collected under the provisions of the mortgage or otherwise. If, notwithstanding the conditions of the mortgage, the mortgagee had the right to independently insure the property, and if the contracts of insurance which were issued by the companies could be construed as having been made exclusively for the benefit of the appellant as mortgagee, there would be force in the contention that the mortgagors had no interest in the moneys to be paid by the insurance companies. But, in our opinion, the contracts of insurance cannot be so construed—First. Because of the right of the mortgagee to keep the property insured at the expense of the mortgagors, and to reimburse herself for any moneys which she might pay in so doing by having it declared a lien upon the mortgaged property, and collected under the terms of the mortgage. She having reserved to herself this right, it will be presumed that she acted in pursuance thereof in taking out the insurance policies; and such presumption cannot be overcome by any intention on her part to effect the insurance in her own interest, and independently of the provisions of the mortgage, unless such intention had been at the time communicated to the mortgagors. Until such intention had been communicated to them, they had a right to suppose that the insurance was effected under the provisions of the mortgage, and that it was for their benefit, excepting that the loss under the contracts of insurance would be

payable to the mortgagee if, at the time of such loss, she had an interest in the property on account of which any money should be paid. There was no proof that the intention which it is claimed the mortgagee had to insure exclusively for her own benefit was ever communicated to the mortgagors. Hence the court cannot now give effect to her intention so to do if it existed. Second. Because the contracts of insurance evidenced by the policies are plain and unambiguous, and have a certain legal construction, which, under well-settled rules, cannot be changed by oral testimony.

Even if the claim of the appellant that it was, in fact, intended both by the insurance companies and by herself that the insurance should be for her exclusive benefit was clearly established, it would not thereby be shown that such a mistake had been made in the drafting of the contracts as to entitle her to introduce oral testimony as to such mistake. But there was no proof whatever that either of the insurance companies intended to issue a policy in other terms than those in which these policies were issued. On the contrary, it affirmatively appeared that it was the universal custom of insurance companies to insist upon this form of contract, even although the object to be secured was the protection of the interest of the mortgagee. That such was the rule was not disputed by either party, and the necessity for it was well illustrated by the argument of counsel in the case at bar. Under the rule which formerly obtained, by which the mortgagee was allowed, in his own name, to insure the mortgaged property, it was impossible to prevent such property from being insured to an amount greatly exceeding its actual value. Hence, public policy, as well as the interest of the insurance companies and of honest insurers, demanded that some rule should be established by which the placing of excessive insurance might be avoided. The rule under consideration resulted from this state of facts, and is one which should be enforced, in the interest of the public and of the parties interested.

The other proposition is founded upon the claim that such machinery was a part of the real estate covered by the mortgage. As we have seen, the mortgage did not purport to cover anything but the real estate therein described. Hence, if the mortgagee had any interest in this machinery, it was because of the fact that it was so related to the real estate as to become a fixture, so that a lien thereon passed to the mortgagee, as a part of the real estate described in her mortgage. No general rule can be promulgated under which it can be determined whether a particular piece of machinery is or is not a fixture to the real estate with which it is used. So many considerations enter into the determination of this

question that no general rule can be stated which will apply in all cases. Not only can no general rule be adduced from the decisions of the courts which will apply to all cases, but it will appear from an examination of the decisions upon this question that there is a great want of harmony, even where the circumstances were identical. There is a class of cases which have adopted a rule which, if applied to the facts shown by the evidence to have existed as to the placing of this machinery in the mill building in which it was used, would require us to hold that such machinery was a fixture, and passed to the mortgagee as a part of the real estate. A leading case of this kind is *Woolen Mill Co. vs. Hawley*, 44 Iowa, 57. But the learned court which decided it, though apparently well satisfied with the conclusion to which it had come, was forced to admit that a contrary doctrine had been established by the courts of a majority of the states which had passed upon the question. This machinery was attached to the building in substantially the same manner as was that in controversy in the case of *Chase vs. Box Co.* (11 Wash., 377) and *Cherry vs. Arthur* (5 Wash., 787), and under the rule announced in those cases, which rule we believe to be supported by the weight of authority, it must be held to have been personal property, and not such a fixture as to pass to the mortgagee. That the means by which this machinery was attached to the real estate was substantially the same as that by which the machinery in question in those cases was so attached is substantially conceded by the appellant; but she contends that in the case at bar she proved, or offered to prove, that the intention of the mortgagors at the time the machinery was attached to the real estate was to make it a permanent fixture, and a part of such real estate. That the intention with which machinery is placed upon the real estate is one of the elements to be taken into consideration in determining whether or not it remains a chattel, or becomes a part of such real estate, is conceded; but it does not follow that such intention can be shown by testimony as to the actual state of the mind of the person who attached the machinery to the real estate at the time it was attached. On the contrary, his intention must be gathered from circumstances surrounding the transaction, and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret. Besides, if we should adopt the theory of the appellant as to the force to be given to the intention existing in the mind at the time the machinery was attached, we should not be so satisfied with the proof that it was intended to make the machinery in question a fixture as to be willing to reverse the judgment on that account. It is true that one of the mortgagors testified in

general terms that he intended the machinery to be a permanent part of the building with which it was connected, but it was made to appear by uncontradicted testimony that, at the time he put the machinery in the building, he made a chattel mortgage thereon; and it must follow either that he supposed at the time that it was not so affixed to the real estate as to become a part thereof, or else he intended to deceive the party to whom he executed such chattel mortgage, and it is more reasonable to presume that he acted honestly in the making of such mortgage than that he thereby intended to perpetrate a fraud. If the question as to the nature of this property had arisen between the mortgagee named in said chattel mortgage and the appellant, there could be no doubt but that, under the rule heretofore announced by this court, it would be held to be personal property; and, in our opinion, the rule was not changed by the fact that the question was raised between the parties to the real estate mortgage.

It follows from what we have said that, in our opinion, the material findings of fact made by the superior court were sustained by the proofs, and that such findings must stand. It therefore becomes immaterial as to whether or not sufficient exceptions were taken to such findings. It is not claimed that the findings of fact do not support the judgment, and, such findings having been approved, the judgment must be affirmed.

Anders, Scott, and Gordon, JJ., concur.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

RAINER

vs.

BOSTON MUT. LIFE ASS'N.\*

R., in his application, answered the question in regard to the use of ardent spirits by saying "glass of beer once in a day or two," when in fact he was an habitual drinker and got intoxicated now and then. *Held*, that such answer as a matter of law avoided the policy.

The jury was out nearly six hours unable to agree, and the trial judge sent for them and directed them to find for the defendant. *Held*, that the judge was right; that he did not lose his control over the jury because they had retired to a side room to deliberate.

H. K. HAWES, *for Plaintiff.*

BROOKS & HAMILTON, *for Defendant.*

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\* Decision rendered, Oct. 26, 1896.

MORTON, J.

The testimony tended overwhelmingly to show that, at the time when the application was made and the policy was issued, the insured was addicted to the excessive use of intoxicating liquors, and that, therefore, the answer, "Glass of beer once in a day or two," to the question in the application, "Do you use ardent spirits, wine, or malt liquors, and, if so, to what extent,—average quantity each day?" was false. It is true that the examining physician testified that he "discovered no indications of his drinking, only what was noted in the report, occasionally a glass of beer;" and that the plaintiff, the widow, testified on direct examination that "he used to drink intoxicating liquor when he felt like it," and that he "got intoxicated once in a while, not very often," and, on cross-examination, that "he used to drink when he felt like it. He did not drink every day, not to my knowledge. For the last year and a half of his life, he was not an habitual user of liquor; not all the time. He used it when he felt like it." But it is plain that the examining physician relied, not on his own observation, but on what the insured told him; and the testimony of the widow, when considered in connection with that of the other witnesses, amounts to little, if anything, more than a scintilla of evidence. In such a posture of the case, it would have been the duty of the court, if a verdict had been rendered for the plaintiff, to have set it aside as often as rendered, and consequently to withdraw the case from the jury: *Hillyer vs. Dickinson*, 154 Mass., 502, 28 N. E., 905; *Denny vs. Williams*, 5 Allen, 1.

The plaintiff does not contend that the insured was not, according to the evidence, in the habit of using intoxicating liquors to excess, but seeks to avoid the effect of the evidence on the ground that it was not shown that he actually or knowingly intended to deceive by the statement which he made in regard to his use of intoxicating liquor, or that the defendant's risk was thereby increased: *St. 1895, c. 271*. But we can have no doubt that the habits of the insured in regard to the use of intoxicating liquor increased the risk, and that, therefore, the answer must be held, as matter of law, to have avoided the policy. It is immaterial whether the insured did or did not actually or knowingly intend to deceive the defendant. The statute provides, alternatively, that the policy shall be avoided if statements are made with intent to deceive, or if the matter misrepresented increases the risk: *Levie vs. Insurance Co.*, 163 Mass., 117, 39 N. E., 792. This view of the evidence in regard to the use by the insured of intoxicating liquors, and of its effect, renders it unnecessary to consider whether the testimony in the case shows that

he also had consumption, and had misrepresented in regard to his family history.

The plaintiff further contends that it was not within the power of the judge to order the jury to return a verdict for the defendant at the time when and under the circumstances which he did. All that the exceptions state on this point is that, "at the close of the evidence, arguments were made by counsel, and the presiding justice charged the jury. After the jury had deliberated upon the case for nearly six hours, they were called back into court. The foreman stated that they were unable to agree, and the presiding justice directed the jury to return a verdict for the defendant, to which the plaintiff duly excepted." So far as appears from the exceptions, this took place in open court, and, if so, it is clear that the presiding justice had a right to call back the jury, and direct them to return a verdict as he did. He did not lose his control over the jury because they had retired to a side room, under his direction, to deliberate on their verdict; and, in the further conduct of the trial, he could reach them, and give them such additional directions or instructions as the case seemed to him to require: *Kullberg vs. O'Donnell*, 158 Mass., 405, 33 N. E., 528; *Merritt vs. Railroad Co.*, 164 Mass., 440, 41 N. E., 667. Exceptions overruled.

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## SUPREME COURT OF NEBRASKA.

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PHENIX INS. CO., OF BROOKLYN, )

vs. }

RAD BILA HORA C. S. P. S.\* }

1. Where a policy of insurance simply requires that notice of loss shall be given to the company at a specified office in writing, and that payment shall be made upon receipt of proper proof, and does not specify otherwise of what such notice and proof shall consist, if notice of the loss be sent in writing to the office specified, and the company makes no objection on account of the form of the notice, and makes no demand for other or further proof, such notice is a sufficient compliance with the terms of the policy.
2. This rule *held* to apply where oral notice was given to the local agent of the company, and he, at the request of the insured, communicated the fact of the loss, in writing, to the specified office of the company; it being *held* that, without regard to his authority as agent of the company, the facts proved constituted him the agent of the insured to give notice of loss.
3. A clause in a policy prohibiting agents from waiving any of its terms or conditions does not prevent the insured from showing that the company, through its proper agents, accepted acts of the insured as a sufficient compliance with the terms of the policy.

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\* Decision rendered, June 5, 1894. Syllabus by the Court.

4. The transcript of the record, authenticated by the certificate of the clerk of the district court, is conclusive evidence of the contents of the pleadings upon which the case was tried.
5. Where a policy provides that no action shall be sustained unless commenced within six months after a loss shall occur, if the insured is reasonably induced by the conduct or statements of the company's agents to believe that the claim will be paid without suit, and therefore withheld bringing suit until after that period, the insurer will, in such case, be estopped from claiming the benefit of such clause in the policy.
6. Certain rulings of the trial court on the admission of evidence examined, and *held* not to be erroneous.

H. C. PRESTON and E. A. HOUSTON, *for Plaintiff in Error.*

S. DRAPER and REESE & GILKESON, *for Defendant in Error.*

IRVINE, C.

This was an action upon a policy of insurance written upon a building owned by the defendant in error, and occupied by it as a lodge room. There was a verdict and judgment in the district court against the insurance company, from which it prosecutes error.

A number of the rulings of the court in relation to the admission of evidence are complained of. Mr. Schmidt, being upon the stand, testified that he was the secretary of the plaintiff association; that the lodge had a charter issued by the Grand Lodge of the state; that it derived its authority from this charter; that the charter was destroyed in the fire. He was then asked to state what this charter was. This question was objected to as incompetent, immaterial, and calling for secondary evidence upon an insufficient foundation. If the evidence was material, it was certainly competent. We cannot imagine a more satisfactory foundation for secondary evidence than proof that the primary evidence had been totally destroyed. We presume the object of this testimony was to show the organization of the plaintiff, and establish its capacity to sue. The petition does not allege the nature of the plaintiff's organization,—whether a corporation or a voluntary association,—but no objection was taken, either by demurrer or answer, to the plaintiff's capacity to sue; and, by sections 94 and 96 of the Code of Civil Procedure, any objection upon that ground was therefore waived. Indeed, the insurance company expressly admitted in its answer the issuance of the policy to the plaintiff,—that is, a contract with the plaintiff,—and we cannot see how, under the issues, it was material to prove plaintiff's character as an association or corporation. The objection for immateriality should have been sustained, but the error was of such a character that it was clearly not prejudicial.

The answer denied plaintiff's ownership of the land upon which the building stood. In order to prove ownership, plaintiff called Mr. Tikalsky, who testified that he had sold the land to the plaintiff,

made a deed to the plaintiff of the land in 1886; that this deed was burned with the building. He then testified that, after the fire, another deed was executed to the plaintiff. This deed was then offered in evidence, and its admission is urged as error. The deed itself recites that it was executed to take the place of a former deed, which had been destroyed by fire in the society hall. It was not necessary to offer the deed, as, upon the proof made, secondary evidence might have been given, and to a certain extent was given, of the contents of the original deed; but this deed, being in the nature of a further assurance, had effect by relation to the original conveyance, and it was competent and material in support of the issues as to plaintiff's ownership.

It appeared in evidence that there had been some negotiations in regard to the loss between plaintiff's secretary and three individuals, whose authority to act for the insurance company the plaintiff had considerable difficulty in establishing. There is a long list of assignments of error in relation to evidence in regard to the authority of these men, and in regard to transactions with them. To discuss each assignment would unreasonably extend this opinion, and there are no questions of law presented of sufficient importance to warrant such a detailed discussion. For the purpose of illustration, we will take two or three of the rulings complained of in their order.

Mr. Kamansky testified that, at the time of the fire, he represented the insurance company, "doing insurance business," and "was employed by them to look after their interests." He was then shown a letter which he testified was written by Mr. Williams. He was then asked if he knew what relation Williams sustained to the insurance company. This question was objected to, upon the ground that he could not know of his own personal knowledge, and that the policy provided how agents must be appointed. The objection was overruled, and the witness answered that he did not know except by hearsay. In the first place, the question was a proper one. It only inquired whether or not he knew the fact. In the next place, the answer was such that the objection became utterly inconsequential, and to urge it here is frivolous. The time of this court is too valuable to be consumed in examining records for the purpose of investigating such points as this.

Mr. Wyman was another person who had dealings with the plaintiff. Mr. Kamansky was asked, "Who was Mr. Wyman?" He answered, "Well, he is the representative of the company." The defendant then moved to strike out all the testimony in relation to Wyman, unless the company was connected with these men. This



motion was overruled; properly so. The question was a competent question, and, if the motion had been to strike out the answer as stating the witness' conclusion, it might have been well taken; but the motion referred vaguely to some other testimony, and, at the time it was made, the plaintiff was proceeding as well as it could to establish the connection between Wyman and the company. Moreover, the question was at once repeated, and the answer this time was that Wyman had been represented to the witness as the company's representative. On motion of the defendant, this testimony was then stricken out. The same remarks apply to this assignment as to the other. These illustrations, we think, are sufficient to disclose the futility of any elaborate discussion of such assignments.

In a general way, the other assignments may be said to be based upon evidence as to statements made by Williams or Wyman as to their authority, and to evidence of their conduct, upon the ground that no authority had been shown in them. As to the first of these classes, it is sufficient to say that, on every occasion when a question was asked directly calling for the declarations of these persons as to their authority, the court properly sustained objections thereto; and, where their statements were admitted, they were statements made in the course of negotiations, and were admissible, and were admitted, not for the purpose of proving agency, but as part of the *res gestæ*. As to the latter class of objections, we think counsel, to a certain extent, misapprehend the precise issue involved. There was no doubt of the authority of the agent to issue the policy. Its issuance and the payment of premiums were expressly admitted. The defense was twofold: First, that the plaintiff had not made proper proofs of loss; and, secondly, that the action was not begun within six months, as the policy required. The legal aspects of these defenses will be hereafter considered. It was proved by Kamansky himself that he was a local agent for the company, with authority to take applications, and some authority at least to collect premiums. Immediately after the fire, the plaintiff's secretary gave to him oral notice of the fire, and requested him to communicate with the company, which he at once did. Counsel conceive that the plaintiff was endeavoring to establish a waiver by Kamansky of the requirements as to proof of loss, and that no authority to do so was shown; but, for plaintiff's real purpose, Kamansky's authority was immaterial. What notice or proof of loss was required will be considered later. If the notice given to the general agent in Chicago by Kamansky was sufficient notice, it was entirely immaterial what Kamansky's authority as agent was, or whether he had any authority. If he was not the company's agent, by complying with the plaintiff's demand,

and notifying the proper officer of the company, he constituted himself the plaintiff's agent to give the notice. If the case rested upon any waiver by Kamansky, we would agree with the defendant that no authority was shown in him; but the question was not whether Kamansky had waived proof of loss, but whether notice of loss had been given the Chicago office, and whether that notice was sufficient. This notice did not have to be given through the company's agent, but might be given by the plaintiff, or by any one delegated by the plaintiff for that purpose.

The plaintiff was endeavoring to meet the other defense by showing that the company lulled defendant into a sense of security by negotiations and proposals until the six months allowed by the policy for bringing suit had expired. These negotiations were carried on by Kamansky, Williams and Wyman. Without any regard to declarations made by any of these men, there is ample evidence to show that all of them sustained some relation of agency to the company; that they habitually acted for it in the examination and adjustment of losses, and their acts were recognized by the company. If the special limitation in the policy was valid, and if the negotiations and proposals during that period excused the plaintiff from earlier beginning this suit, we think there was ample reason to charge the company with the consequences of the acts of these men in that behalf.

Coming now to the assignments of error relating to the instructions, we will consider, first, the law as applicable to this case in regard to notice or proofs of loss. On this subject the court gave the following instruction: "And, upon the issues found, it devolves upon the plaintiff to prove, by a preponderance of the evidence, its ownership of the property insured, and the destruction of the same by fire, as alleged, and the value of said property at the time of its destruction; and that the plaintiff, immediately after such loss, notified the said company, or its adjusting agent, of the destruction of said property, or that the plaintiff gave defendant notice of such loss, although not in exact conformity with the requirement of said policy; and that the notice was received by the company without objection, and without suggesting that it did not conform to the terms of the said policy. In such case defendant will be deemed to have waived other or further proof of the said loss." The defendant requested a peremptory instruction to find for the defendant, because there was no evidence that proofs of loss had been made. The policy in evidence is very simple in its requirements. The following are the only provisions as to notice or proofs of loss: "The Phenix Insurance Company hereby agrees to make good

unto the insured, their executors, administrators, or assigns, upon receipt of proper proofs at its Chicago office, all such immediate loss," etc.; also, "in case of loss or damage, the insured shall forthwith give notice of such loss in writing to the company." It will be observed that the policy does not specify in what form the proofs or notice shall be given, except that the notice shall be in writing. The evidence shows that upon request of plaintiff's secretary, Kamansky did notify, in writing, the Chicago office, and that thereafter a person, who Kamansky testifies was the adjuster, appeared upon the scene, and negotiations in regard to the loss were had. It does not appear that objections were ever made that the notice was insufficient, or that the plaintiff was ever called upon for other or further proofs. In *Insurance Co. vs. Lippold* (3 Neb., 391), it was said that the clauses in a policy as to preliminary proofs and notice should always be construed with great liberality, and that, if objection is made by the company to the form of proof of loss, it is its duty to notify the party of the alleged defect, and, failing to do so, it will be deemed waived. In *Insurance Co. vs. Schreck* (27 Neb., 527, 43 N. W., 340), the policy did not require written notice, and it was held that under such a policy, where agents of the company were present at the fire, and agreed to give notice to the company, and soon thereafter an adjuster appeared, this was sufficient. In *Insurance Co. vs. Barwick* (36 Neb., 223, 54 N. W., 519), it is repeated that, if objection is made to the form of the proof, it should be communicated to the insured, and he should be required to make out a full statement, otherwise the objection will be unavailing; that if a company has notice from its own agent that a loss has occurred, and it sends an adjuster to estimate the amount, that constitutes a waiver. These authorities are all applicable to the case under consideration. There being no requirement as to the nature of the proof or notice, and notice in writing having been given by the authority of the plaintiff, and the adjuster having appeared in response thereto, this was a sufficient compliance with the policy, no objections having been communicated to the insured, and no further proofs or information having been requested.

It is said that no waiver is pleaded. The amended petition pleads a performance of "all the conditions of said policy of insurance, except final proof of loss, which was waived by the defendant." It is charged by plaintiff in error that the last clause was not in the petition when the case was tried, and a passage near the close of the bill of exceptions tends to corroborate this statement. We place the decision rather upon the ground that the terms had been complied with than that there had been a waiver; but, if the case was

one of waiver, we would have to accept the transcript of the record, authenticated by the clerk's certificate, as conclusive evidence of the contents of the pleadings, and could not permit this evidence to be impeached, either by statements of counsel or by colloquies in the bill of exceptions between counsel and the trial judge. It is true that there is a clause in this policy denying to agents the power to waive any of its terms or conditions, except in the case of the general agent at Chicago, who is only empowered to waive conditions by writing. This is not such a case as that of *Insurance Co. vs. Heiduk* (30 Neb., 288, 46 N. W., 481), where such a provision was enforced. There is a distinction between waiving the terms of a policy and accepting and acting upon an attempted performance of such terms in such a manner as to adopt such attempts as a compliance. Probably no special agent could orally waive the requirement as to notice of loss, but the company itself, acting through an agent of general authority or one of special authority in that regard, might, and in this case did, accept what was done as sufficient, and estop itself from requiring anything further.

The limitation clause in the policy was as follows: "No suit or action against this company shall be sustainable in any court of law or chancery unless commenced within six months next after such loss shall occur, any statute of limitations to the contrary notwithstanding." A respectable line of authorities is to be found in support of the validity of similar provisions. There have been at least two cases in this court whose language indicates that such provisions, under certain conditions, are enforceable: *Barnes vs. McMurry*, 29 Neb., 178, 45 N. W., 285; *Insurance Co. vs. Fairbank*, 32 Neb., 750, 49 N. W., 711. In no case, however, has effect been given to such a provision in this state. Notwithstanding the authorities upon the subject, the writer would hesitate to commit himself to the view that the parties to a contract may bind the courts to a period of limitations other than that prescribed by statute. That question is not, however, necessarily in this case. The court instructed the jury upon the subject as follows: "If you find from the evidence that the defendant, by any conduct or statement of its adjusting agent, while attempting to adjust the said loss, did that which was calculated to induce a reasonable belief in the plaintiff that the claim would be paid without suit, and that the plaintiff was reasonably induced by such conduct of defendant and proposition to settlement to withhold bringing suit until after six months after said loss, then defendant will be deemed to have waived the right to insist upon requiring such suit to be brought within six months from the date of the loss." The evidence fairly tended to support this

instruction. Persons undoubtedly authorized to represent the company to some extent and for some purposes in the adjustment of the loss were shown to have conducted negotiations and made proposals for settlement until after the expiration of six months. We have no doubt that, if such a provision is of any validity, the company may, by its conduct, estop itself from claiming the benefit thereof; and that when the company, by holding out prospects of an amicable settlement, induces the plaintiff to forbear suit until after the expiration of the time limited, the company is thereby estopped from claiming the benefit of the special limitation: *Thompson vs. Insurance Co.*, 136 U. S., 287, 10 Sup. Ct., 1019; *Steel vs. Insurance Co.*, 47 Fed., 863; *Martin vs. Insurance Co.*, 44 N. J. Law, 485; *Ripley vs. Insurance Co.*, 30 N. Y., 136; *Blanks vs. Insurance Co.*, 36 La. Ann., 599; *Insurance Co. vs. McGregor*, 63 Tex., 399; *Bish vs. Insurance Co.*, 69 Iowa, 184, 28 N. W., 553; *Insurance Co. vs. Myer*, 93 Ill., 271. All of the cases above cited fully recognize the principle and sustain the instruction given by the trial court. Some of them hold that, under the facts of the cases under consideration, there was no estoppel; but those cases were either where there was a denial of liability accompanying an offer to compromise, or cases where there was distinct denial of liability, following negotiations for a settlement, and within such a period that there was a reasonable time after such denial to begin the suit before the period of limitations expired.

We can find neither error in the record, nor merit in the defense interposed. Judgment affirmed.

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## SUPREME COURT OF KANSAS.

KANSAS FARMERS' FIRE INS. CO. )

*vs.*

SAINDON.\* }

1. Where an insurance policy provides against future incumbrances, the policy may be avoided if a subsequent incumbrance is created, or if the incumbrances existing at the time of the application for the insurance are materially increased by a new or additional debt, but a mere subsequent renewal of a prior lien or mortgage, with accrued interest, is not an increase of such pre-existing indebtedness or the creation of a new or an additional incumbrance.
2. Where an insurance policy covers a dwelling-house and various classes of personal property, including household furniture, beds, books, etc.,

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\* Decision rendered, June 9, 1894. Syllabus by the Court.

describing them separately, and specifies different and separate amounts on the dwelling and on the personal property,—as, \$1,900 on dwelling and \$600 on furniture, beds, books, etc.,—such contract is severable, and the execution of a mortgage on the real estate, in violation of a condition of the policy against subsequent incumbrances on the property insured in whole or in part, is no defense to an action for the loss of the personal property not incumbered.

ON REHEARING. Former judgment modified.

PER CURIAM.

Upon the application for a rehearing in this case, it is insisted that this court incorrectly stated in its opinion that “the insurance company issued the policy, and paid Pelletier 25 per cent for his services.” And, again: “That having accepted Pelletier’s services as solicitor, and having paid him for the same, the company cannot now disown his agency.” It appears from the policy of insurance that the premium was \$37.50. John E. Bonebrake, the president of the insurance company, testified on trial as follows: “Q. What amount of net premium was received by the Kansas Farmers’ Fire Insurance Company for this policy, which was issued by the defendant company to Ben Saindon, the plaintiff herein? A. I suppose the amount mentioned in the application. I will have to examine the books and see, in order to get the exact net amount.” The application referred to by Mr. Bonebrake, and attached to the answer, does not state upon its face the amount of the premium except as follows: “Rate, \$1.50.” Indorsed on the back of the application, partly in printing and partly in writing, was the following:—

Written and Sent, 4-9, 1871.

Application.

No. 7,545.

Kansas Farmers’  
Fire Insurance Co.  
of

Abilene, Kansas.

Ben Saindon,

Applicant.

Concordia, P. O.

Cloud County, Kansas.

Amount of Insurance, \$2,500.00.

Term, 5 year, 1 1-2.

First Payment, \$9.37.

Cash to Company, \$26.43.

Premium, \$37.50.

Expires, 1st Day of April, 1892.

E. D. Pelletier, Solicitor.

Agents will leave this blank to be filled by company.

This indorsement clearly shows that the insurance company, when it received and acted upon the application, had notice that Pelletier

was acting as soliciting agent. The indorsement also shows that the cash payment to the company was \$26.13. Opposite to this is the following: "Agents will leave this blank to be filled by company." The premium upon the policy was cash. No note was given. If the premium was \$37.50, and the cash to the company \$26.13 only, the inference is that Pelletier was paid 25 per cent for his services. He was not paid anything by Saindon. Pelletier had been a soliciting agent for the company. His agency had expired. He had blank applications of the company left in his hands. He took and forwarded an application for insurance for Saindon, made out upon one of the blanks of the company, on which his name was indorsed as solicitor. The policy was sent to him by the company. He received the premium and delivered the policy, and the entry on the application shows "that the cash paid to the company was \$26.13." If the company only received \$26.13 in cash, Pelletier retained the balance, and the other indorsements on the application do not contradict this. The insurance company, we suppose, filled in on the back of the application the amount actually paid in cash, or the net cash received. After Pelletier delivered the policy to Saindon, the latter returned it to Pelletier to be corrected, but he did not send it back to the company. We do not think that this court, when it handed down its former opinion, was mistaken in any of the material facts concerning the action of Pelletier, as soliciting agent, in receiving and forwarding the application of Saindon for insurance, or of the cash payment to the company. If Pelletier's agency was limited to this single transaction as soliciting agent for the company, he was the agent of the company for all the purposes of this case, and, if he made false answers, the company cannot avoid the payment of the loss on account of them. In the former opinion it was said: "It appears from the evidence that the subsequent mortgages were simply renewals of those in existence at the time the policy was issued, with interest." At the time of the first presentation of this case, the various items contained in the renewal mortgages were not referred to in detail, or commented upon at very great length. Our examination then led us to believe that the mortgages upon the property taken after the issuance of the policy were merely renewals of the prior existing mortgages. The weight of authority is that increasing an existing incumbrance, contrary to the terms of the policy, avoids the same: *Bowlus vs. Insurance Co. (Ind. Sup.)*, 32 N. E., 319. Since the additional briefs have been filed, we have carefully re-examined all the testimony concerning the mortgages. The insurance policy was written April 1, 1887. At that time the premises were mortgaged to T. B. Sweet for \$3,500.00, and to the

First National Bank of Concordia for \$4,437.00; total, \$7,937. The mortgage to T. B. Sweet was not paid until March 7, 1889, after the fire of November 1, 1888. The mortgage to the bank was paid July 1, 1887, by the execution of a mortgage to C. E. Sweet for \$5,314, and the mortgage for \$5,314 to C. E. Sweet was paid March 1, 1888, by the execution of the new mortgage for \$6,000 to G. E. Lathrop. At the time of the fire the premises were mortgaged to T. B. Sweet for \$3,500, to G. E. Lathrop for \$6,000.00; total, 9,500,—\$1,563.00 more, upon the face of the mortgages, than when the insurance was written. But a part of this \$1,563.00 was interest which had accrued upon the mortgages. It appears, however, that when the mortgage of \$4,437 to the bank of June 2, 1868, was renewed on July 1, 1887, for \$5,314, it also included \$450 of a note of \$650 given by Saindon on the 21st of June, 1887. On that day he paid \$44.37, interest on the note of \$4,437.00. There is no evidence in the record that the \$650 note was given to the bank for interest on the mortgages, or either of them.

Upon the trial, Saindon, at one time in the course of his examination testified "that the renewals were for what he owed the bank, and also that the money he drew from the bank was for the purpose of keeping up interest." But when examined concerning the \$650 note which he paid by including a large part of it in the mortgage of \$5,314 executed on July 1, 1887, he did not state that it was given to the bank for interest upon the mortgages, but testified, among other things, as follows: "Q. You heard Mr. Atwood testify that this \$5,314 note, at the time that it was made, took up a \$600 note? A. Yes, sir. Q. And that \$450 of the \$600 was included in this \$5,314 note? You understand that, do you? A. Yes, sir. Q. You say you don't recollect what that \$650 note was given for? A. Well, that was given— That was because I was owing him something. Q. You don't remember what it was given for? A. Not exactly, to say positive, that \$600, you know, what it was given for. That is what I told you before. I don't keep any memorandum. And then when we come to talking about— Of course, I have a little memory. Well, that is the best I can. Q. It was secured by chattel mortgage, was it not? A. Yes; all the notes generally that I got, you know, were secured by chattel mortgages. Q. And you can't tell what it was for? A. No; to say one time from another, I guess I can't. As I said before, I didn't keep any memorandum, and, of course, when that is paid off, well, that is done with it." It appears that Saindon was engaged in feeding cattle from June 2, 1886, to April 11, 1888, and that he borrowed money from time to time from the bank with which to buy cattle and feed them; also, that the note of \$650.00



was secured by a chattel mortgage. After the prior and subsequent mortgages had been introduced, it then became incumbent upon Saindon to show the mortgages executed after the policy were not the creation of new debts, or included a new debt, but were merely the renewals of the prior mortgages, with interest. It is not shown that the \$450 included in the mortgage of July 1, 1887, which was used to pay a part of the \$650 note, was any part of the principal or interest of the prior mortgages. Therefore, upon the evidence, the mortgage liens upon the dwelling and real estate were materially increased after the issuance of the policy, and before the fire. This would render the insurance upon the dwelling void, unless upon another hearing it were shown by additional evidence that the subsequent mortgages were merely renewals of the prior mortgages, with interest. In other words, that there was no creation of a new debt in either of the subsequent mortgages. But this ruling will not avoid the payment of the loss upon the personal property. The condition of the policy which the company claims to have been broken reads: "If the property be sold or transferred or incumbered in whole or in part, \* \* \* in every such case this policy is void." A separate valuation was placed in the policy upon the different subjects of insurance; as, \$1,900.00 on the dwelling house, and \$600 upon the personal property, including the household furniture, beds, wearing apparel, books, etc. It was decided in *Insurance Co. vs. Ward* (50 Kan., 346, 31 Pac., 1079), that "where a policy of insurance is so written as to place separate valuations upon different subjects of insurance, the contract is severable, and a breach of the contract only affects the insured property which is the immediate subject of the act of alienation." See, also, *Insurance Co. vs. York*, 48 Kan., 489, 29 Pac., 586; *Insurance Co. vs. Fairbank* (Neb.) 49 N. W., 711, and cases cited. The policy of insurance being severable, it admits of being separately executed.

The judgment formerly rendered by this court will be modified as follows: The judgment of the district court will be reversed, and a new trial awarded, unless the plaintiff below shall, within 30 days, file in writing a remittitur of the judgment in the court below for \$1,900, loss on the house, with \$124.76 as interest thereon. If such remittitur is filed, the judgment of the district court will be affirmed for \$600 for loss of personal property, with interest.

## SUPREME COURT OF GEORGIA.

GEORGIA HOME INS. CO. }

vs. }

HALL ET AL.\*

1. A policy of insurance upon partnership personalty, taken out by the partners in their firm name, is not vitiated by a contract between them, made while the policy was in force and before any loss was sustained, by which one of the partners agreed to sell his interest in the property insured to the other, reserving the title to such interest until the purchase money should be paid, the loss occurring before payment in full had been made, the stipulations in the policy bearing upon the subject being that the policy should be void if there be a mortgage, bill of sale, or other lien upon the property insured, or any part of it, either prior or subsequent to the issuance of the policy, without the fact being indorsed thereon; or if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree; or if the policy, before loss, be assigned without the consent of the company indorsed thereon; or if the insured is not the sole, absolute, and unconditional owner of the property insured.
2. A partnership has no insurable interest in household, ornamental, and kitchen furniture of one of the partners and his wife, or in their wearing apparel. A policy embracing these articles, as well as property of the firm, is void as to the former, though valid as to the latter.

Hall & Peddinghaus, suing for the use of Hall, brought their action against the Georgia Home Insurance Company. The defendant demurred generally and specially to the declaration. An amendment was made to the declaration, and the judge presiding overruled the demurrer upon the first four grounds thereof, and sustained it as to the fifth ground. After the judge had announced his decision on the demurrer, counsel proceeded to strike the jury; and after the jury was stricken, and counsel for plaintiffs was about to proceed with the evidence, defendant's counsel asked that the trial of the case be postponed until the supreme court could review the decision on the demurrer, which request was granted. The plaintiffs excepted pendente lite to the decision of the judge ordering stricken from the declaration the language objected to in the fifth ground of the demurrer, and to the action of the judge in granting a postponement of the case. The defendant excepted to the judgment overruling the first four grounds of demurrer, and brought the case to this court for review.

The declaration alleged, in brief: The defendant is indebted to petitioners \$3,000, besides interest, 25 per cent damages, and \$500 reasonable attorney's fees, upon a policy of insurance, and arising

\* Decision rendered, July 16, 1894. Syllabus by the Court.

as follows: On December 6, 1889, petitioners, having a photograph and art gallery in Augusta, and petitioner Hall with his wife occupying rooms adjacent, in the same building with the gallery, applied through Hall to Allen & Co., agents of defendant, for \$2,500 insurance upon the gallery and stock therein, and for \$500 on the household furniture, wearing apparel, etc., of Hall and wife. Petitioner had no connection with the writing of the policy, but informed the agent that the \$2,500 insurance was wanted upon the art gallery belonging to Hall & Peddinghaus, and the \$500 insurance upon the personal effects of Hall and wife. Allen, the agent of defendant, was not only familiar with the surroundings and location of the gallery, and knew that Hall and wife occupied rooms adjacent thereto, but Hall fully explained to him all the facts and circumstances connected therewith which he desired to know; and, after being satisfied with the conditions, location, ownership, and circumstances connected with the risk, Allen issued to Hall & Peddinghaus policy number 140,315 of defendant, containing a written description in reference to the property insured, after stating "insures Hall & Peddinghaus to the amount of three thousand dollars," as follows: \$2,500 on furniture, fixtures, cases in gallery, portraits, cameras, working tools, photograph implements, stands, rests, baths, screens, material, supplies, and all other furniture, fixtures, and stock usual to a photograph gallery; and \$500 on household, ornamental, and kitchen furniture of all kinds, including wearing apparel, and all while contained in their apartments on second and third floors of three-story brick, metal-roof building No. 712, south side Broad street, Augusta, Ga. The policy was to be of force until December 6, 1890, the consideration therefor being \$30, which was paid by petitioners to Allen & Co. The words "in their apartments" were intended by defendant and understood by Hall to mean the apartments of Hall and wife, in the rooms adjacent to the gallery, as before stated. On December 6, 1890, by renewal receipt of defendant No. 6,174, the policy was continued to December 6, 1891, for a consideration of \$30 paid by petitioners; and on December, 6, 1891, by renewal receipt No. 6,810, the policy was continued to December 6, 1892, for a like consideration paid by petitioners. The original policy was placed by Hall in the safe of John Sancken, who in September or October, 1891, sold his safe, and in removing papers therefrom, seeing that the policy on its face had expired and supposing it of no value, destroyed it, with other papers of his own. About the time of the renewal of the policy, in December, 1891, Hall informed Allen that Sancken had destroyed the original policy, and Allen stated that that made no difference; that the company had

the material parts on its books; that the body of the policy was a printed form, and that petitioners' holding a renewal receipt was all-sufficient for their protection. Petitioners, therefore, sue upon the policy as a paper destroyed, and attach a copy in substance thereof, if not an exact copy, the written portion having been furnished from defendant's books, and the balance being upon one of the regular official blank forms furnished by defendant. On August 27, 1892, fire in an adjoining building spread to the buildings and rooms occupied by petitioners and Hall and his wife, and Hall and his wife were obliged to leave the building hurriedly, saving only a few articles belonging to the gallery and of wearing apparel, the remainder of the property appertaining to the gallery and in the apartments of Hall and wife being destroyed. A few days after the fire defendant sent its special agent, Spencer, to examine into the losses, and, among others, that covered by this policy. He was given every facility and all the information possible concerning the loss of petitioners, and, after considering the same, offered to waive all proof, and give Hall a check at once for about \$1,500, if he would give a receipt in full. This proposition was not made with a view to a compromise, but because Spencer was of opinion that as a partner Hall had never owned but a half interest in the firm, and he claimed, as Peddinghaus had sold to Hall, Peddinghaus' interest in the insurance was forfeited. Petitioner at once declined this offer, and for about ten days or two weeks Spencer led him to believe the loss would be soon adjusted, but finally left the city without even reporting to Hall that he had gone. After waiting some time, petitioner, on a loss blank furnished by Allen & Co., made out full proofs of the loss, verifying same by affidavit about September 22, 1892, and forwarded them, as requested, to the home office of defendant, where they were received a few days afterwards. These proofs showed a loss upon the property covered by the policy of \$7,845, showing a loss upon the gallery of about \$6,800, and upon the wearing apparel and furniture of Hall and wife of over \$1,100. Defendant was notified at the time that petitioner was anxious to give it all the information it desired, and, if the proofs were in any way unsatisfactory, any additional information or proof would be furnished. After keeping the proofs until about November 2, 1892, and without specifying wherein they were deficient in any way, defendant demanded from petitioner Hall duplicate invoices of all purchases made within six months prior to the fire. After much trouble in procuring them, about January 7, 1893, he forwarded the duplicate invoices to defendant at its home office, and the same were duly received by it. On or about April 30, 1892, Hall made a con-

tract with Peddinghaus to purchase the latter's interest in the gallery, the latter agreeing to sell, but reserving his title to the half interest bargained for by Hall until the purchase money for said half interest was paid. It has not yet all been paid, and at the time of the fire Peddinghaus held title to the half interest, as agreed at the time of the sale. He has agreed that the suit shall be brought upon the policy in the name of the firm for the use of Hall, so far as the firm were interested in the contract. After 60 days from the filing of the proof of loss with defendant, it having failed to pay or in any manner adjust the loss, Petitioner Hall made a written demand on it on or about December 1, 1892, and served the same on Allen, its agent at Augusta. On January 26, 1893, defendant, through its agent Spencer, made demand upon Hall for an appraisal of the value of loss; and about February 4, 1893, without acknowledging its right to ask for appraisal, Hall signed the papers sent him, and forwarded them, as requested, to defendant's home office. Hall having appointed Cohen appraiser to act in his behalf, Spencer, said special agent, appointed Doughty appraiser in behalf of defendant. Defendant then undertook in its own behalf to appoint an umpire, and referred the name of the umpire to Cohen, who, without other objections to the umpire than that he was named by defendant, declined to agree to him as an umpire, and notified Doughty, Spencer, and Allen that he was ready to select an umpire in accordance with the terms of the policy, and proceed with the appraisal. Cohen informed them that he rejected the umpire named by them because not appointed in accordance with the policy, law, or usage, and informed defendant and Hall that he would be ready to proceed with the appraisal on the morning of February 18, 1893; and petitioner appeared there, with his witnesses, but neither the appraiser appointed by defendant nor defendant appeared, and since that time have abandoned all efforts to have an appraisal made. On March 7, 1893, Hall made written demand of defendant that it proceed with the appraisal, if it desired the same, within five days, but from that time until now defendant has refused to go on with the appraisal, and has therefore abandoned the same. Petitioner claims that defendant never had any bona fide intent of having an appraisal made, unless it could have it done by a board with a majority of the appraisers appointed by itself, and in making such attempt it acted in bad faith, and it is a part of an original intent to defeat petitioner in the collection of the insurance. Defendant has acted in bad faith, caused petitioner unnecessary delay, trouble, and expense, and, in refusing to pay a loss it knew to be just and due, has forced him to the expense of employing attorneys

and bringing suit. At the time of the fire the policy was in full force, and all its terms and conditions have been fully complied with by petitioner, and everything done either required by the policy or demanded by defendant.

The demurrer was upon the following grounds: (1) That the declaration does not set out a complete cause of action at law. (2) That the plaintiff or plaintiffs cannot recover any portion of the \$500 damages alleged to have been done to the "household, ornamental, and kitchen furniture," because it appears from the declaration and exhibits attached that said furniture was insured as the property of the partnership of Hall & Peddinghaus, whereas it did not belong to said partnership at all, but was the individual property of said Hall and his wife,—said policy of insurance expressly stating that it was to be void "if the assured is not the sole, absolute, and unconditional owner of the property insured." (3) That the plaintiff or plaintiffs cannot recover any portion of the \$2,500 damages alleged to have been done to the "furniture or fixtures, cases," etc., and "stock," etc., because it appears from the declaration and exhibits attached that the property was insured as the property of the partnership of Hall & Peddinghaus, and that on April 30, 1892, after the renewal of the policy, and before the fire, said Peddinghaus executed and delivered to said Hall a conditional bill of sale to his (Peddinghaus') half interest therein, and surrendered possession of said property to said Hall, without said change in title and possession of the property being indorsed on the policy, and without any notice of such change being given to the defendant company or any of its agents, and without any consent or ratification by said company or its agents; said policy of insurance expressly stating that it shall be void "if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, or if the policy before loss be assigned without the consent of the company indorsed thereon." (4) That the plaintiff or plaintiffs cannot recover any portion of the \$2,500 damages alleged to have been done to the furniture, fixtures, cases, etc., stock, etc., because it appears from the declaration that on April 30, 1892, said Peddinghaus made a conditional bill of sale of his half interest therein to said Hall without having that fact indorsed on the policy, or giving notice thereof to the defendant company or its agents, or obtaining any consent or ratification by said company or its agents; said policy of insurance expressly stating that it shall be void "if there be a mortgage, bill of sale, or other lien upon the property hereby insured, or any part of it, either prior or subsequent to the issue of this policy, without the fact being indorsed

hereon." (5) That the plaintiff has improperly and illegally incorporated into his pleadings the statement that this defendant company, through its agent R. P. Spencer, offered to pay plaintiff \$1,500 in full settlement of his claim, it appearing that said offer was made by way of compromise, and therefore it is not admissible in evidence or in pleading against the defendant company, and defendant moves now to strike from the declaration all words referring to said offer. The words which were incorporated in the declaration by amendment were, after the allegation that Spencer offered to waive all proof and give Hall a check at once for about \$1,500, if he would give a receipt in full: "This proposition was not made with a view to a compromise, but because Spencer was of opinion that as the partner Hall had never owned but a half interest in the firm, and he claimed that, as Peddinghaus had sold to Hall, his (Peddinghaus') interest in the insurance was forfeited."

FLEMING & ALEXANDER, *for Plaintiff in Error.*

J. S. & W. T. DAVIDSON, *for Defendants in Error.*

PER CURIAM. Judgment reversed in part, and affirmed in part.

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## SUPREME COURT OF VERMONT.

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HARTFORD STEAM BOILER INSPECTION & INS. CO. }

*vs.*

LASHER STOCKING CO.\* }

Defendant signed a written application at Bennington, Vt., for insurance in the plaintiff company. Application was transmitted to the New York office of the company, where a policy was executed and mailed back to plaintiff.

*Held,* That the contract was completed and the premium was due and payable. A report of an examination by plaintiff of defendant's boilers and a suggestion in regard to the resetting of a boiler, mailed along with the policy, was not a condition precedent. The contract was completed without it.

Mortgages on the property subsequent to the insurance held not to change the title or invalidate the insurance.

The plaintiff was an insurance company, duly incorporated under the laws of Connecticut, having its home office at Hartford, in the

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\* Decision rendered, June 9, 1894.

state of Connecticut, and a branch office in the city of New York, through which its Vermont business was transacted. The defendant was a Vermont corporation, having its principal place of business at Bennington, in the state of Vermont. The plaintiff seeks to recover \$100 due it as a premium upon a policy of insurance issued by it in favor of the defendant. May 7, 1892, the defendant signed a written application to the plaintiff for insurance against damage arising from the explosion of its boiler. This application was made by the defendant at the solicitation of one Bernard McChan, a special agent of the plaintiff, and was delivered to him at Bennington, Vt., and by him transmitted to the branch office of the plaintiff in New York City. May 13, 1892, one Babcock, the manager of the New York branch office, deposited in the mail at New York City an envelope containing the policy of insurance in accordance with the terms of the application, and another paper marked "Exhibit C," and which was the report from an inspector of the plaintiff, who had examined the defendant's boiler, and who suggested certain changes in the setting of the boiler in this report. The policy and Exhibit C were duly received by the defendant on May 15th. On June 1st the defendant returned the policy, declining to receive it for the reason that the report of the inspector required these changes in the setting of the boiler, which the defendant was unwilling to make. On June 5th the plaintiff returned the policy to the defendant, and notified it that the payment of the premium would be insisted upon. The defendant alleged upon the trial before the auditor that its refusal to accept the policy and pay the premium was due to the fact that it understood that Exhibit C, taken in connection with certain parts of the policy, required, as a condition precedent to the taking effect of the policy, that the changes specified in it should be made in the setting of the boiler, and the master found, from evidence received under the objection and exception of the plaintiff, that the defendant did in good faith so understand and believe. He further found, upon evidence received under the objection and exception of the defendant, that the plaintiff did not so intend. By inclosing Exhibit C it simply intended to point out the fact that these changes ought to be made. Exhibit C was as follows:—

New York, May 13, 1892. To the Lasher Stocking Co., Bennington, Vt.: The Hartford Steam Boiler Inspection and Insurance Co. makes the following report of an external examination of your steam boiler, made May 12, 1892: One boiler, externally in good condition, as far as can be told by external examination. Safety valve and connections in good working order. The flues over boiler should be so arranged as to prevent heat from furnace flues coming



in contact with top of shell of boiler above water level. R. K. McMurray, Chief Inspector.

The parts of the policy bearing upon this question, and the further question as to whether the policy would be avoided by the execution of a mortgage, were as follows: "Against all such immediate loss or damage as shall be caused to the property or persons specified by the explosion or rupture, caused by the action of steam, of the boiler described in the application of the assured,—except as hereinafter provided, and not exceeding in amount the sum insured,—from the 13th day of May, eighteen hundred and ninety-two, at 12 o'clock noon, until the 13th day of May, eighteen hundred and ninety-five, at 12 o'clock noon; to be paid at said Hartford, within sixty days after notice and proof of loss made by the assured, according to the requirements, and in conformity to the provisions, of this policy; it being expressly covenanted and agreed, as conditions of this contract, that this company is not to be liable for any loss or damage resulting from neglect to use all reasonable efforts to save and preserve the property at the time of and after any explosion; nor for any loss where the boiler or boilers are placed in charge of a person known to be incompetent or negligent; nor for any explosion caused by the burning of the building or steamer containing the boiler or boilers; nor for any loss or damages in case the load on the safety valve approved by the company's inspector, viz., one hundred (100) pounds per square inch, shall be exceeded; and if the title or possession of said property is transferred or changed, or if this policy is assigned without the written consent of this company indorsed hereon, this policy shall be void; and any change in the boilers, within the control of the assured material to the risk, without the consent of this company, shall make void this policy. Prevention of steam-boiler explosions being one of the objects of this company, it is hereby agreed that the inspectors of this company shall at all reasonable times have access to said boiler or boilers, and the machinery connected therewith on which safety depends; and ample facilities shall be afforded to such inspectors, whenever this company shall desire it, for a thorough examination of said boiler or boilers; and should any inspector, at any time, discover any defect affecting the safety of said boiler or boilers, or the apparatus connected therewith, he shall notify the assured; or should the assured discover any defect, or be notified of any defect or source of danger by the engineer, or by any person using said boiler or boilers,—in either case, the policy shall become void, unless the boiler or boilers so affected cease to be worked until such defect shall be thoroughly repaired by the assured, to the satisfaction

and approval of the inspector of this company; and this company reserves the right, at any time, to cancel this policy, in which case, after deducting the charges for inspection, the company will return to the assured a ratable proportion of the remaining premium for the unexpired terms of this policy. This policy may also be cancelled at the request of the assured in case of the sale, lease, transfer, or destruction of the boiler or boilers insured, or the buildings containing same, or if the boiler or boilers shall cease to be used for a period of more than three months, provided the premium has been paid; in which case, the company, after deducting the charges for inspection and the customary short rates for the time the policy has been in force, will return to the assured the remaining portion of the premium. But if this policy is delivered to, or presented for cancellation through, by, or in the interest of, any other boiler-insurance company, no return premium will be paid." The auditor found, from evidence introduced subject to the objection and exception of the plaintiff, that subsequent to the issuing of the policy and before the beginning of the suit, the defendant had executed two mortgages upon its property, covering the boiler in question, but that these mortgages had never been recorded. The auditor also found, from evidence received against the objection and exception of the defendant, that the plaintiff was licensed to transact an insurance business in the state of Vermont, and that a similar license had been issued to the said Bernard McChan. He further found that the said McChan was not, at the time the license was issued to him, in fact a resident of the state of Vermont, although he so represented to the insurance commissioner at the time his license was issued.

C. H. DARLING, *for Plaintiff.*

W. B. SHELDON, *for Defendant.*

TAFT, J.

From the auditor's report, it appears that the plaintiff accepted the defendant's application for insurance, executed a policy, and inclosed it to the defendant May 13, 1892, depositing it in the post-office in New York City. The law is now well settled that, if an offer of a contract is made and accepted by letters sent through the post, the contract is complete the moment the letter accepting the offer is posted, and this upon the ground that the post-office is regarded as the agent of the one making the proposition. The acceptance must be identical with the terms proposed. That it cannot be conditional, and take effect at that time: See *Fenno vs. Weston*, 31 Vt., 345. We do not regard the letter of the plaintiff's

inspector, sent the defendant, as a part of the contract, nor as a condition precedent, upon the fulfillment of which the contract was to take effect, but as a suggestion to the defendant in regard to the future state and condition of the boiler. The plaintiff, having delivered the policy, knowing the condition of the boiler in the respect named, would be estopped from insisting that the policy was void by reason of the noncompliance with the suggestion. Delivering the policy, knowing the condition of the boiler, it cannot be heard to say that the contract was void for the reason named. The contract, taking effect when the policy was deposited in the New York post-office, was a New York contract and must be governed by the law of that state, and the presumption is it was a valid agreement. As the contract was a New York one, the questions of the authority of the plaintiff to transact business in this state, the nonallegation of that fact in the declaration, and whether the plaintiff's agent, through whom the application for the policy was transmitted, was duly licensed, are immaterial and need not be considered. The defendant claims that the policy became void subsequent to its delivery, by reason of one or more mortgages given by it, as there is a condition in the policy that renders it void if the title of the property was transferred or changed without the consent of the plaintiff. Giving a mortgage upon the property did not change nor transfer the title; it incumbered it, but it does not appear that there was any proviso against an incumbrance. If the mortgage did render the policy void, it did not affect the plaintiff's right to the premium, which became due it at the time the policy took effect, May 13, 1892. Judgment reversed, and judgment for the plaintiff. Start, J., being absent in county court, did not sit.

## SUPREME COURT OF CALIFORNIA.

GRIFFITH

vs.

NEW YORK LIFE INS. CO.\* }

Application was made for \$20,000 life insurance in two policies of \$10,000 each, and the applicant gave two notes to the local solicitor for the two first premiums. On the arrival of the policies, one of them was returned to the company and one of the notes was returned to the applicant, but the other note was retained and the other policy delivered. The note was for six months. At its maturity, the applicant came to the local solicitor and stated that he could not pay the premium nor meet the note, and he asked for a return of the same while he gave up the policy. The exchange was made and the second policy was returned to the company. It was an admitted fact that the company never received or authorized any one to receive for it anything but money in the payment of premiums, and where agents took notes as above they did so on their own responsibility. It was also admitted that the company never received any payment whatever on either of said policies. The applicant died about thirteen months after the policies were issued and about six months after the surrender of the second policy.

*Held*, That the first policy, not having been delivered, was void, but the second was in force for the following reasons: (1) The act of delivery with intent that it shall take effect constitutes a waiver of the policy provision that the company shall not be liable until the premium is actually paid, and raises an estoppel against the insurer. (2) A legal delivery of a policy vests the beneficiary with rights that the insured may not destroy, and his surrender of the second policy in exchange for his note was void.

The second premium would be due in July, 1890. There is a law of New York that no policy shall be forfeited or lapsed for non-payment of premium unless the company has given the assured notice of the amount due, the place where, and the person to whom payment is to be made. The company did not send any such notice of the second premium on this second policy. *Held*, (1) That the non-payment of the second annual premium did not defeat the right of plaintiff to recover. (2) A corporation, being the creature of law, must confine its functions strictly within the law, and cannot declare policies void for non-payment except in the prescribed mode. The full amount of the second policy with interest thereon must be paid.

T. C. VAN NESS & J. P. MEUX (L. A. Redman, of counsel), *for Appellant*.

WILSON & McCUTCHEN, *for Respondent*.

SEARLS, C.

This is an action by the appellant, as plaintiff, to recover from the defendant and respondent \$20,000, interest and costs, upon two 20-year endowment policies of insurance averred to have been issued by the defendant, an insurance company, for \$10,000 each, to and upon the life of E. J. Griffith; loss, if any, payable to his wife,

\*Decision rend.-red., March 15, 1894.

Mary V. Griffith, or, in case of her death, to the representatives or assigns of the insured, and, in the event of his survival for the period of 20 years, to him, the said Griffith. Griffith died within two years after the policies issued, and his wife, the beneficiary named therein, is the plaintiff and appellant herein. The policies were issued, and all payments were to be made at New York, in the state of New York, where defendant is organized. The cause was tried by the court without a jury, written findings filed, and a judgment rendered thereon in favor of defendant for costs, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

We are satisfied, after an examination of the evidence and findings of the court, that the alleged insufficiency of the evidence to sustain the several findings cannot be maintained. Technical criticism may be properly indulged as to the precise language used in some of them, but, taken together, they express fully and clearly the facts fairly deducible from the evidence. So, too, the two errors of law assigned upon the action of the court in overruling the objections of plaintiff's counsel to questions put to the witness, J. D. Mouser, are deemed of little importance, in our view of the case. We think the rulings of the court were correct, but, if otherwise, that the errors would not call for a reversal.

The questions involved are highly important, and are well presented by the facts, as found by the court, which are set out at length, and are as follows:—

“(1) That at all the times mentioned in the complaint the defendant was a corporation organized and existing under the laws of the state of New York, with its principal office in the city of New York, and carrying on the business of life insurance in said state of New York and in the Pacific Coast states and territories, including the state of California.

“(2) That at all the times in the complaint mentioned, and for many years prior thereto, Alexander G. Hawes was the general manager of the defendant for the Pacific Coast, including the state of California; that the duties of the said Alexander G. Hawes, as such manager, were strictly confined to the securing of new business for the defendant on said Pacific Coast, including the state of California, and the collection of renewal premiums; to receive all applications for life insurance made within said territory, and to forward the same to the home office of the defendant, in said city of New York; to receive the policies when issued by the defendant, and to deliver the same to the assured upon receiving the premium called for thereby.

"(3) That at all the times mentioned in the complaint, Messrs. Walker & Cerf were the state agents of the defendant in the state of California, and as such state agents they were engaged in procuring applications for policies of insurance in said company, and were paid a commission on premiums paid upon policies issued upon applications obtained by them; and said Walker & Cerf employed various persons to solicit such applications for life insurance.

"(3½) That for many years prior to the application of E. J. Griffith for life insurance in the company defendant, as stated in finding five, it has been the custom of the company to forward policies procured for the company through Walker & Cerf to the company's manager, Hawes, to be by him delivered to Walker & Cerf, to be by them, in turn, delivered to the applicants for the policies; and the company charged said policies to the manager, Hawes, and the said Hawes, in turn, charged the said policies to the state agents, Walker & Cerf. The said Walker & Cerf, with the knowledge, consent, and approval of the said Hawes, frequently, upon the delivery of policies to the applicants therefor, accepted the promissory notes of the said applicants for the first year's premium due upon said policies; and in the cases in which this was done the said Walker & Cerf became responsible to the company for the amount of such premiums, and, in case of the surrender or cancellation of any of such policies without the payment of the note accepted for said premium, became and were liable for the earned premium upon such policies for the time they were in the possession of the applicant, and unsurrendered and uncanceled.

"(4) That at all the times mentioned in the complaint one J. D. Mouser was one of the persons employed by said Walker & Cerf to solicit for them applications for life insurance in defendant company, in the state of California. That, as such solicitor, said J. D. Mouser was to solicit life insurance in defendant company for said Walker & Cerf, and receive the applications therefor.

"(5) That on or about the 1st day of June, 1889, said J. D. Mouser, solicitor as aforesaid, did solicit one E. J. Griffith, in the complaint mentioned, and then the husband of plaintiff, to take insurance upon his life in the defendant company in the sum of twenty thousand dollars; and thereupon, on said last-mentioned date, the said E. J. Griffith did, in writing, make his application to the defendant company for insurance upon his life in said defendant company for the sum of twenty thousand dollars, to be issued in two policies, of ten thousand dollars each, being the same application, a true copy of which is attached to and made a part of the answer of the defendant on file herein, marked 'Exhibit A.' That

the said E. J. Griffith then and there delivered said application to said J. D. Mouser, solicitor aforesaid, and at the same time delivered to said Mouser his two certain promissory notes for the sum of \$449 each, payable to himself, or order, six months after date, and dated June 21, 1889, which notes were duly indorsed by said Griffith, and by him given for the first annual premium for said insurance, amounting in the aggregate to \$898, in the event said application for insurance was accepted by the defendant company, and policies therefor issued by it.

“(6) That after said application had been delivered to said Mouser, he, the said Mouser, delivered the same to the said Walker & Cerf, and the said Walker & Cerf thereafter delivered the same to the said A. G. Hawes, and the said A. G. Hawes thereupon forwarded the same to the home office of the defendant in the said city of New York; and the defendant, believing and relying upon the truth of the statements and representations made by the said Griffith in said application, and in consideration thereof, did, on the 3d day of July, 1889, by and through its officers, sign two policies of insurance, numbered, respectively, 323,792 and 323,793, for the sum of ten thousand dollars each, being the same policies of insurance, true copies of which are attached to and made part of the answer of the defendant on file herein, and marked, respectively, ‘Exhibit B’ and ‘Exhibit D.’ That said two policies of insurance were thereupon mailed to the said Alexander G. Hawes, manager as aforesaid, and then were by the said Hawes delivered to the said Walker & Cerf, state agents as aforesaid, and by them were then delivered to the said Mouser, solicitor as aforesaid, to be delivered to the said E. J. Griffith. That during the month of July, 1889, said Mouser did deliver to the said E. J. Griffith one of the before-mentioned policies, number 323,792. That the above-mentioned policy, number 323,793, was never delivered by the said Mouser, or anybody else, to the said Griffith, nor was said policy ever in the possession or under the control of the said E. J. Griffith.

“(7) That at or about the time said policy, number 323,792, was delivered as aforesaid to the said E. J. Griffith, the said Griffith, not being financially able to pay said note, requested the said Mouser to return said policy, number 323,793, to the defendant company, for cancellation, and that his said note be returned to him canceled. That thereupon said promissory note was returned to the said E. J. Griffith, and said policy of insurance, number 323,793, was returned by the said Mouser to said Walker & Cerf, with a report that the premium thereon could not be collected; and by the said Walker & Cerf said policy was returned to the said A. G. Hawes, with the

same report; and by the said Hawes said policy was returned to the defendant company, with the same report. Whereupon on the 12th day of August, 1889, said policy was by said defendant company canceled.

"(8) That on or about the 30th day of January, 1890, and after the maturity of the hereinabove mentioned note, which he, the said Griffith, had given for the first annual premium on the policy so as aforesaid delivered (number 323,792), said E. J. Griffith stated and represented to the said Mouser that he could not pay said note or said premium, and requested the said Mouser to return said note to him, and asked to surrender said policy. Thereupon said note was returned to the said Griffith by said Mouser; and he, the said Griffith, surrendered and returned said policy to said Mouser. Thereupon, the said Mouser returned said policy to said Walker & Cerf, with a report that the premium thereon could not be collected; and thereupon the said Walker & Cerf returned said policy to said A. G. Hawes, with the same report; and thereupon the said Hawes returned said policy to the defendant company, with the same report. The defendant company received said policy, and on the 8th day of March, 1890, marked the same 'Canceled.'

"(9) That the said E. J. Griffith did not at any time ever pay unto the defendant company, or to any one on its behalf, any money whatever, as premiums on said policies, or either of them, or for any other purpose.

"(10) That neither of said promissory notes ever came into the possession or control of the defendant, except as above stated. Nor did defendant ever know that promissory notes had been given by said Griffith for the premium on said policies, except as above stated. Nor did defendant know, until the receipt by it from said Hawes of the policies as above found, that the premiums called for thereby had not been paid, except as above stated.

"(11) Except as herein stated, neither the said Hawes, nor the said Walker & Cerf, nor the said Mouser were ever authorized by the defendant company, or by any of its officers, to waive any of the stipulations or requirements contained in the applications signed by said Griffith, or contained in the policies of insurance signed by the defendant, nor to receive or accept notes in payment of premiums; but, on the contrary, they were instructed by said defendant company to take nothing in payment of premiums except money.

"(12) That neither the said E. J. Griffith nor the plaintiff paid the second year's premium for the insurance evidenced by said policies, but at the time said policies were issued, and at all times thereafter, the statute law of the state of New York provided that 'no



life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued by reason of nonpayment of premium, unless after it becomes due a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured at his last known post-office address, postage paid by the company; and further stating that unless the premium then due shall be paid to the company or its agent, within thirty days after the mailing of such notice, the policy and all demands thereon will become forfeited and void, and that in case such payment should be made within the thirty days limited therefor, it should be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and that no such policy should in any case be forfeited until the expiration of the thirty days after the mailing of such notice.

“(13) That at no time before or after the second annual premium became due did the defendant give or mail to the said E. J. Griffith, or to the plaintiff, a notice, as by the law of New York (as stated in finding twelve) provided, or any notice, stating the amount of premium, the place where it should be paid, or the person to whom the same was payable, or that unless the premium then due should be paid to the company or its agent within thirty days, or at any other time after the mailing of such notice, the policy and all payments thereon would become forfeited and void, or any similar notice, and did not give nor address nor mail to plaintiff such notice, nor any similar notice.

“(14) That on the 24th day of July, 1890, and in the city and county of San Francisco, state of California, the said E. J. Griffith died.

“(15) That subsequent to the death of the said E. J. Griffith the plaintiff furnished to the defendant notice and proof of the death of said E. J. Griffith, as and in the manner required by the provisions of the policies executed by the defendant, as stated in the foregoing findings.”

The question is, was the defendant, upon this state of facts, entitled to the judgment rendered? For convenience of consideration, I change the order in which counsel for appellant formulate their propositions in negation of the question, and in favor of a reversal of the judgment, by stating their second proposition as the first, and their first as second. Thus transposed, they are as follows: First, that there was a perfect legal delivery of policy 793 (323,793), whereupon the right of the plaintiff, as beneficiary, so

vested as to prevent the right of surrender upon the part of Griffith; second, that the surrender of the policies by Griffith without the knowledge and consent of the beneficiary, the plaintiff in this action was void, and of no effect; third, that the nonpayment of the second annual premium does not defeat the right of plaintiff to recover.

The court finds that this policy "was never delivered by said Mouser, or anybody else, to the said Griffith, nor was said policy ever in the possession of, or under the control of, the said E. J. Griffith." Counsel for appellant do not claim that the policy was ever in the physical possession of plaintiff. Their contention is that there was, as appears by the other findings, a consummated contract, and that it was, in legal contemplation, delivered. This position is assumed upon the theory that the contract was consummated, and that thereupon an interest in the policy vested in the plaintiff, as beneficiary, which could not be divested by Griffith without her consent. As a general rule applicable to the ordinary policies of life insurance, "where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation of title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so the person originally designated in the policy will derive the benefit. The change of designation can only be made by the persons originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur:" *Bliss, Ins.*, § 339; *Gould vs. Emerson*, 99 Mass., 154; *Chapin vs. Fellows*, 36 Conn., 132; *Insurance Co. vs. Applegate*, 7 Ohio St., 292; *Ruppert vs. Insurance Co.*, 7 Rob. (N. Y.), 155. As an apparent exception to this rule, it was held in *Bowman vs. Moore* (87 Cal., 306, 25 Pac., 409), that a change of beneficiary in a mutual benefit association, the by-laws of which provided therefor, made according to such by-laws, was a valid substitution. Another proposition which may be considered as established is this: An express provision in a policy of insurance that the company shall not be liable on the policy until the premium is actually paid is waived by the unconditional delivery of the policy to the assured, as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium, and in such a case the company insuring is liable for a loss which may occur during the period of credit: *Farnum vs. Insurance Co.* (83 Cal. 246, 23 Pac., 869), and cases cited. These propositions are stated as prescribing limitations upon the insurers in cases

where the contract is fully consummated, but do not go to the essential point in our present inquiry, viz.: was it so consummated as to bind the insurer? Griffith desired two policies of \$10,000 each. The solicitor of defendant was willing to procure them, and take his notes at three months for the premium for the first year. The applications were sent to defendant at New York, representing the premiums as paid in cash. The policies were forwarded to the manager in San Francisco, and by him, through the general agents, to the local agent at Fresno. This local agent has in the meantime become skeptical as to the solvency of Griffith; and, as he and the California agents will be held personally responsible to the company in case the notes are not paid, he delivers one of the policies, and, with the consent of Griffith, declines to deliver the other, surrenders the note for the premium therefor, and returns the policy in question, which is canceled by the company. Plaintiff's rights in the premises only vested when the contract was consummated. Griffith was under no legal obligation to procure the policy for her. He was to pay the premium from his own funds, and might stop short of doing so, or, having paid the first annual premium, might allow the policy to lapse for the want of payment of subsequent premiums. The most that can be said is that, had he consummated the contract, it would have inured to the benefit of the plaintiff; and, although his acts were purely voluntary, he would have been regarded as the agent of the plaintiff in their performance, and defendant would have been estopped from denying such agency. As long as the contract remained executory, Griffith and defendant, or its agent, could, by mutual consent, decline to complete it, without consulting the plaintiff, who could only become a beneficiary upon its completion. Griffith had not only represented in his statement that the first annual premium had been paid in cash, but he had also agreed, in the same statement, "that any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company, or its authorized agent, during my lifetime and good health." We may concede that this agreement might have been waived by a delivery of the policy without such payment, but it by no means follows that the same result follows without a delivery, or that the agent would be legally bound to deliver without payment. In such a case it is the act of delivery, with intent that it shall take effect, that constitutes the waiver, and raises an estoppel against the insurer, and where the intent and act are wanting there is no waiver. Up to the time of delivery the agreement to give credit was a mere personal one on the part of the solicitor, without authority from defendant,

which he might and did cancel, with the consent of Griffith, before consummation of the contract. It follows from these views that the finding of the court that policy No. 793 (323,793) was not delivered is one of fact, and not a conclusion of law, as claimed by appellant, and that the additional facts found by the court are in harmony therewith, and, as a sequence, that the first contention of the appellant cannot be maintained.

2. Was the surrender of the other policy, 323,792 (which we will designate as 792), by Griffith void, as against the plaintiff? It is conceded that this policy was delivered to Griffith, and retained by him from July, 1889, to January 30, 1890, when, being unable to pay the note given by him for the first year's premium when it fell due, he requested Mouser, the local agent of defendant, to return the note to him, and that he be permitted to surrender the policy, all of which was done, and the policy returned to defendant, and canceled, as for want of payment of the premium. So far as appears, defendant had no knowledge of the giving of the note, except what is to be inferred by the knowledge and acts of its agents in California. The findings are full upon this branch of the case. We think the doctrine is well settled that where a valid policy is regularly delivered, in pursuance of a consummated contract, to one who has procured insurance upon his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary: *Pilcher vs. Insurance Co.*, 23 La. Ann., 322; *Trager vs. Insurance Co.*, 31 La. Ann., 235; *Whitehead vs. Insurance Co.*, 102 N. Y. 143, 6 N. E., 267; *Schneider vs. Insurance Co.*, 123 N. Y. 109, 25 N. E., 321; *Garner vs. Insurance Co.*, 110 N. Y., 266, 18 N. E., 130; *Ricker vs. Insurance Co. (Minn.)*, 6 N. E., 771; *Insurance Co. vs. Haley (Me.)*, 4 Atl., 415; *Harley vs. Heist*, 86 Ind., 196; *Hubbard vs. Stapp*, 32 Ill. App., 541; *Packard vs. Insurance Co.*, 9 Mo. App., 469; *Bank vs. Hume*, 128 U. S., 195, 9 Sup. Ct., 41. We do not understand counsel for respondent to seriously combat this proposition. Their theory is that the giving of a credit was, at most, an extension of time for payment, and that when the promissory note of Griffith fell due, and was not paid, the clause in the policy which provided that it should not take effect until payment of the premium became operative, and the policy lapsed for nonpayment. There are numerous cases reported, in which policies have been held to be forfeited for nonpayment of premium notes; but, so far as observed they are all cases where the insurers might, under their charters,—or were accustomed to,—take such notes, and in which the policies provided for a forfeiture upon a nonpayment thereof. The agents of defendant were not authorized by defendant to take anything ex-

cept money in payment of premiums. They did consent to take the note in question in lieu of money, the effect of which, according to the evidence, was that they became individually liable to defendant for so much money, less their commissions. It was, in effect, so far as defendant was concerned, a payment of the premium to the agents, who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment. The note was payable to order, duly indorsed, and, so far as appears, in no way referred to the premium or policy. Under such circumstances, its nonpayment at maturity did not work a forfeiture of the policy, or defeat its validity: *Insurance Co. vs. Hoover*, 113 Pa. St., 591, 8 Atl., 163; *Insurance Co. vs. Block*, 109 Pa. St., 535, 1 Atl., 523; *Boehen vs. Insurance Co.*, 35 N. Y., 131; *Miller vs. Insurance Co.*, 12 Wall., 285; *Farnum vs. Insurance Co.*, 83 Cal., 246, 23 Pac., 869.

3. Did the nonpayment of the second annual premium, which fell due June 1, 1890 (but upon the payment of which a grace of one month was, by the terms of the policy, allowed), work a forfeiture of the policy? The law of the state of New York, under which this policy issued, is set out in the twelfth finding of the court, and need not be repeated. It is also found that the defendant did not give the notice as required by said statute. In avoidance of this statute, and as a waiver of the notice there provided for, respondent relies upon the following clause in the policy: "Notice that each and every payment of premiums is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived." The policy also provided as follows: "That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company." Such provisions as the law prescribes for the advantage or protection of individuals may, as a rule, be waived by them, where not inhibited by public policy. "Where no principle of public policy is violated, parties are at liberty to forego the protection of the law." *Sedg. St. & Const. Law*, p. 109. Where, however, "the object of a statute is to promote great public interests, liberty, or morals, it cannot be defeated by any private stipulation." *Id.* p. 110; *Civ. Code*, § 3268; *Code Civ. Proc.*, §§ 406, 434, 631; *Bowen vs. Aubrey*, 22 Cal., at page 572, and cases there cited. In *Caffery vs. Insurance Co.* (27 Fed. 25), it was held, in substance, that where an act of the legislature provided that, upon the payment of the first premium upon a policy

of life insurance, the policy shall remain in force for a certain time, for the full amount thereof, "anything in the policy to the contrary notwithstanding," the statute might be waived, by the express agreement of the parties, by the substitution of a nonforfeitable policy, of a different character, and that, as the waiver was a part of the original contract, the beneficiary was bound by the waiver. In *Desmazes vs. Insurance Co.* (7 Ins. Law. J., 926, Fed. Cas. No. 3,821), a like question was discussed; Clifford, J., using the following language: "Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had, outside the statute, to waive the nonforfeiture provisions, if the other party consented." The case passed off upon a different point, and is only useful as indicating the opinion of an able jurist. There are other cases, bearing more or less directly on the subject, tending to uphold the same general doctrine. It would seem, however, that the New York statute was intended to cut deeper, and, as a matter of public policy, to inhibit forfeitures by life insurance companies, except by the method therein provided. "No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy \* \* \* by reason of nonpayment of premiums," etc., except as therein provided. The statute is a limitation on the power of the company to do a specified thing, except under prescribed conditions. That which a corporation has not the power to do, if attempted to be done by it, is *ultra vires* and void. Admit that Griffith attempted to waive all notice of nonpayment of premiums. If the power was lacking in the corporation to declare a forfeiture in consequence thereof, it is not perceived how it can be done. The very idea of a waiver involves the right of the contracting parties to make and accept such waiver. Consent never gives jurisdiction not otherwise possessed of the subject-matter to a court, for the reason that it lacks the power to adjudicate such subject-matter, except as conferred by law. A corporation, being the creature of the law, must confine its functions to the limits prescribed for its action; and, if the law expressly inhibits it from doing a given thing, it is powerless to do that thing, and if it can do it only in a given manner the prescribed method becomes the measure of its power. We are not met with any suggestion that the statute in question is violative of any chartered right of the defendant, and, in the absence of a showing to the contrary, must assume the New York statute to be in consonance with its constitutional and chartered rights. The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies for-

feited for nonpayment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power, in the face of the law which has taken it away. The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them.

The conclusion is reached that, as no notice was given by defendant, the policy was not forfeited by failure to pay the annual premium which fell due June 1, 1890. It follows from these views that the judgment of the court below, so far as applicable to policy No. 323,793, was correct, and should be affirmed; that the judgment, so far as applicable to policy No. 323,792 is erroneous, and should be reversed. And, as the findings are full and complete, the court below should be directed to enter judgment in favor of plaintiff, and against the defendant, for the amount due upon policy No. 323,792, viz.: for \$10,000, and interest, less the amount of two annual premiums of \$499 each, and interest thereon from the date when they, respectively, fell due, viz.: June 1, 1889, and July 1, 1890, and without costs to either party on this appeal.

We concur: Haynes, C.; Belcher, C.

PER CURIAM.

For the reasons given in the foregoing opinion, the judgment of the court below in favor of defendant upon policy of insurance No. 323,793 is affirmed. It is further adjudged that the judgment of the court below in favor of defendant upon policy No. 323,792 be, and the same is hereby, reversed, and the court below directed to enter judgment in favor of plaintiff, and against the defendant, for the amount due on said policy No. 323,792, to wit, \$10,000, and interest thereon, less the amount of two annual premiums, of \$449 each, and interest thereon from the date when they, respectively, fell due, viz.: June 1, 1889, and June 1, 1890, and that the parties pay their own costs on this appeal.

## SUPREME COURT OF NEBRASKA.

BURLINGTON VOLUNTARY RELIEF DEPARTMENT  
OF CHI., B. & Q. R. R. CO.

vs.

WHITE.\*

A relief department in the nature of a mutual insurance association was maintained in connection with a railroad company. The members of the relief department were employes of the railroad company. By their contract of membership they authorized the company to withhold from their wages certain sums to provide a fund for the payment of benefits in the case of sickness or death of members. The railroad company contracted to make up any deficiencies in the fund so provided. It also furnished the clerks and other employes for conducting the affairs of the department. The department was under the general management of a superintendent, and subject to the supervisory control of an advisory committee. The by-laws of the department required an employe who desired to become a member to make application in a prescribed manner, and submit himself to a physical examination. His application was then subject to the approval of the superintendent. W. was an employe of the railroad. July 21st he expressed to a soliciting agent of the department his desire to become a member. The agent gave written notice of W.'s application to the superintendent of the department, the paymaster of the road, and W.'s superior officer in the employ of the road. This notice specified July 21st as the day when the application was to take effect. July 22d W. was taken sick. No application was made in the form prescribed by the by-laws, and no physical examination was had. No demand was made upon W. either for such application or for such examination. W.'s name was placed upon the roll of members of the department, and from the July pay roll there was deducted by the company, for the benefit of the department, the assessment due from W. on the basis of membership from July 21st to September 1st. On August 7th, the officers of the department were notified of W.'s disability. September 19th, the superintendent wrote to W.'s superior officer, stating that W. was not a member of the department; that his contribution should be refunded by time check, and that the notice of disability should be canceled. September 20th, an instrument called a "time check" was tendered to W., and by him refused. A few hours thereafter W. died. *Held:*

1. That the department, by causing to be deducted from W.'s pay assessments on the basis of membership, with knowledge of the fact that no formal application had been made, and no examination had, was estopped from disputing W.'s membership.
2. That the fact that the relief department was a mutual insurance company did not relieve it from the operation of the rules of equitable estoppel.
3. That all of the transactions being with the knowledge of the superintendent of the department, there was no question of the authority of subordinate employes to waive requirements, their acts being in such case the acts of the department.
4. That the department was not relieved from liability because of a rule which provided that where an employe had made a proper application, and passed a physical examination, the department should only be liable during a delay in the approval of his application for injuries or death caused by accident. The department, under the facts stated, was estopped, not only from denying that there had been an application, and examination, but from denying that the application had been approved.

\* Decision rendered, June 26, 1894. Syllabus by the Court.



5. The tender of the time check before W.'s death did not release the department from liability—First, because it was not a legal tender; and, secondly, because liabilities had already accrued against the department from which it could not discharge itself by refunding the assessment.
6. A rule of the department, providing that all questions or controversies arising between any parties or persons in connection with the relief department or operation thereof, whether as to the construction of language or the meaning of regulations or as to any right, decision, or act in connection therewith, should be submitted to the determination of the superintendent, whose decision should be final, subject, however, to an appeal to the advisory committee, did not prevent the maintaining of this action, for the reasons: First, that in disclaiming W.'s membership before his death the superintendent was not acting judicially after a hearing of a controversy upon the subject, but was acting in an administrative capacity on behalf of the department alone; and, secondly, that this was not a controversy with the department as to transactions between it and a member, but was an action by the widow, after W.'s membership had ceased, to enforce a liability accruing to her. *Association vs. Loomis*, 43 Ill., App. 599, followed.
7. No beneficiary having been designated by W., the rules of the department construed, and held to constitute W.'s widow his beneficiary.

MARQUETT & DEWESEE, JOHN H. AMES and BYRON CLARK, *for Plaintiff in Error.*

MATTHEW GERING, *for Defendant in Error.*

IRVINE, C.

There is maintained, in connection with the Chicago, Burlington & Quincy Railroad and certain allied companies, what is called the Burlington Voluntary Relief Department, which is the plaintiff in error. This voluntary association is somewhat in the nature of a mutual benefit society, paying to its members stipulated sums during disability caused by sickness or accident, and paying to designated beneficiaries certain sums upon the death of members. The members are employes of the railroad companies operating the department. The employing railroad company contracts to make up deficiencies in the relief fund for the payment of losses accruing to those employes. It also furnishes clerks and other employes to conduct the affairs of the department. The department has a superintendent, charged with the general conduct of its business, but subject to the supervisory control of an advisory committee, consisting of the general manager of the Chicago, Burlington & Quincy Railroad, certain members chosen by the directors of that road, and other members chosen by employes of different divisions of the road, who are members of the department. The method prescribed for obtaining membership is for the employe to make an application upon a form prescribed by the by-laws, and submit himself to a physical examination by an examiner appointed by the department. His application is then passed upon by the superintendent, and, if approved, a certificate of membership is issued. The principal source of income is by deducting specified amounts

monthly from the wages of the members. The railroad company makes this deduction and retains the fund, paying interest to the department upon monthly balances, in his hands. These are the general features, to some of which it will be necessary hereafter to refer more specifically.

Landon T. White was, in 1890, employed as an engineer by the Chicago, Burlington & Quincy Company. On July 21st of that year he met a soliciting agent of the department, also an employe of the company, and suggested to him his desire to become a member of the department. The agent then filled out in triplicate a printed form used for the purpose, headed "Notice of Application for Membership," stating the applicant's name, date at which application was to take effect, applicant's occupation, age, wages, and the class of membership to which he desired to be admitted. On this form the date at which the application was to take effect was stated as July 21, 1890, the day the form was filled and dated. One of these forms was sent to the superintendent at Chicago, one to the paymaster, and one to the superintendent of motive power. The following day White was taken sick. Upon a subsequent day the medical examiner called at his house, but testified that, finding him not in a physical condition to make the examination, none took place. According to Mrs. White, some kind of an examination was made, but its nature does not appear. On August 7th the employe of the company charged with that duty filled out another form in triplicate entitled "Notice of Disability," the contents being indicated by the title, and sent one form to the department physician, one to the superintendent of motive power, and one to the superintendent of the relief department. In the meantime White's name had been placed on a roll of members of the relief department, and from the pay roll for July there had been deducted from the wages of White by the officer charged with that duty \$4.10, being the assessment upon White for all of August, and for that portion of July following the 21st. On September 19th the superintendent of the department wrote to the superintendent of the motive power as follows:—

Chicago, Ill., September 19, 1890. Mr. D. Hawksworth, Supt. Motive Power, Plattsmouth, Neb. Dear Sir: L. T. White, engineman, Plattsmouth, made preliminary application on form 3, July 21st, for membership in the fourth class, to take effect July 21st, and was taken sick on July 22d, as per form 8, No. 15,753, issued by J. E. Barwick, before medical examination could be made. Mr. White is not a member of the fund, and the contribution of \$4.10 deducted on the July roll should be refunded him at once by time check. Will you please see that this is done; also that the form 8 is canceled.

Yours, truly,

J. C. Bartlett, Supt.

On the 20th an employe was sent to White's house, where he made a tender of what is designated a "time check." This was on a printed blank, in form a certificate, signed by the master mechanic of an amount due for labor for a specified time; but, taking this document as it was written, it read as follows:—

Burlington & Missouri River Railroad Company in Nebraska. C., B. & Q. R. R. Co., Owner. Plattsmouth, Neb., September 20, 1890. L. T. White has worked for this Company Relief Dept. C. R. in month of September. Amount due, four dollars and 10-100 (\$4.10). D. Hawsworth, Master Mechanic.  
S. W. Dutton.

This was refused by White and his wife. A few hours afterwards White died. No application according to the form prescribed had ever been made by White, and it may be assumed that there had been no physical examination. The defendant in error is White's widow, and she brought this action to recover the amount of the death benefit.

A portion of the argument is addressed to the rulings of the court on the admission of evidence. It has been so frequently decided that such rulings will not be reviewed, in the absence of specific assignments in the petition in error calling attention to the particular rulings complained of, that it is unnecessary to cite those decisions. There is no assignment in the petition in error herein of the character required to present any of these questions for review. This leaves the case to be determined practically upon a consideration of the instructions given and refused. The court charged the jury quite at length, and refused nine of the instructions asked by the defendant below. One so requested was given with modification, but the transcript is in such shape that it is impossible to determine in what the modification consisted, and it is only by the exceptions noted on the margin that we ascertain that there was any modification. Fortunately for the ends of conciseness, the case is presented in such a manner that it becomes unnecessary to review the instructions in detail. The burden of the instructions excepted to was to the effect that, if the jury should find that a verbal application for insurance was made, the deceased was not called upon to make a written application; that he was not called upon to submit to a physical examination; that he had not agreed, as a condition to his insurance, to submit to such examination; that the relief department had taken from his pay the assessments due from a member, and had retained the same,—then that these facts would estop the department from denying his membership, and would constitute a waiver of the written application and physical examination. The jury was furthermore instructed that the tender of the time check

was not a sufficient tender of a return of the assessment withheld. The effect of the instructions requested and refused was that by the by-laws of the department the assessments were to be made in advance; that the application for membership must be made according to the form prescribed; that a physical examination must take place, and thereafter the application must be approved by the department, before the applicant should become a member; that the applicant was bound by all the conditions of the constitution and by-laws. Under the evidence in the case the instructions asked by the defendant amounted practically to an instruction to find for the defendant, and the instructions given practically amounted to an instruction to find for the plaintiff. We may therefore consider the questions presented generally without reference to the specific instructions. We think that upon every principle of equity the court took the correct view of the law. The notice of application was transmitted by the soliciting agent to the superintendent of the relief department, notifying that officer of White's desire to become a member. It was also sent to White's immediate superior as an employe of the railroad company. For what purpose is not so clear, but from the testimony evidently, in part at least, for the purpose of enabling clerks in that department to keep their records upon the basis of White's membership in the department. A third copy was sent to the paymaster, evidently for use in connection with the collection, or rather withholding, of assessments. The department certainly had notice of his application. His name was entered upon a membership roll of the department, with a statement that his application took effect July 21, 1890. Upon the subject of assessments the rules are as follows: "Contributions will be due on the first day of the month, and will ordinarily be deducted from the members' wages from the pay roll of the preceding month." "The contribution for a month, or any unexpired part of a month, in which an application takes effect shall be made on the pay roll for that month, together with the contribution for the following month." "A member shall not make contribution for any time during which he is entitled to benefits except for the month in which the disability begins." The deduction was made in accordance with these rules from White's pay, contribution for the fraction of July and the whole of August being taken from the July pay roll. The only right which the company could claim for withholding these assessments from the members' pay, and the only right which the department could claim for receiving them, is derived from a clause of the application which is a part of the by-laws, whereby the company is authorized to withhold such moneys. The application also is re-

quired to specify the date when it is to take effect. Another provision of the by-laws is that, if the application is approved, it shall take effect on the date specified therein. We have here, then, this association, acting through the same officers as the railroad company, or, in other words the railroad employes, acting under authority of the association, receiving notice of White's application for membership, and that it was to take effect on July 21st. We have them deducting from his pay assessments from July 21st; their sole right to do so being by virtue of White's being a member of the department. We have them holding this money until the day before his death, when an effort is made to disclaim his membership and refund his contribution by the tender of a paper which was neither money nor a promise to pay money. In a case unincumbered by the technicalities of the law of insurance, there could be little doubt that a party so conducting itself would be estopped from denying liability.

While the authorities are very numerous in regard to contracts of mutual insurance and in regard to benefit associations, but little light is derived from them in the solution of the questions here presented. The cases are nearly all inapplicable because of the peculiar constitution of this association. Most of the mutual benefit associations perform social functions, or are such organizations that the insurance is only an incident of the membership. There the question as to whether one is or is not a member must be solved with a view to other objects of the association. In the case of mutual insurance companies every payment is voluntarily made by the member, and may be with the express or implied understanding that its payment is merely conditional. Here, while the assessments are termed "voluntary contributions," they are only voluntary in the sense that an employe of the railroad may enter the association or not, as he sees fit. If he elect to enter, he must in so doing give to his employer and the association the power to seize the assessments without any further exercise of his own volition. White did not voluntarily make a payment in connection with his application, knowing that the money might be held for some time, and then his application refused; but the department seized his money, and its act in doing so was wrongful, unless by becoming a member he had given the department the right to take it. By its own acts it subjected him to the obligations of membership, and it cannot deny him its privileges.

It is urged in argument that White's application had simply been delayed by reason of his sickness, and inaction for that reason would not estop the department. If there had been merely inaction,

the case would not be difficult, but there was very decided action on the part of the department. It seized White's money, which it had no right to do unless he was a member, and retained it until a loss occurred, and for some six weeks after notice of his sickness. If I give to another authority to take my property in consideration of certain agreements by him to be performed, and he goes and seizes my property, and retains it, it is not difficult to determine that he should not be permitted to disclaim liability upon his agreement. He cannot receive the fruits of his contract and reject its burden. We know of no principle of law exempting a mutual insurance company from the operations of such an estoppel. If there be authority to that effect, we would not recognize it. The doctrine of estoppel is based upon the requirements of morals and conscience,—obligations which even mutual insurance companies should recognize.

But it is said that White did not alter his condition in reliance upon the acts of the department, and that, therefore, the principle of equitable estoppel does not apply. We presume that counsel do not think that his parting with a portion of his pay was an alteration of his position. Generally, the payment of money is sufficient as an act of reliance to render an estoppel operative, and we do not think that the amount of money paid affects the case.

Next, it is said that neither the soliciting agent nor different clerks who took part in the transactions had authority to waive compliance with the by-laws of the association. We need not inquire into the special authority of subordinate employees. The evidence shows that every material fact was speedily communicated to the superintendent, who was charged with the general management of the business, and had authority to approve or reject applications. This is true, except as to the entry of White's name upon the roll of members. But this we consider, in the light of the evidence, an immaterial fact, except as such entry may have led to the withholding of White's pay. The superintendent's power was general, his knowledge was that of the department, his acts were those of the department. We think so far there was a complete case of estoppel made out, and the court's instructions were fully warranted.

Much stress is placed upon rule 49 of the department, whereby it is provided that an employe who has passed a satisfactory medical examination, has made a proper application for membership, shall, notwithstanding the delay in examining his application, be entitled to the benefits and subject to the obligations of membership, but shall in the meantime be entitled only to benefits on account of injury or death caused by accident. The trouble in applying this

rule is that White was not within its provisions. This was not the case of a delay after a proper application and medical examination, where the application would bind him by all its terms, but the case of the department treating White as a member, seizing a portion of his pay in a way only authorized under such circumstances, and thereby estopping itself from setting up that there had not been an application and examination and approval on the 21st of July. The department cannot invoke this rule without admitting that there had been both an application and examination. The facts, indeed, require it to admit this much, but require it to admit more,—that is, that the application had been accepted.

But little is required to be said as to the effect of the department's attempt to refund the so-called "contribution" to the defendant before White's death. Perhaps the company recognized such a document as we have above set forth as an instrument for the payment of money. Certainly no one else would so recognize it, and, even if money had been tendered, it would be extremely doubtful whether a tender made to a man upon his deathbed, within a few hours of final dissolution, would amount to a valid tender in any case. Certainly, in this case, White's money having long before been taken, and the disability having already accrued by which he became entitled to compensation by the department, he was not then required to accept a return of his money in lieu of a discharge of the obligations already incurred by the department.

A section of the rules of the department provides that all questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with the relief department, or operation thereof, whether as to the construction of language or the meaning of the regulations of the relief department, or as to any right, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the department, whose decision shall be final and conclusive, subject to the right of appeal to the advisory committee. Based upon this rule, the defendant requested an instruction that if the jury believed that the superintendent had passed upon this claim, and rejected the same, such decision was conclusive, unless an appeal had been taken to the advisory committee. This instruction was properly refused. We have no doubt of the power of members of voluntary associations to restrict themselves, at least as to matters incidental to the operation of the association, to remedies before tribunals created by the association. It is only to this extent that the rule seems to apply. It certainly does not apply to this case. In the first place, while the superintendent, immediately after

notification of White's death, did write a letter, denying White's membership, there was no hearing before him. In so doing he was acting as the executive officer of the association in disclaiming liability, and was not judicially examining and determining a controversy between the association and one of its members. In the next place, we fail to see how the association, while denying White's membership, can invoke the protection of a rule necessarily affecting members alone. Finally, this was not a controversy arising during White's membership. His membership terminated with his death. Mrs. White's rights were then complete. She had no voice in the management of the association, and her interests were adverse thereto. She was not, and could not be, bound by the decision of the officers of the association. This was the view taken in the opinion of Judge Gary in *Association vs. Loomis*, 43 Ill., App. 599. The Supreme Court of Illinois reversed Judge Gary's judgment, but upon an entirely different point: 32 N. E., 424.

Finally, it is contended that the widow was not the beneficiary, and cannot maintain the action. The application in the by-laws contains the following: "Death benefits shall be payable to \* \* \* (here designate the beneficiary or beneficiaries), or to such other person or persons as I shall subsequently designate in writing in substitution thereof; \* \* \* otherwise to my wife." To this form there is a foot note as follows: "If no beneficiary is designated, a line will be drawn through the blank space and through the following words, beginning, 'or such other person or persons,' and ending and including the words 'otherwise to.'" White having not designated a beneficiary, his application, if one had been filed, would read, under this by-law, "Death benefits shall be payable to my wife." It is clear that the contract of the department is to pay the death benefit, where no beneficiary is named, to the wife of a member, if he have one; and Mrs. White was therefore the proper person to maintain the action. Judgment affirmed.

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At a further hearing of the same case on the same date Irvine, C., said:—

This case is based upon the same state of facts as that of *Association vs. White* (just decided). Here Mrs. White, as administratrix, sues to recover the disability benefits which accrued to White before his death. The trials were separate, and there are some differences in the evidence and in the instructions, but none of them is material. The cases were submitted upon the same briefs, and it is recognized by the parties that upon the principal questions involved the same considerations must control both cases. Upon an exami-



ination of rules 54 and 55 of the association, it is perhaps doubtful whether, in the case of the death of a member at a time when disability benefits have accrued, those benefits do not become consolidated with the death benefit, and payable to his beneficiary, rather than to his personal representative. We do not understand, however, that counsel contend for this construction, nor do we find that the question is raised by the record. Judgment affirmed.

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SUPREME COURT OF MISSISSIPPI.

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HOME INS. CO., OF NEW YORK

vs.

DELTA BANK.\*

1. A defendant who has demurred to the reply, and, the demurrer being undisposed of, has rejoined, has waived his demurrer.
2. An invoice of goods purchased is not an inventory of stock to be produced under the "iron-safe clause" of a fire policy.

Action by the Delta Bank against the Home Insurance Company, of New York, on a fire policy. Judgment for plaintiff. Defendant appealed. Affirmed.

Mrs. R. Stein, who was a merchant at Greenwood, owned two stores,—one a grocery, and the other a dry-goods store,—and a separate set of books was kept for each store, and they were run as separate businesses. Both the stores were insured with appellant for \$2,000. On the night of January 30, 1893, they were both destroyed by fire. Appellant was promptly notified of the loss, and sent their general agent and adjuster to Greenwood to adjust the loss. The policy contained what is called the "iron-safe clause," as follows: "The assured under this policy hereby covenants and agrees to keep a set of books showing a record of business transacted, including all purchases and sales, both by cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such inventory and books securely locked in a fire-proof safe at night, and at all other times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where the business is carried on; and, in case of loss, the assured agrees and covenants to produce such books and inventory, and, in the event of failure to produce the same, the policy shall be

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\* Decision rendered, Feb. 19, 1894. From *Southern Reporter*.

deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Immediately on the arrival of the adjuster, he was notified by Stein that the inventory was lost, but he demanded the books, and took and kept them several days, and had Stein to procure for him duplicate invoices of the goods that had been bought just before the fire, the originals of which had been burned. After several days' examination of the books and papers produced, the general agent told Stein that the policy would be paid. Payment of the policy was afterwards refused. The policy was assigned to the Delta Bank, who instituted this suit to recover the amount of the policy. Appellant pleaded the general issue and a special plea, in which it was charged that there had been a failure to comply with the iron-safe clause. Appellee filed three replications to the special plea. One of these admitted the failure to produce the inventory, but denied that the books required to be kept had not been kept and produced when demanded, and one of the replications charged that the condition of the iron safe clause had been waived by reason that appellant promised to take advantage of that clause when he was notified of the loss of the inventory, and afterwards, on making an examination of the books, promised Stein to pay the loss. The other replication charged substantial compliance with the iron-safe clause, as the books and invoices produced showed all that the inventory would show. Issue was taken on these replications, after a demurrer had been overruled, which the record does not show was disposed of. From a verdict and judgment for plaintiff, defendant appealed.

CALHOON & GREEN, *for Appellant.*

RUSH & GARDNER, *for Appellee.*

CAMPBELL, C. J.

The appellant, having demurred to the replications, and, without the demurrer having been disposed of, rejoined, must be held to have waived demurrer. Besides this, the question raised by the demurrer was fully presented in the trial of the issues of fact, and no harm was suffered by the defendant by the failure to obtain a ruling on the demurrer it presented. Conceding that error was committed in the trial of the issues joined, and that the plaintiff was not entitled to recover for the loss of the "dry-goods and general merchandise stock," because of the breach of the "iron-safe clause" of the policy, it seems to us that a recovery was rightly had for the loss on the "grocery department." As to that, there was no breach of the condition of the policy in the matter which is claimed to be fatal to recovery for the loss in the other department. The grocery business was begun March 11, 1892, and no inventory of the grocery

stock had been taken, and therefore there was no inventory to be preserved and produced, as required by the policy. The invoice of the goods by which they were purchased was not the sort of inventory contemplated by the policy, and its nonproduction was not a breach of it. The evidence shows the loss of goods in the grocery department covered by the policy sued on, to an amount sufficient to entitle to recover the sum of the policy; and while it appears that there was another policy on the goods covered by this, as we know nothing more of that, and have to deal only with this, that presented no reason for denial of recovery on this.

We observe the fact that there was no motion for a new trial, and that the case is before us on a special bill of exceptions; but it specifically informs us that it contains "all the evidence in the case," and therefore, with all the evidence in the case before us, and seeing that upon that a proper result was reached, even though by wrong methods or by accident, it is right to maintain it. Affirmed.

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## SUPREME COURT OF MINNESOTA.

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KOTTMAN

*vs.*

MINNESOTA ODD FELLOWS' MUT. BEN. SOC.\* }  
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The Minnesota Odd Fellows' Mutual Benefit Society issued to one Gazett a certificate of membership, by which it agreed to pay, within sixty days after notice and satisfactory proofs of his death, to his wife if living, if not living, then to his heirs or assigns, a sum equal to one dollar for each full member of the society at the time of his death, etc. He died, leaving his wife surviving him. Six days afterwards, and before proofs of his death had been made to the society, his widow also died. *Held*. That the words "if living" and "if not living" refer to the date of his death, and not to the date when the proofs of his death were furnished, or to the date when the money became payable according to the terms of the certificate; that the widow's right as beneficiary became vested at the date of the death of her husband, and the money belongs to her heirs, and not to the heirs of her husband.

G. L. FORT and A. B. JACKSON, *for Appellants*.

A. GRETHEN, *for Respondent*.

MITCHELL, J.

On January 3, 1884, Jacob Gazett became a member of the Minnesota Odd Fellows' Mutual Benefit Society, which issued to him a certificate of membership by which it agreed "to pay, within sixty days after notice and satisfactory proofs of the death of said brother, made as provided by the by-laws, to Mrs. Fride Gazett, his wife, if

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\* Decision rendered, Oct. 21, 1896. Syllabus by the Court.

living, if not living then to the heirs or assigns of the aforesaid brother, a sum equal to the amount of one dollar for each full member of the society at the time of his death, which sum, however, shall not exceed \$2,000." Gazett died on the 12th of November, 1894, leaving his wife, Fride, surviving him. On November 18, 1894, before any proofs of the death of Gazett had been furnished to the society, Fride, the widow, also died.

The question is: Who are entitled to the money due on the certificate, the heirs of Jacob Gazett or the heirs of his widow, Fride? The answer to this depends upon the language of the contract contained in the certificate; that is, whether the words "if living" and "if not living" refer to the date of the death of Gazett, or to the date when the money becomes due and payable, to wit, sixty days after proofs of death are made to the society. Counsel for the defendants contend for a middle ground, to wit, that the words refer to the date when the proofs of death are made; but the language of the certificate leaves no room for any such construction. It refers either to the date of the death of the member, or to the date when the money is payable according to the terms of the contract. We have no doubt that the words "if living" and "if not living" refer to the time of the death of the member, and that the right of the beneficiary became fixed and vested at that date. As is suggested in *Association vs. Montgomery* (70 Mich., 587, 38 N. W., 588), the disposition of the proceeds of membership certificates in these mutual benefit associations partakes of the nature of testamentary dispositions of property, and the same rules of construction should be applied as far as possible. Unless a contrary intention is made to appear, they should be construed as speaking of the date of the death of the donor. The law always favors vested in preference to contingent estates or interests. If defendant's contention is correct, then who is or will be the beneficiary will remain incapable of ascertainment until sixty days after proof of death, or, at least, until proof of death. Until that proof is made, no one would have any vested interest in the fund. Who, then, it may be asked, is to furnish the proof of death? The provision requiring proofs of death is designed solely for the protection of the society, and the sixty-day clause is also intended exclusively for its benefit, to give it time to collect an assessment from its members. Neither provision has any reference to the question as to who the beneficiary shall be. These provisions being solely for the benefit of the society, it is competent for it to waive them. Suppose in this case the society had waived proofs of death, and paid over the money to the widow before she died; would it be contended that the society would be liable to pay a second

time to the heirs of Gazett? We fail to see why it would not be if defendant's construction of the certificate is to obtain. Any such construction is also subject to the serious objection that it leaves the determination of the question who the beneficiary shall be subject to be manipulated and changed by the conduct of the parties after the death of the member, as, for example, by expediting or delaying the furnishing of proofs of death. We hold that the widow's right to the fund became vested at the date of the death of her husband, and that right was not divested by her subsequent death before proofs of death had been made. Judgment affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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McCOY

vs.

ROMAN CATHOLIC MUT. INS. CO.\* }

The principles which apply to ordinary mutual insurance companies in regard to the waiver of by-laws are equally applicable to a mutual beneficiary association.

Officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity.

An applicant, over the age fixed by the by-laws of a mutual insurance company, who understates his age, invalidates his contract.

WELLS, McCLENCH & BARNES, *for Plaintiff.*

WILLIAM SLATTERY and JAMES B. CARROLL, *for Defendant.*

KNOWLTON, J.

From the report it is fairly to be inferred that the defendant corporation was organized under the statute of 1877, c. 204, § 1, (Pub. St., c. 115, §§ 2, 8,) and that it was a mutual beneficiary association. Its by-laws are made a part of the case, and from them it appears that since their adoption only male Roman Catholics between the ages of 20 and 51 years are eligible to membership. John McCoy at the time he made his application was much older than that; and under the by-laws he could not be admitted to membership. It does not distinctly appear that any officer of the corporation intended to waive the provisions of the by-laws. Perhaps the court might properly infer that the vice-president and the three directors who approved the application did, for the vice-president knew, and the others knew, or had good reason to know,

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\* Decision rendered, Oct. 23, 1890.

that the applicant was more than 51 years of age. But his application described him as about 49 years of age, and expressly referred to the by-laws; and the directors who indorsed their approval certified that they considered him eligible for membership. It seems probable that their approval of the application was given through inadvertence. Moreover, the by-laws provide for a large number of directors, requiring at least three from each parish, and permitting the admission of members from every parish in the diocese. Geran, the director to whom the letter was written by John J. McCoy, did not intend to waive the by-laws; for he supposed that John McCoy was one of the original associates, to whom this provision of the by-laws did not apply. None of the other officers of the corporation had any knowledge that the deceased was older than he represented himself to be in his application, and no other person has been admitted as a member of the corporation since the adoption of the by-laws without an application, under the by-laws, stating that he was less than 51 years of age. But, even if the officers of the corporation had attempted to waive the by-laws in this particular, which was of the substance of the contract, we are of opinion that they had no authority so to do. This is a corporation which does not make contracts of life insurance with strangers, but arranges a system of payments for the benefit of the relatives of its deceased members. It adopts by-laws to determine the relations of the members to each other, and fix their rights against the corporation. The principles which apply to ordinary mutual insurance companies in regard to the waiver of by-laws by officers are equally applicable to this corporation: *Bolton vs. Bolton*, 73 Me., 299, *Swett vs. Society*, 78 Me., 541, 7 Atl. Rep., 394. It is well settled that the officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity: *Baxter vs. Insurance Co.*, 1 Allen, 294; *Evans vs. Insurance Co.*, 9 Allen, 329; *Hale vs. Insurance Co.*, 6 Gray, 169; *Mulrey vs. Insurance Co.*, 4 Allen, 116; *Swett vs. Society*, 78 Me., 541, 7 Atl. Rep., 394. See, also, *Burbank vs. Association*, 144 Mass., 434, 11 N. E. Rep., 691. In regard to a by-law in relation to the proof of loss, which does not touch the essence of the contract, but relates only to the mode in which the liability of the company is to be established to the satisfaction of the officers who are to act upon the matter, the rule is different: *Priest vs. Insurance Co.*, 3 Allen, 602. The officers of the defendant were agents, with a limited authority. The corporation, by the law which it laid down for its government, received into association with its members and to participation in its benefits

**E. D. MICHIGAN.**

A steamer stranded in a fog where she could have been easily pulled off by a tug, but while help was coming a storm arose and the vessel began to pound, and to save her from going to pieces she was scuttled.

**Held**, That the storm rather than the stranding was the cause of loss; that the negligent stranding did not operate to suspend the policy as to the subsequent disaster, which made a proper case for general average.

The material facts of this case, on which the questions of law arise and the rights of the parties depend, are the following:—

The steam-propeller Ontario, owned by the libellant and valued at \$55,000, was, in May, 1883, insured against total loss and general average, only to the limit of \$49,500, in fire insurance companies, one of said fire companies being the respondent, whose policy was for the sum of \$17,500 insurance upon the body, tackle, apparel, and other furniture of said propeller. In the body of the policy the adventures and perils which the respondent undertook to bear and take upon itself were those "of the lakes, rivers, canals, fires, jettisons," that should come to the damage of said vessel or any part thereof. It also contained the following exception to the general liability of the respondent or insurer: "Excepting all perils, losses, misfortunes, or expenses consequent upon, or arising from, or caused by, the following or other legally excepted causes: Damages that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel;

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rottenness, inherent defects, unloading, and all other unseaworthiness; theft, barratry, or robbery." Indorsed upon the policy was the following: "This policy is free from any loss caused by or in consequence of fire, and covers against total loss and general average only." On October 11, 1883, while said policy was in full force, the propeller, laden with a large cargo of miscellaneous merchandise, left the port of Sarnia, Ontario, bound for Duluth. She was in all respects properly officered, manned, and equipped. She had an amply sufficient crew, with competent, experienced, and skilful master and mate, who were familiar with the route. Her cargo was properly loaded, stowed, and secured, and the vessel was entirely seaworthy, and free from rottenness or other inherent defects. Her cargo was insured by several companies other than respondent. The Ontario reached the port of Kincardine at noon of October 12th, and left there about 1 p. m. of that day, the weather being fine, the lake smooth and calm, with only a slight wind from the southward. The course after leaving Kincardine is N. E. by N. to Point Douglass. From there to the "Dummy," the entrance of Southampton harbor, the course is N. E. half E., which takes the vessel clear of the shoal at or near Nine-Mile Point on the east shore of Lake Huron. This portion of the route from Kincardine to Southampton is usually run on time, and the course of vessels is maintained from Kincardine until Point Douglass is passed; then it is changed by porting for Southampton. The master of the Ontario went off watch, and the mate took charge of the vessel's navigation, soon after leaving Kincardine. The propeller was running on time, upon the usual course, and at her ordinary speed of about ten miles per hour. About 2 o'clock p. m. "a very wet, dense, heavy fog" came up, which shut out from view all landmarks and natural objects. The propeller continued on her course at her ordinary speed of nine or ten miles per hour. When she had run out his time, the mate called the master, who at once came on deck, took his position in front of the pilot-house, and sent the mate to the mast-head to ascertain if anything could be seen over the fog. The master, supposing that the propeller had cleared the point, as she had run out her time, ported the vessel so as to change her course for Southampton, but finding from the vessel's movements almost immediately afterwards that she was getting into shallow water he at once starboarded her wheel and checked down. The propeller, however, stranded upon the outer edge of Nine-Mile Point, eight or nine miles from the harbor of Southampton. If she had run one or two minutes more on her original course, or if she had run 100 feet further to the north and east before porting her wheel, the point



would have been cleared, and the stranding would not have occurred. When he came upon deck, at the call of the mate, the master did not examine his compass to ascertain the exact course of the vessel. The stranding was caused by his porting a minute too soon, and occurred about 2:30 P. M., while the dense fog was still prevailing and obscuring all landmarks. After stranding, efforts were made to back her off, but without success. Then her anchor was put out, and the attempt made to work her bow out into the lake by the use of the windlass. While these efforts were being made the clerk of the boat was sent ashore to telegraph to Sarnia for the assistance of a tug to pull the vessel off. She could have been readily and easily pulled off by a good tug, without lightering her, as she was only aground at or on her heel. In her efforts to release herself, the Ontario broke her wheel and shoe. This was the only damage she sustained directly from the stranding and the efforts to get her off. The cargo was in no respect injured or damaged by the stranding, or the attempts to release the vessel. While the vessel was being gradually worked off by the use of her anchor and windlass, and about four hours after the stranding, the wind, which had been from the southward and light when she grounded, changed to the northwest, commenced blowing hard, and the sea began to rise, indicating the approach of a severe storm. The heavy sea prevented all further efforts to get the vessel off by means of the anchor and windlass. The storm continued to increase in force and violence, and became so severe that the lady passengers and children were put ashore in the early part of the night. About ten o'clock at night, the storm continuing to increase in violence, and the wind coming from the lake, the vessel commenced pounding, and was in imminent danger of being driven onto the shore and becoming a total wreck. To avoid this threatened and impending danger, the master, after consulting with his officers, opened the sea cocks, and scuttled the propeller. As a result of this scuttling portions of the cargo were greatly damaged, but the vessel herself and the remainder of the cargo were saved. The storm continued throughout the night of the 12th of October, and at daylight on the 13th [Sunday] it was still so severe and threatening that all the passengers were landed. It continued during Sunday. Sunday night it blew so hard that the officers and crew abandoned the vessel, expecting she would become a total wreck before morning; but on Monday morning, the storm having abated somewhat, the officers and crew returned to the boat. The storm was so violent, and the sea so heavy, that the wrecking tugs with steam pumps could not reach the Ontario until Monday afternoon. Agents of all or most of the underwriters,

except respondent, came with the tugs, and took charge of the operations of getting the propeller off, which was accomplished on Tuesday, the 15th of October, and done without special difficulty after she was pumped out. She was towed with her cargo to Sarnia, where the underwriters in charge unloaded and disposed of the damaged portions of the cargo, and where the vessel was repaired. The matter of adjusting the loss was referred to a skilled adjuster of Toronto, most of the underwriters expressly consenting to the appointment and selection of said adjuster. Respondent's general agents were informed of his appointment, knew that he was proceeding to make the adjustment on the basis of general average contribution, and when the adjustment was completed were notified of the result thereof, and made no objection to the proceeding or to the award. All the underwriters on the vessel, except respondent, paid their respective proportions of the general average loss charged against the Ontario under and according to the adjustment.

The respondent refusing to recognize its liability for any portion of the loss sustained by the Ontario, under the general average insured against, in, and by its said policy, the libelant filed its libel to recover of respondent its proper proportion of said general average loss. Several defenses to the suit are set up by respondent in its answer; the one ultimately mainly relied on, however, being that there was a want of ordinary care and skill in the navigation of the Ontario at the time the stranding occurred, and that such stranding was the direct or chief cause of the loss, thereby exempting respondent from all liability therefor under the exception contained in the policy. On the first submission of the case the learned district judge adjudged and decreed that libelant was entitled to recover its damages for the loss set forth in the libel, and for the purpose of ascertaining the amount thereof a reference was made to a commissioner to take proofs and report the sum due libelant for such damage. When the commissioner's report, which found the amount due libelant from respondent to be \$3,074.22, with interest from August 27, 1887, the date of filing the libel, after disallowing the item \$376.28 for new wheel and shoe for the propeller, and other items for telegraphing, wages and board of crew, use and damage to hawser, and services of tugs and lighters in pulling off the Ontario, came before the court for final action thereon, both sides having reserved general exceptions thereto, the respondent asked a reconsideration of the question of its liability under the terms and provisions of its policy. Such reconsideration was had, and the court reached the conclusion that the master was guilty of gross negligence in approaching the land, and in endeavoring to

enter the harbor of Southampton at the speed of nine or ten miles per hour, in a very wet, dense, and heavy fog, as thick as ever occurred on Lake Huron, and that, if the loss had been total, libelant would not have been entitled to recover by reason of the exception in the policy exonerating the insurer from liability for all perils, losses, misfortunes, and expenses arising from the incompetency of the master or the insufficiency of the crew, or want of ordinary care and skill in navigating the vessel. The libel was accordingly dismissed, with costs. The reasons given in support of the conclusions reached by the court below are fully and clearly stated in the opinion of the learned district judge, reported in 37 Fed. Rep., 220.

Libelant seeks by its appeal a reversal of the decree dismissing the libel, and a recovery against respondent for its proportion of the general average loss arising from the scuttling of the vessel. The right of the district court, when the case came on for hearing upon exceptions to the report of the commissioner, to reconsider and reverse its decision as to respondent's liability, made when the reference was ordered, is not, and cannot be, questioned under the authorities: *Fourniquet vs. Perkins*, 16 How., 84; *Green vs. Fisk*, 103 U. S., 518. Neither is the correctness of the amount apportioned and charged against respondent by the report of the commissioner controverted by either side. But the two questions raised and discussed before this court are those on which the district court rested its decision, viz.: First, was there a want of ordinary care and skill in navigating the *Ontario* which led to her stranding? and, second, was such stranding, in a legal sense, the proximate cause of scuttling the vessel so as to defeat libelant's right to recover the general average loss sustained thereby?

It is settled by the authorities that stranding is a peril of the sea and lakes, and that a policy of insurance against perils of the lakes covers a loss by stranding, although arising from the negligence of the master or crew, in the absence of an express exception to the contrary, for the reason that the insurer undertakes to indemnify the assured against losses from particular risks, without any implied undertaking on the part of the assured that his agents shall use due care to avoid them: *Insurance Co. vs. Sherwood*, 14 How., 351-365; *Insurance Co. vs. Adams*, 123 U. S., 67, 73, 8 Sup. Ct. Rep., 68; *Steam Co. vs. Insurance Co.*, 129 U. S., 438, 9 Sup. Ct. Rep., 469; and *Copeland vs. Insurance Co.*, 2 Metc., 432, 448, 450. The policy in the present case contained such an express exception against negligent navigation, but the fact of stranding does not in and of itself raise a presumption or create any legal inference that

it resulted from a want of ordinary care and skill in navigating the vessel so as to bring it within the operation of the exception. The stranding being a peril covered by the general terms of the policy, it raised a *prima facie* case of liability against respondent for such losses thence arising as came within the provisions of the policy, and it devolves upon the respondent to show that such stranding was consequent upon, arose from, or was caused by, the negligent navigation of the vessel. The rule laid down in *Transportation Co. vs. Downer* (11 Wall., 129) seems to me to impose this burden upon the respondent. But it is not very material upon which side rests the burden of proof of showing whether there was or was not a want of ordinary care and skill in navigating the vessel, as there is little or no controversy or conflict touching the facts bearing upon the question. No incompetency of the master or mate, nor insufficiency of the crew, is either claimed or established. The respondent vests its claim of a want of ordinary care and skill in navigating the Ontario mainly, if not solely, upon the fact that the vessel maintained her speed at the rate of nine or ten miles per hour in a very wet, dense, and heavy fog. This is the distinct act of negligence charged against the vessel, and relied on as the cause of her stranding. Bearing upon this alleged improper rate of speed, counsel for respondent calls attention to the thirteenth article of a Canadian statute entitled "An act to make further provision respecting the navigation of Canadian waters, assented to May 7th, 1880," which provides that "every ship, whether a sailing ship or steamship, shall, in a fog or falling snow, go at a moderate speed." By another section the non-observance of the rules provided by the act is deemed a wilful default by the person in charge of the vessel at the time, rendering him liable for any damage to person or property thence resulting. This Canadian law was neither pleaded nor proved. It is, therefore, doubtful whether this court can properly take notice of it; the rule being "that the courts of one country cannot take cognizance of the law of another without plea and proof." *Steam Co. vs. Insurance Co.*, 129 U. S., 445, 9 Sup. Ct. Rep., 469, and cases cited. But there is no occasion for looking to or considering this Canadian act, as the twenty-first rule of our own navigation statute (section 4233, Rev. St.) provides that "every steam vessel shall, when in a fog, go at a moderate speed." The purpose of this requirement, as stated in the case of the *Pennsylvania* (19 Wall., 133, 134), was to guard against danger of collisions. What is "a moderate speed" can hardly be precisely defined; it must depend upon the circumstances of each case. In the *Portsmouth* (9 Wall., 682), the vessel's speed of eight or nine miles

an hour in a fog was considered excessive. Other cases are to the same effect. I accordingly concur with the district judge in the conclusion that the Ontario was at fault in maintaining a speed of nine or ten miles an hour in the dense fog then prevailing. Regarding the vessel's speed as being immoderate, and as constituting negligent navigation under the circumstances, the question still remains whether this fault contributed to the stranding,—that is, whether the vessel's improper speed was in any proper sense the cause of such stranding. If her speed, however immoderate or excessive, did not contribute to the disaster, or had nothing to do with bringing it about, it cannot be charged against the vessel so as to be of any avail to respondent. In the *Farragut* (10 Wall., 334, 339), the absence of a special lookout was charged as a fault. The court said: "It is perfectly evident that the absence of a special lookout had nothing at all to do with the happening of the accident, and therefore it can have nothing to do with fixing the liability of the parties." This principle has been repeatedly recognized and announced. Applying it to the present case, I am unable, after a careful examination of the facts and circumstances preceding and attending the stranding, to see that the vessel's speed, whether moderate or immoderate, had any connection whatever with her stranding, or in any way contributed to that disaster. Her rate of speed would, undoubtedly, have its bearing upon the force with which she would strike in running upon shoals. It would thus affect the question as to the ease or difficulty of getting the vessel off, and would be calculated to produce greater or less injury in the event of striking, according to whether she was moving fast or slow. But these are effects or incidental results of the stranding, and throw little or no light upon the material question, whether the stranding was caused by the vessel's improper speed. Libellant seeks no recovery for, nor does the policy cover, the partial injury to the Ontario sustained as the direct or immediate result of the stranding.

Several captains of large experience and familiarity with the subject testify that it was the general usage and custom of Canadian vessels navigating this route to run on time, and maintain this ordinary speed, notwithstanding the prevalence of fog, and that aside from the danger of collision with other craft this was the safer course to pursue until within a short distance, say a mile or half mile, from the "Dummy," at or near the entrance to Southampton harbor. This "Dummy" was four or five miles beyond the point at which the Ontario stranded. The reason assigned by said witnesses for the statement that it is safer to run on time at ordinary

speed than to check up in a fog, is that this course affords a better reckoning as to the place and position of a vessel, and location of landmarks. It is not shown that this general usage and custom was known to respondent; nor can it be relied on to justify a rate of speed forbidden by law. While this is so we may, however, look to the facts and circumstances attending the vessel's running on time to ascertain what contributory connection, if any, existed between the speed maintained and the stranding. On running the regular course on time from Kincardine to the place of stranding, a distance of twenty miles, there was little or no deviation. Having run out her time and in a proper direction, the master, supposing that the vessel had passed Nine-Mile Point, and that the proper position had consequently been reached for changing her course in the direction to make Southampton harbor, ported the vessel's wheel one or two minutes too soon. If she had gone a hundred feet further on her course, N. E. by N., before porting, the point of stranding would, as the master supposed it was, have been cleared. It thus appears that the vessel in running on time fell only one or two minutes short of passing the shoal on which she struck. A fraction more of speed, or a delay of two minutes in porting her wheel, would have prevented the stranding. How can it be said that the vessel's improper or excessive rate of speed either caused or contributed to the disaster under such circumstances? The mistake of the master in porting a trifle too soon was not due to the vessel's immoderate speed. Ordinary care and skill did not require the Ontario to stop when she encountered the fog, and wait until it should clear up. No law imposed such a requirement. She had the right to keep moving, provided she maintained her proper course. Having run out her time at a known speed, whether moderate or immoderate, the master fairly and reasonably assumed that the vessel had reached the position on her voyage where, in the course of proper navigation, her wheel should be ported. He was mistaken, ported too soon, and grounded. But what had the vessel's improper rate of speed to do with that mistake, or in bringing it about? I am unable to see any connection whatever. It has not been claimed that the master's act in porting the vessel's wheel one or two minutes too soon was, under the circumstances, a want of ordinary care and skill in navigating the vessel. Tested by the authorities the master's mistake which led to the stranding was not negligent. In *Brown vs. Lynn* (31 Pa. St., 513), it is said that "ordinary care, skill, and diligence is such a degree of care, skill, and diligence as men of ordinary prudence under similar circumstances usually employ." In the nitro-glycerine case (15 Wall., 524), the supreme court say that

"the rule deducible from them [the authorities] is that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own." The court in that case, after adopting the definition of negligence as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, further say that "it [negligence] must be determined in all cases by reference to the situation and knowledge of the parties, and all the attendant circumstances." No proof is introduced to show that the act of the master in porting the vessel's wheel when he did, and which carried her aground, was, under the circumstances, either negligence or bad seamanship. My conclusions on the first branch of the case are that, while the vessel was at fault in maintaining too high a rate of speed in the fog, such fault or want of proper navigation neither caused nor contributed to the stranding; and that the mistake of the master in porting too soon, which did cause the stranding, was not such want of ordinary care and skill in navigating the vessel as brought it within the exception of the policy.

But suppose it be conceded that the stranding resulted from such want of care and skill in navigating the vessel as came within the exception of the policy, does it follow that libellant's right to recover for the general average loss arising from the subsequent voluntary scuttling thereof, whereby a portion of the cargo was damaged, is thereby defeated? The determination of this question depends upon the point whether the voluntary scuttling can properly be treated or regarded as the immediate or proximate result or consequence of such negligent stranding; in other words, whether such stranding was the proximate cause of the scuttling. The learned district judge reached the conclusion, on which the libel was dismissed, that the storm which occasioned the scuttling of the vessel "was such a consequence of the stranding as might have been reasonably anticipated, and ought not to be considered as a distinct, independent cause of the voluntary scuttling."

After a careful examination of the facts of this case, and of the authorities bearing upon the subject, I am unable to concur in this opinion and conclusion of the district judge. In cases where two causes of loss concur it is often a matter of considerable difficulty to correctly apply the well-settled maxim, "*Proxima causa non remota spectatur*," and determine which is to be regarded as the efficient predominating and which the remote cause of such loss.

While recognizing the rule of looking only to the proximate or predominating cause of loss, the courts have differed in its application, and the decisions on the subject are in many cases not easily reconciled. The particular facts and circumstances of each case have largely controlled and determined the application of the settled maxim. In the present case the stranding of the vessel, though negligently done, did not operate to suspend the policy as to other and distinct perils covered by its terms. While the stranding continued the policy was in full force and operation for the assured's protection as to any and all other perils of the lakes against which the insurers undertook to indemnify libellant. The fact that storms, with attendant heavy seas, might be reasonably anticipated, did not operate to take the perils thence arising out of the operation of the policy. No such effect is to be given to the words of the exception exempting the insurer from liability for damages consequent upon, caused by, or arising from want of ordinary care and skill in navigating the vessel. These words are the words of the insurer, and not those of the assured. This exception is in no sense a warranty on the part of the assured against negligent navigation, which affects the policy generally, or its continuance as to risks not directly connected with or resulting from such negligence. The legal effect and operation of the exception is merely to take a particular risk and resulting damage out of the policy, which, but for the exception, would be comprehended in the contract in the event of total loss or general average. Stranding was a peril of the lakes, covered by the general terms of the policy. A total loss of the vessel, or a general average loss thence arising, would raise a case of *prima facie* liability against the insurer. The whole scope and purpose of said exception was to exonerate the respondent from liability from all perils, losses, misfortunes, expenses, or damages consequent upon, arising from, or caused by a "want of ordinary care and skill in navigating said vessel." It has no bearing upon risks and damages covered by the policy, which cannot properly be considered as consequent upon, arising from, or caused by such want of ordinary care and skill in the vessel's navigation: *Yeaton vs. Fry*, 5 Cranch, 335. What perils, losses, misfortunes, expenses, or damages can properly be regarded as consequent upon, arising from, or caused by the alleged negligent stranding of the vessel? They are manifestly limited to such and such only as are the direct, immediate, or proximate consequence or result of such stranding, and do not extend to the remote consequences thereof. This limitation upon the term of the exception is sanctioned by the case of *Insurance Co. vs. Adams* (123 U. S., 67, 74, 8 Sup. Ct. Rep., 68), where the policy



contained the provision that the insurer should not be liable for loss occasioned by "the derangement or breaking of the engine or machinery, or any consequences resulting therefrom." It was held that this exception related "to losses of which the derangement or breaking is the proximate cause, and not to such as are a remote consequence of either." No injury whatever resulted to the Ontario's cargo as the direct or proximate consequence of her negligent navigation or her stranding as an accomplished act, nor did the vessel herself sustain any material or recoverable damage therefrom. The stranding did not directly endanger or imperil either the vessel or her cargo. It temporarily delayed her voyage, and while thus delayed another peril arises in the shape of a severe storm of force and violence, and attended with such heavy seas as to make it probable that the vessel would be driven ashore and become a total wreck, to avoid which threatened and imminent danger she was voluntarily scuttled. Can it be maintained that this storm, which arose four or five hours after the stranding was an accomplished fact, and which necessitated the scuttling of the vessel, was in any proper sense the immediate or proximate consequence of the stranding, or that it arose from or was caused by such stranding, or the alleged negligent navigation of the vessel? No case has been cited, nor has my own investigation resulted in finding any authority which sustains or sanctions such a proposition. The stranding, even though occasioned by want of ordinary care and skill in navigating the vessel, certainly did not set in motion or give rise to the storm which rendered the scuttling necessary, thereby causing damage to a portion of the cargo, and giving rise to the general average loss for which recovery is sought. The storm with its proximate consequences and results was an independent peril against which the insurer undertook to indemnify the assured. In what sense was such storm, or the voluntary scuttling made necessary therefrom, a peril consequent upon, arising from, or caused by want of ordinary care and skill in navigating the vessel or in negligently stranding her?

The stranding, on the theory of the defense, was not only the effect of the want of proper care and skill in navigating the vessel, but such effect was the efficient predominating cause of subsequent loss from a peril of the lakes wholly distinct and independent of the peril incurred in stranding. It is urged in behalf of respondent that the stranding should be regarded as the proximate or efficient cause of the disaster which befell the vessel, because such stranding never ceased to operate until the loss was complete,—because it created the necessity for the scuttling,—and should therefore be

treated and considered as the *causa causans* of the loss, for the reason that if the vessel had not been stranded she would probably have sustained no injury from the storm, or would not have been compelled to resort to scuttling as a means of safety. This claim and position of respondent, which seems to me to confuse mere antecedent wants and conditions with efficient causation, does not settle, but merely presents, the vital question, which is this: Was the negligent navigation or stranding of the vessel the predominating proximate cause of the loss arising from the voluntary scuttling of the same, or was the storm the immediate, distinct, and proximate cause of such scuttling, and the loss thence resulting? The storm which arose after the stranding was of such force and violence, and from such direction, as to drive the vessel from her position further ashore, and render it highly probable, if not absolutely certain, that she would become a total wreck. In the presence of this new impending peril and danger the master, after consultation with the other officers, voluntarily scuttled the vessel in order to save her and her cargo from destruction. I fail to see any causal connection between the stranding and this subsequent scuttling of the vessel under such circumstances. Suppose the vessel had been insured against loss or damage by fire or lightning, with the same exception as contained in the present policy against perils and losses arising from or consequent upon want of ordinary care and skill in navigating the vessel, and she had been struck by lightning or burned by fire communicated from the shore while stranded, it would not admit of a moment's debate that the insurer would be bound to make good the loss sustained, even though the stranding occurred through negligent navigation. No court would seriously entertain the proposition as a defense for the insurer, that if the vessel had not been in that particular place she would not have been exposed to the fire, or would not probably have been struck by lightning. So in the present case, unless it can be successfully maintained that the storm and the necessity thence resulting for scuttling the vessel was the immediate or proximate consequence of the stranding, or directly arose from, or was caused by, such stranding, then such storm as an independent peril covered by the policy must stand upon the same footing as fire or lightning in the case supposed. A correct application of the doctrine of proximate and remote cause establishes, in my opinion, the proposition that the storm rather than the stranding should be considered the predominating efficient cause, and the loss resulting from the voluntary scuttling of the vessel.

Where there is a loss from the operation of two concurring or co-operating agencies or instrumentalities, this character, connection, and effect may be such that the one nearest in point of time to the accident or disaster should not be regarded as the predominating efficient cause of the loss. That it is said in the case of *Dole vs. Insurance Co.* (2 Cliff., 431): "The rule is that where different causes concur, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or not in activity at the consummation of the disaster;" and the learned district judge, after referring to the cases of *Peters vs. Insurance Co.* (14 Pet., 99, 100), and *Insurance Co. vs. Sherwood* (14 How., 351), correctly states that by the proximate cause of loss is to be understood, not necessarily that cause which instantly precedes or accompanies the loss in point of time, but the dominant cause,—the cause but for which the loss would not have occurred, and between which and the loss no other distinct cause intervened. The general rule, however, is that when the contributory causes are independent of each other the nearest is of course to be charged with the disaster. Thus in *Insurance Co. vs. Boon* (95 U. S., 130), it is said: "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instrumental of a superior or controlling agency are not the proximate causes and responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is of course to be charged with the disaster." In that case the policy exempted the insurer from liability for any loss or damage by fire which might happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. An armed force of Confederates during the civil war attacked the city in which the insured property was located. The Federal officers in command, finding it could not be successfully defended, and in order to prevent the military stores from falling into the hands of the rebel troops, set fire to the town hall in which such supplies were deposited. The fire, without other interference or agency, spread to the adjacent building, thence through two other buildings to the store containing the insured goods, which were destroyed. It was held that the fire happened by means of invasion and the proper exercise of military power, and came within the exception of the policy, on the ground that the burning of the city hall and the continuing spread of the fire could not be regarded as a new and independent cause of loss. Firing the hall was a necessary incident and consequence of the hostile rebel attack upon the city,—a military necessity caused by

the attack,—and having been started the fire continued till it reached and destroyed the goods insured. When the conclusion was reached that the fire was brought into being by invasion or usurped military power, or that no new or independent agency intervened in spreading it, the result logically followed that the risk or loss came within the exception. In the present case the storm which created the necessity for scuttling the vessel was in no sense set in operation by the stranding, but was a distinct, independent, and intervening cause, nearest to and, therefore, properly chargeable with the disaster. I am wholly at a loss to understand how the scuttling of the vessel to save it from the danger of the new and independent peril of the storm can be considered as a mere incident of the stranding as the superior or controlling agency. The stranding would itself have occasioned no loss, except perhaps a slight injury to the vessel's wheel and shoe, which the policy did not cover. Upon what principle can it be declared the dominant or proximate cause of the loss resulting from the subsequent scuttling rendered necessary by the distinct, disconnected, and independent agency and instrumentality of the storm? Certainly the scuttling was not the result of the continued influence or effect of the stranding, nor was it the natural and probable consequence of the alleged want of ordinary care and skill in navigating the vessel. In *Railroad Co. vs. Kellogg* (94 U. S., 475), it is said: "But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury." Here there was disconnected from the stranding an intermediate, independent, self-operating cause, which was sufficient of itself to produce, and which did produce, the loss sought to be recovered. In *Insurance Co. vs. Transportation Co.* (12 Wall., 194–199), it is said: "There is undoubtedly difficulty, in many cases, attending the application of the maxim '*Proxima causa non remota spectatur*,' but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the *causa causans*. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim." In that case it was urged on behalf of the insurance company that, as the assured had taken the risk of collision, and as the collision caused the fire, it was not liable. The court, however, while conceding that the assured had taken the risk of collision, and that the collision caused the fire,

said: "But it is well settled that, when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract." The present case falls within the rule thus laid down by the supreme court, for if the stranding be considered as one of the contributing causes of the loss it was succeeded by another, sufficient to produce the disaster, and such succeeding cause in order of time was a peril expressly insured against. When the facts of *Insurance Co. vs. Transportation Co.* (12 Wall., 194) are examined it will be seen that, in reaching the conclusion that the fire was the proximate cause of the loss sustained, the court gave a broader application to the rule than the present case calls for. In *Insurance Co. vs. Sherwood* (14 How., 365, 366), Mr. Justice Curtis, speaking for the court, says that, "in applying this maxim, in looking for the proximate cause of the loss, if it be found to be a peril of the sea [covered by the policy] we inquire no further; we do not look for the cause of that peril." *Insurance Co. vs. Tweed* (7 Wall., 44) does not support respondent's position, for there it was assumed that no new intervening cause had occurred. But this case of *Insurance Co. vs. Tweed* is criticised in *Scheffer vs. Railroad Co.*, 105 U. S., 251. Speaking for the court, Mr. Justice Miller says: "This case (7 Wall., 44,) went to the verge of sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found." It was conceded in that case that if a new force had intervened sufficient of itself to stand as the cause of the misfortune, the other (the explosion) would be considered as too remote. Without extending quotations from decision and text writers on "Insurance," or entering upon a detailed review of the cases, I am clearly of the opinion, after careful consideration of the subject, that the authorities, American and English, support the conclusion reached by the court, that a correct application of the doctrine of proximate and remote cause to the facts of this case requires that the storm should be regarded as the proximate or predominating efficient cause, which necessitated the scuttling of the vessel from which resulted the damage to a portion of the cargo, and gave rise to the general average loss sought to be recovered: *Insurance Co. vs. Lawrence*, 10 Pet., 517; *Express Co. vs. Insurance Co.*, 132 Mass., 377; *Lee, Shipp.*, 444; 2 Arn. Ins., 800-808, 1342; *Lown. Ins.*, 122; *Hild. Ins.*, 269; *Cory vs. Burr*, L. R., 8 App. Cas., 393; *Dudgeon vs. Pembroke*, L. R., 9 Q. B., 582; same case affirmed in the House

of Lords, L. R., 2 App. Cas. 284; *Wilson vs. The Xantho*, L. R., 12 App. Cas., 503.

If the stranding of the vessel had resulted from negligent navigation within the exception of the policy, the master could not, under the authority of the *Portsmouth* (9 Wall., 682), have resorted to a jettison of her cargo, or any part of it, in order to release the vessel, and then recover by way of general average contribution for such loss. But that case does not control the present, in which there was no want of ordinary care and skill in navigating the vessel which caused the stranding, nor any necessity for making a jettison of the cargo, or any part of it, to release the vessel or relieve her from any direct effects or proximate consequences of the stranding. The voluntary scuttling was produced by another and different cause, and his right to resort to voluntary sacrifice under the circumstances can hardly be questioned. The cases of *Barnard vs. Adams* (10 How., 270) and *Fowler vs. Rathbones* (12 Wall., 102) fully sanction the action of the master in scuttling the vessel, and make a proper case for general average, to which the owners and insurers of the cargo have all assented. It is not material to consider whether the owners of the damaged cargo could have held the vessel or its owners liable for the injury sustained, or whether the vessel could have enforced against cargo owners a general average contribution. Respondent cannot be heard to interpose objections to the adjustment which the owners of the cargo did not choose to make. Nor are we in this case called upon to determine whether the vessel, as a common carrier and insurer of the goods except against the acts of God and the public enemies, could have been held for the damage sustained by that portion of cargo injured from the scuttling. The terms of the bills of lading, under which the cargo was being carried, are not before the court, so as to enable it to say what were the legal rights and liabilities between the vessel and cargo owners under the circumstances.

From the foregoing conclusions reached by this court it follows that the decree of the district court dismissing the libel was erroneous and should be reversed, and that libellant is entitled to recover, and should have a decree against respondent for the sum of \$3,074.22, with interest from August 27, 1887, as reported by the commissioner, together with costs in this and the district court; and it is accordingly so ordered and adjudged.

## LOWER COURT DECISIONS.

### CHANGE OF TITLE FROM MORTGAGEE TO OWNER.

*Court of Appeals of Kansas, Southern Department, C. D.*

DODGE

vs.

HAMBURG-BREMEN FIRE INS. CO.\*

When a loss of insured property occurs according to the terms of the policy, and the insurance policy has attached to it a subrogation contract which stipulates that the loss, if any, is payable to a mortgagee, or his assigns, as his interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property, even to absolute ownership, will not release the insurance company from its liability to pay the loss.

A change in the title of insured property, which increases the interest of the insured from a lien holder to absolute ownership, is not such a change of ownership as requires notice to be given to the insurance company, under the terms of a subrogation contract which stipulates that the mortgagee shall notify the insurance company of any change of ownership.

BENTLY & HATFIELD and HOLMES & HAYMAKER, *for Plaintiff in Error.*  
BENTLY & FERGUSON, *for Defendant in Error.*

DENNISON, J.

Mrs. Flora Cowley was the owner of a lot upon which was situated a house and barn, upon which she procured a loan from the Sedgwick Loan & Investment Company, and she and her husband executed to said company a mortgage thereon. She also procured a policy of insurance upon said house and barn, from the agents of this defendant in error in Wichita, Kan., which had attached to it the following subrogation contract:—

Policy No. 963, in name of Flora Cowley. Agency at Wichita, Kansas. Loss, if any, payable to the Sedgwick Loan and Investment Company, mortgagee or trustee, or its assigns, as its interests may appear as herein provided: It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided that the mortgagee or trustee, or assigns, shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee or trustee, or assigns, on reasonable demand, and after demand made by this

\* Decision rendered, Sept. 5, 1896. Syllabus by the Court.

company upon, and refused by, the mortgagor or owner to pay, according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions in said policy, and also to cancel this agreement, on giving ten days notice of their intentions to the trustee, or assigns, or mortgagee, named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that, in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater proportion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgagee or trustee, or assigns, any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or said company may, at its option, pay the mortgagee or trustee, or assigns, the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said parties for the payment thereof. The foregoing provisions and agreements shall take precedence over any provision or condition conflicting therewith contained in said policy. This clause is attached to, and is made a part of, the said policy, from the 9th day of January, 1890. In witness whereof the duly authorized agent of said insurance company has hereunto set his hand on said day. Caldwell & Fellows, Agents. Hamburg-Bremen Insurance Company of Germany.

Dodge commenced this action to recover upon said insurance policy. The answer was a general denial. The case was tried by the judge without a jury, upon the following agreed statement of facts: "Agreed Statement of Facts. It is hereby stipulated and agreed between the parties to this action that the above-entitled cause may be tried in the court without a jury, and that the court may render judgment upon the pleadings filed herein, and the following facts, which are hereby agreed to: That the defendant, the Hamburg-Bremen Fire Insurance Company, is a corporation organized under the laws of Germany, and duly authorized to and is transacting business in the state of Kansas as an insurance company. That on the 9th day of January, 1890, the defendant herein, for a valuable consideration paid to it by Mrs. Flora Cowley, issued to her its certain fire-insurance policy. Said original policy is attached to the plaintiff's petition herein. That at the time said policy was issued Mrs. Flora Cowley was the owner of the fee title of the property described in said policy. That on the 1st day of April, 1889, the said Flora Cowley, with her husband, Hale Cowley,



executed a mortgage on the premises described in said policy, to the Sedgwick Loan & Investment Company. That on or about the 9th day of January, 1890, the date on which the policy of insurance was delivered to the said Mrs. Flora Cowley, she delivered the same, with the mortgage clause attached to said policy, to the Sedgwick Loan & Investment Company. That, subsequent to the delivery of said policy of insurance by Mrs. Flora Cowley to the Sedgwick Loan & Investment Company, the said the Sedgwick Loan & Investment Company assigned, indorsed, and delivered said mortgage hereinbefore mentioned, together with this policy of insurance, to John L. Dodge, plaintiff herein. That on the 21st day of January, 1892, John L. Dodge, plaintiff herein, as plaintiff, commenced an action in this court against Hale Cowley and Robert E. Lawrence, administrator of the estate of Flora Cowley, deceased, and others, to foreclose the said mortgage herein mentioned, on the premises described in the policy sued on in this action. A copy of petition in said action of John L. Dodge against said Hale Cowley and others, together with a copy of the mortgage sued on herein, above mentioned, is hereto attached, and made a part of these facts, and marked Exhibits 'A' and 'B,' respectively. That thereafter, on the 24th day of October, 1892, the said John L. Dodge, as plaintiff, recovered a judgment in said cause, which has never been vacated, reversed, set aside, or modified. A copy of said judgment is hereto attached, marked 'Exhibit C,' and made a part of these facts. That on the 6th day of September, 1893, I. T. Ault, the then duly elected, qualified, and acting sheriff of Sedgwick County, Kansas, did, pursuant to said last-mentioned judgment, sell the premises described in said policy to the said John L. Dodge. That on the 12th day of October, 1893, Hon. C. Reed, judge of the court, did confirm the sale of real estate made in said action by the said sheriff. A copy of said confirmation of sale is hereto attached, and made a part of these facts, and marked 'Exhibit D.' That on the 8th day of November, 1893, the dwelling house and private barn insured by the policy hereinbefore mentioned were totally destroyed by fire. That said policy sued on in this action provides, among other things, in said mortgage clause, as follows:—

It being hereby understood and agreed that this insurance is as to the interest of the mortgagee or trustee only therein; shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: provided, that the mortgagee or trustee, or assignees, shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have

the permission for such change of ownership or increase of hazard duly indorsed on this policy.

That the said policy and mortgage clause, attached to the plaintiff's petition herein, are to be considered a part of these facts, as if fully set out herein. That this defendant company had no knowledge or information of the suit, or any of the proceedings had therein, by said John L. Dodge against Hale Cowley and others, to foreclose said mortgage herein mentioned, or of the sale of said premises by the said sheriff to John L. Dodge on the 6th day of September, 1893. That on or about the 10th day of November, 1893, the plaintiff, John L. Dodge, by his agent, R. E. Lawrence, notified this defendant company, by stating verbally to Caldwell & Fellows, agents of this defendant company, that the house and private barn insured by this policy had been destroyed by fire. That on the 2d day of December, 1893, the plaintiff herein submitted proof of loss, as provided for by conditions in said policy of insurance, a copy of which is hereto attached and made a part of these facts, and marked 'Exhibit E.' Dated Wichita, Kansas, December 4, 1894." Judgment was rendered for the defendant, and the plaintiff brings the case here for review.

At the outset, we are met with a motion to dismiss this action for the reason that there is no sufficient transcript or case-made attached to the petition in error. The record is certainly far from satisfactory. It cannot be upheld as a case-made. However, the petition, answer, agreed statement of facts, judgment, and all proceedings necessary to show the errors complained of, are attached to the petition in error, accompanied by a certificate of the clerk of the court which reads as follows: "I, S. N. Bridgman, clerk of the district court within and for the county of Sedgwick, state of Kansas, do hereby certify that the above and foregoing is a true copy of all papers and proceedings in the cause wherein John L. Dodge is plaintiff, and the Hamburg-Bremen Fire Insurance Company is defendant, as the same remains of record in my office, except: Returned summons by superintendent of insurance præcipes for copies. Execution. Journal entry of correction. Journal entry overruling motion. Witness my hand, as such clerk, and the seal of said court attached, this the 13th day of April, 1895. S. N. Bridgman, Clerk of the District Court of Sedgwick County, Kansas." By a liberal interpretation, we treat the record as a transcript, and review the case. We cannot, however, recommend it as a model to be copied in the future.

The real question in this case is, should the plaintiff recover, upon the agreed statement of facts and the pleadings? In Insur-

ance Co. vs. Coverdale (48 Kan., 446), it was decided that the mortgagor could not maintain an action upon a policy of insurance which contained a similar subrogation contract, unless the mortgage was paid, but that the mortgagee only could maintain the action, unless he authorized the owner so to do. By the subrogation contract, the insurance company entered into a contract with the mortgage company, or its assigns, by the terms of which the amount of the policy, in case of loss, is to be paid to it, so far as its interest shall appear. It therefore follows that, so far as his interest appears, John L. Dodge is the assured. The subrogation contract must be construed the same as though it read, "Loss, if any, under this policy, payable to John L. Dodge, mortgagee, as his interest may appear." The policy is to run five years, and the premium for the full time has been paid. No one can collect the money, in case of loss, but Dodge. The insurance company takes the risk, and collects the full premium, knowing that, while Mrs. Cowley holds the fee title, Dodge holds a lien upon the property, which may in time be transferred into a title. It must have anticipated that Dodge was likely to take steps to foreclose the lien which was insured. When an insurance company insures a mortgage lien, it must anticipate that upon default the lien holder will begin foreclosure proceedings, obtain judgment, and secure a sale of the mortgaged property. There can be no question but that the mortgagee is protected by the terms of the contract with the insurance company until the sale is confirmed, and the money ordered by the court to be paid to the mortgagee. Is the purchaser also protected by the terms of the contract, and does it make any difference whether the mortgagee or a stranger is the purchaser? If a stranger is the purchaser, there is a change of ownership. If the mortgagee is the purchaser, his interest is changed from a lien holder to an owner in fee. Counsel for defendant in error contends that the interest of John L. Dodge, mortgagee, was insured, and not the interest of John L. Dodge, owner, and that, in order to have held the insurance in force, Dodge should have notified the company of the change of the fee title, and obtained the consent of the company to the change. They argue that the company might have been willing to have insured the property if Mrs. Cowley was the owner, but not if Dodge was the owner. The property was occupied by a tenant as a dwelling when it was insured, and when it burned. It cannot be said that the hazard was increased by the transfer of the interest of Dodge from a lien holder to a judgment creditor, and then to an owner in fee. The insurance company was willing to insure Dodge, as the assignee of

the mortgagee. The contention of counsel for the insurance company is that Dodge failed to notify the company of the change of ownership which occurred when he purchased the property at sheriff's sale, and have the permission of the insurance company for the change of ownership indorsed upon the policy. We cannot think that this is such a change of ownership as is contemplated by that clause of the subrogation contract. The change of ownership in this case increased the interest of Dodge, who, under the subrogation contract, is the insured. In no way was the risk increased. The title had not vested in some one other than the insured. It cannot be said that the insurance company might not be willing to insure the property with Dodge as the owner, because Dodge was already the insured. No one else could have maintained an action for the recovery of the insurance money. "A change of title which increases the interest of the insured, whether the same be by sale under judicial decree, or by voluntary conveyance, will not defeat the insurance:" *Insurance Co. vs. Ward*, 50 Kan., 349, and cases there cited. If the property had been sold to some one other than the insured, and the insured had knowledge thereof, there would be a reason why such knowledge should have been imparted to the insurance company, so that they could have elected whether they would have carried the insurance with such a person as owner. In this case there was at no time a change of the person insured. It was always the loan company and its assignees. The only change of title or ownership was to increase the interest of the insured in the property, and make his interest the absolute ownership thereof. Surely the insurance company cannot complain of this; nor is it entitled to any notice of such a change, under the terms of the subrogation contract. The judgment of the district court is reversed, and the cause remanded, with instructions to render judgment upon the pleadings and agreed statement of facts against the defendant in error, and in favor of the plaintiff in error, in accordance with the views expressed in this opinion. All the judges concurring.

## OWNERSHIP OF GOODS.—AGENT NO POWER TO WAIVE.

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*Court of Civil Appeals of Texas.*

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WESTCHESTER FIRE INS. CO.

vs.

WAGNER ET AL.\*

Merchandise was insured by claimants in their own name which did not belong to them but to persons resident elsewhere. Claimants held them on consignment only and sold them for a commission. *Held*, That a clause in the policy requiring a true statement of ownership works a forfeiture if such true statement be not made.

*Held*, That an ordinary insurance agent has no power to waive the above-named provision of the policy.

SWEARENGEN & BROOKS, *for Appellant.*

WRIGHT & SUMMERLIN, *for Appellees.*

FLY, J.

Appellees instituted this suit, and alleged in their petition that appellant had insured them in the sum of \$2,000 against loss from the destruction of a certain stock of goods that had been destroyed by fire; that the goods belonged to Kloak Bros. & Co., of Cincinnati, O., and that appellees had been holding them on consignment and selling them in consideration of a certain per cent of the profits. It was also alleged that the goods had been insured as the property of appellees, but that the agent of appellant had been informed, when the contract of insurance was executed, that the property did not belong to appellees, but was the property of Kloak Bros. & Co., and that appellees were selling the same on commission. The policy was attached as an exhibit to the petition. The petition was excepted to, as showing on its face that the policy was void by reason of the true interest of appellees in the goods not being stated therein, the terms of the policy showing that it was expressly provided that the agent should not have authority to waive the provision in regard to the interest of the assured in the property. The authority of the agent to waive the provision was specially denied in the answer. The exceptions were overruled, and the case was tried by a jury, and a verdict rendered in favor of appellees for \$2,000.

The policy provides that the insurance company "shall not be liable beyond the actual cash value of the property" at the time the

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\* Decision rendered. April 24, 1894.

loss occurred. We think it was error to give the special charge requested by appellees, wherein the jury were instructed to find for the appellees for the amount expressed in the policy. This was, in effect, an instruction to disregard any proof that may have been made as to the actual value of the goods that were destroyed by fire: *Insurance Co. vs. Starr*, 71 Tex., 733.

In the policy of insurance is found the following clause: "This entire policy shall be void if \* \* \* the interest of the insured in the property be not truly stated herein." As said by the Supreme Court of Pennsylvania in passing upon a clause in the same language: "This clause is not without force. Its meaning is apparent. Its object is to enable the insurance company to know who it is insuring:" *Diffenbaugh vs. Insurance Co.* (Pa. Sup.), 24 Atl., 745. Where there is a clause in the policy requiring a true statement of the assured's interest in the property, it works a forfeiture of the policy, in the absence of a waiver upon the part of the insurer. It is admitted by appellees that the property, although insured as belonging to them, was not in reality theirs, but the property of Kloak Bros. & Co., of Cincinnati. The property had been placed by the owners with appellees for sale, and their interest in the property was contingent upon a sale, and, while admitting the force of the proposition that they can only recover upon proof of a waiver of the clause in the contract, yet they insist that the agent of appellant was informed of the exact status of their connection with the property before and at the time of the execution of the contract, and that his principal is estopped from setting up a forfeiture of the policy. It is provided in the policy that it "is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written." The object of this clause is to define and limit the powers and authority of the agent, and to prescribe the subjects about which he shall and shall not have authority to waive the provisions of the policy, and to set forth the manner in which he shall indicate his waiver, in connection with those subjects over which he

is given this power. It is clear that no authority is given in the policy to the agent to waive the requirement that the insured shall state their true interest in the property, but, on the other hand, it is expressly provided that he shall not have authority "to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement." The clause in regard to the statement of the interest of the insured in the property is not of this class. According, then, to the contract entered into between the parties, the policy was rendered void by the failure of the insured to make known their true interest in the property, and they were duly notified that the stipulation in question could not be waived by the agent of the insurer. We can see no difference in the binding force and effect to be given in any ordinary case and one of insurance; and, where the policy expressly provides that no agent has authority to waive certain conditions or stipulations therein, the holder of the policy is bound by such limitation of the agent's authority. The proposition is supported by the weight and logic of the adjudicated cases: *Quinlan vs. Insurance Co.*, 31 N. E., 31, 133 N. Y., 356; *O'Brien vs. Insurance Co.* (N. Y. App.), 31 N. E., 265; *Moore vs. Insurance Co.* (N. Y. App.), 36 N. E., 191; *Kirkman vs. Insurance Co.* (Iowa), 57 N. W., 952; *Cleaver vs. Insurance Co.* (Mich.), 32 N. W., 660; *Hankins vs. Insurance Co.* (Wis.), 35 N. W., 34; *Herbst vs. Lowe* (Wis.), 26 N. W., 751; *Mersereau vs. Insurance Co.*, 66 N. Y., 274; *Marvin vs. Insurance Co.*, 85 N. Y., 278; *O'Reilly vs. Assurance Corp.*, 101 N. Y., 575, 5 N. E., 568; *Kyte vs. Assurance Co.*, 144 Mass., 43, 10 N. E., 518; *McIntyre vs. Insurance Co.* (Mich.), 17 N. W., 781; *Enos vs. Insurance Co.* (Cal.), 8 Pac., 379.

In the *Hankins* Case, above cited, the Supreme Court of Wisconsin says: "We must hold that, when the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity." The court of last resort in New York has, in the *Quinlan* Case, above cited, in a clear and logical opinion, expressed the views entertained by this court on the question. It says: "The powers possessed by agents of insurance companies, like those of agents of any other corporations, or of an individual principal, are to be interpreted in accordance with the general law of agency. No other or different rule is to be applied to a contract of insurance than is applied to other contracts. The agent of an insurance company possesses such powers, and such powers only, as have been conferred verbally or by the instrument of authorization, or such as third persons have a right to assume that he possesses.

Where the act or representation of the agent of an insurance company is alleged as the act of the principal, and therefore binding upon the latter, the test of the liability of the principal is the same as in other cases of agency. No principle is better settled in the law, nor is there any founded upon more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound; and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other." This statement of the law is sustained by a number of the courts of the different states, and our attention has not been called to a single authority that holds that an agent has the power to waive a condition in a policy of insurance which the policy expressly provides shall not be waived by him. Where the restrictions upon the power and authority of the agent are plainly stated, and the proof does not indicate an enlargement of his powers, there can be no reason why the authority given in the policy should not be the measure of his full authority to bind his principal: *Fitzmaurice vs. Insurance Co.*, 84 Tex., 61, 19 S. W., 301. Appellees entered into the contract voluntarily, and they knew, or were required to know, its terms and conditions, and they are bound by them: *Insurance Co. vs. Kempner* (Tex. Sup.), 27 S. W., 122. There is nothing whatever that tends to show that appellant had the least intimation, previous to the time when it was made known to the adjuster after the fire, that the ownership of the property was other than that expressed in the policy. Notice to the agent, with circumscribed special authority, was not notice on matters about which it was provided that he should not have the power of waiver; and in regard to such matters, to raise an estoppel against the principal, it would be necessary to prove that he had been actually notified of the act of waiver on the part of the agent, and had in some manner indorsed or ratified it. None of the Texas cases cited by appellees passed directly upon the point discussed in this opinion, but seem to have dealt with the manner of executing powers that had been granted to the agent. On the question of the manner of execution of delegated authority, it would seem that the Texas cases are in conflict with the weight of authority in this country, but upon this question it is unnecessary for this court to express an opinion at this time. There are some other Texas cases, however, among the number, *Insurance Co. vs. Ende* (65 Tex., 118) and *Insurance Co. vs. Camp* (71 Tex., 503, 9 S. W., 473), in which it was held that the clause in regard to ownership could be waived by an agent; but in



none of those cases was it shown that there was a clause denying the authority of the agent to waive the clause, and that question does not enter into the decisions. The judgment will be reversed and the cause remanded.

ON REHEARING.

(May 15, 1895.)

It is insisted that the opinion of this court is in conflict with the opinion in *Morrison vs. Insurance Co.* (69 Tex., 353, 6 S. W., 605), but we think not. In the *Morrison Case* it was admitted that the agent had authority to grant permission in writing to the insured to obtain further insurance, the only question at issue being the manner in which that permission was evidenced. The policy required that it be in writing indorsed on the policy, and the agent had not done this. While the opinion holds that the verbal permission of the agent would be sufficient to raise an estoppel against the insurance company, still it is reiterated that the basis of the decision is that the agent had the authority to give the permission to obtain other insurance, and that, having this power, his act was that of the company, when it had been acted and relied upon by the insured. In the same case it is held that insurance contracts do not furnish exceptions to the rule that "every person having capacity to make a contract, in the absence of fraud, misrepresentation, or concealment, must be held to have known their meaning, and he must also be held to have known and fully comprehended the legal effect of the contract which the words used made." In the case of *Insurance Co. vs. Lee* (73 Tex., 641, 11 S. W., 1024), we see nothing that was necessary to the decision that is in conflict with the opinion of this court. As in the *Morrison Case*, the insurer was held to be estopped by a failure to repudiate the action of its agent, which presupposes notice upon the part of the company, because the agent had acted within the scope of his authority. Says the court: "If the act is within the scope of the authority of the agent at the time, it will be binding upon the corporation, without reference to its restrictions contained in the policy." The restrictions referred to must apply to the manner of execution of powers conferred on the agent, as is shown by the quotation from the *Morrison Case*, which immediately follows the above language. In both the *Morrison* and *Lee Cases*, the decisions are predicated upon the proposition that the agent was acting within the scope of his authority, and that in such cases notice to him was notice to his principal. It would be subversive of one of the fundamental principles governing the law of agency to hold that, when notice of the authority conferred upon an agent is given in writing, persons dealing with him could claim notice to the

principal through the agent, in regard to matters about which it is expressly declared that he shall not have power to act. The question as to whether notice to the agent is notice to the principal must depend upon the nature and extent of the agency: Wade, Notice, § 674. The case of *Insurance Co. vs. Josey* (Tex. Civ. App., 25 S. W., 685), at first glance, would seem to be in conflict with this principle; but in that case the point as to a clause in the policy expressly prohibiting the waiver of the clause as to ownership of the property by the agent was not raised. The motion for rehearing is overruled.

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## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### INSPECTION IS NOT INSURANCE.

The case of *People ex rel. Woodward vs. Rosendale*, Attorney-General, of which there is a note in XXIII Insurance Law Journal, 79, was appealed to the general term and the ruling was reversed. It was then carried to the Court of Appeals of New York, and on the 10th of April, 1894, the reversal was affirmed. The decision now stands that "the inspection and certification as to the sanitary condition of buildings and premises" is *not* insurance in any legal sense, and the Attorney-General was right in refusing to certify to the insurance superintendent that the charter of the Sanitary Insurance & Inspection Co. was in accordance with the laws of New York. The decision is valuable for reference to those who may be contemplating the organization of similar companies under the insurance laws of this state.

### JURISDICTION.—VENUE.—SERVICE.

Suit may be brought and service had upon an agent or officer of an insurance company in any county in the state of Kentucky where the insurance was solicited and the policy delivered. The venue is not restricted to the county where the policy was signed, so said the Court of Appeals of Kentucky, Sept. 11, 1890, in the case of *Kentucky M. F. S. Co. vs. Logan's administrators*.

### CONSTITUTIONAL LAW.—CORPORATIONS.—STOCK.

The case of the *Republic Life Ins. Co. vs. Swigert*, Auditor, et al., decided by the Supreme Court of Illinois, Oct. 31, 1890, confirms, in the main, a case

with the same title in the same court, Jan. 22, 1885, and reported in XIV Insurance Law Journal, 745 :—

1. The law which authorizes the auditor to wind up and dissolve insurance companies by suit in equity whenever he is of the opinion, upon examination of the affairs of a company, that "its condition is such as to render its further continuance in business hazardous to the insured," is not unconstitutional, either as impairing the obligation of a contract or depriving the stockholders of their property without due process of law. Following *Ward vs. Farwell*, 97 Ill., 593.

2. An agreement between a corporation and its stockholders whereby the latter, who have only paid 20 per cent of the par value of their stock, may surrender their stock in exchange for full-paid stock to the amount of one-fifth of their subscriptions, is valid as between the parties.

3. The receiver of an insurance company has no power, either by virtue of his appointment by a court of equity or a deed of assignment made to him by the corporation, or by Rev. St. Ill., 1889, c. 73, § 107, which authorizes the receiver of an insurance company "to take charge of the estate and effects of the company, \* \* \* and to collect the debts due and property belonging to it, with power to prosecute and defend suits," to sue stockholders for unpaid subscriptions to stock which has been surrendered to the corporation, since the receiver has no greater rights than the corporation itself. *Scholfield, C. J.*, dissenting.

4. An order directing the receiver of an insolvent corporation to sue the stockholders and subscribers to the capital stock, though interlocutory, is appealable, since it determines a matter of substantial right.

5. The corporation may appeal from such an order on behalf of its stockholders when the latter are not parties to the suit in which it is entered.

6. Where a cause has been submitted to and determined by the Supreme Court, upon the theory that the order appealed from is properly in the record, it cannot be urged upon a second hearing that such order is not in the record.

7. Where an order directing a receiver to pay a certain dividend is neither objected to nor appealed from until after the entry of the final decree in the cause, and after the dividend has been thereupon paid, and its payment confirmed by the court, the validity of the order cannot be questioned on appeal from the final decree.

#### LLOYDS NOT A CORPORATION.

Judge Green, in *Commonwealth vs. Reinoehl*, Supreme Court of Pennsylvania, July 12, 1894, decided that a policy executed by one hundred different persons contracting for the individual liability of each does not emanate from a "company," as "company" is synonymous with "corporation" in the Pennsylvania insurance law; and an agent acting for the one hundred individuals without license is not liable to the penalties imposed for acting for foreign companies.

#### COPY OF APPLICATION.—BENEFICIARY ASSOCIATIONS.

In *Johnson vs. Philadelphia & Reading Railroad Co.*, in the Supreme Court of Pennsylvania, July 12, 1894, it was held that the act of May 11, 1881, requiring that insurance policies shall have attached to them copies of the application, etc., otherwise the application, etc., shall not be admissible in evidence, applies only to the case of policies issued by an insurance company, and not to the case of a beneficial association which issues certificates of membership.

The provision of a membership certificate in a benefit association, made up of the employees of a railroad company, under which the benefit becomes due to the member whenever he is disabled from any cause, that acceptance of benefit shall be a release of the railroad's liability for the disability, is not

against public policy, it not having the effect of a release till the member accepts the benefit.

SUBROGATION.—RIGHT OF ACTION.

In *Mobile Ins. Co. et al. vs. Columbia & Greenville Railroad Co.*, in the Supreme Court of South Carolina, June 25, 1894, it was held :—

1. Where several insurance companies have become subrogated to the rights of insured against the company whose act caused the loss, the mode of enforcing subrogation in the absence of statutory enactment is by action in the name of insured for the benefit of such insurance companies, and one of such companies cannot maintain a separate action to recover its proportion of the loss.

2. Where defendant permits one of the insurance companies to take judgment against it, and pays the amount recovered without appeal, it does not bar an action by the other insurance companies and the insured to recover their proportion of the loss.

HEIRS.—RIGHTS OF CREDITORS.

The word "heirs" in a policy of life insurance is defined in *Hubbard et al. vs. Turner et al.*, in the Supreme Court of Georgia, June 18, 1894, to be the next of kin according to the statute of distributions, which in Georgia, when the decedent leaves no widow, is the same as the statute of descent or inheritance.

The proceeds of a life-insurance policy are no part of the estate of the assured, and are not subject to the claims of his creditors, unless, by reason of some fraud, actual or constructive, committed by the assured upon their rights in taking out or keeping up the policy, the creditors are equitably entitled to follow and reclaim money invested in the policy which ought to have been used or reserved for use in satisfying their demands.

DEED.—TRANSFER OF INSURANCE.

A conveyance of property does not carry the insurance policies, nor does it constitute an executory agreement to sell and transfer the policies with an obligation on the seller's part to procure the insurer's consent to their transfer. Also the purchaser of the property is not entitled to the return premium on cancelled policies which were in the hands of the former purchaser to whom they were issued. Such was the doctrine laid down by the Supreme Court of Alabama, May 16, 1894, in the case of *Jackson et al. vs. Millspaugh et al.*

RECEIVER.—ACTION ON PREMIUM NOTES.

The Supreme Court of Iowa, in the case of *Barker vs. Lamb & Sons*, Oct. 16, 1896, held that the principle of comity between the states does not entitle the receiver of a foreign corporation appointed in another state to maintain an action in Iowa upon a contract between such corporation and a citizen of Iowa, and he cannot sue on premium notes given for insurance upon property situated in Iowa; a decree of a Circuit Court of Illinois directing the receiver of a mutual life-insurance company to assess upon each of the members thereof 65 per cent of their premium notes, not being such an adjudication as will be conclusive upon the courts of Iowa in an action brought to enforce the payment of the premium notes given by defendant upon a policy of insurance. The policy had been cancelled some months before and the premium notes surrendered to the maker of them. *Held*, That defendant, having ceased to be a member by the cancellation of his policy, was not a party to the proceedings, so as to be bound by the decree.

## PLEADING OVER.—ASSIGNMENT TO BROTHER.

In *Barrett vs. Northwestern Mutual Life*, the Supreme Court of Iowa, Oct. 27, 1896, held that the defendant by pleading over waives error in sustaining a demurrer to his own pleading. An assignment to Barrett by his brother of a life policy, on which assignee afterwards paid the premiums, was held to be qualified and not absolute, notwithstanding assignee had conveyed land to assignor as a consideration; and the children and heirs at law must come in for a share of the proceeds.

## AUTHORITY OF GENERAL AGENT.—HORSE AND BUGGY FOR PREMIUMS.

A local solicitor agreed with a policyholder to receive the first three premiums in a single payment, and did so, receiving \$540.80, of which \$200 was cash, and the balance was for a horse and buggy. The first premium of \$166.80 was sent to the company where the transaction appeared regular, the company's instructions to its agents being to accept nothing but money in payment of premiums. The second premium was also paid to the company, but when the third became due, it was not paid and the company rescinded the policy. The local solicitor was the appointee of a general agent who had charge of the company's affairs in the state, and the general agent was cognizant of the arrangements between the solicitor and the assured. It was held by the Supreme Court of Iowa, Oct. 27, 1896, in *Van Werden vs. Equitable Life*, that the society through its general agent had recognized the acceptance of the property by the solicitor whose obligation the general agent had accepted, and that the assured was thereby discharged from liability for the third annual premium. The court further decided that where a foreign life-assurance society maintains a branch office in a state, with a manager whose agency is general in that state, and to whom the people look for information or adjustments of the society's business in the state, the acts and knowledge of the manager are the acts and knowledge of the society.

## BENEFICIARY.

An "affiliated wife" is not a proper beneficiary under a certificate of membership in the Royal Arcanum, although named in the certificate. The money due on the death of a member was awarded to his brothers, as being next of kin, by the Supreme Court of Illinois, Jan. 21, 1890, in *Palmer vs. Welch et al.*

## ASSIGNMENT ON SEPARATE PAPER.

In *Bridge vs. Wheeler*, the Supreme Judicial Court of Massachusetts, Oct. 24, 1890, held that an assignee of life insurance, who re-assigns part to the insured and delivers the policy to him with the assignment so attached that they can be easily removed, is guilty of laches, which will defeat his claim as against a bona fide assignee of paid-up insurance issued by the company on the surrender of the policy without notice of its assignment.

## CONSTITUTIONAL LAW.

The case of the *Union Central Life Ins. Co. vs. Chowning*, in the Supreme Court of Texas, May 10, 1894, relates to the constitutionality of various sections of the revised statutes of Texas, article 2953. It decided in effect that the penalty of 12 per cent on the claim for failing to pay a loss is valid.

## MUTUAL BENEFIT SOCIETIES.—CHANGE OF BY-LAWS.

The Supreme Court of California, Jan. 22, 1890, in the case of *Stohr vs. San Francisco Musical Fund Soc.*, held that where both the general laws of the

state and the by-laws of an incorporated society give it the right to repeal, alter, or amend its by-laws, it is not a breach of contract for such society to amend a by-law which provides that, in case of sickness, a member shall be entitled to receive \$10 per week, by limiting such allowance to a certain number of weeks thereafter, though a member be sick at the time of such amendment.

#### GOOD STANDING.

In the case of *High Court of Foresters vs. Zak*, Jan. 12, 1891, Judge Magruder, of the Supreme Court of Illinois, held that the loss of "good standing" could not be established after the death of a member by the oral statements of living members, but could only be proved by the official acts of the order itself, as shown by its minutes, proceedings or records in connection with the trial reprimand, suspension or expulsion of the member, and that the absence of such records was absence of adequate proof.

#### PLEADING.—SIXTY DAYS.

It is sufficient allegation that proofs of loss were forwarded within sixty days after the fire, to say that they were so forwarded immediately after the fire; as it is also sufficient to say that defendant has refused to pay although sixty days have elapsed since notice and proofs were furnished. So said Judge Cassoday in *Benedix vs. German Ins. Co.*, of Freeport, Nov. 5, 1890, Supreme Court of Wisconsin.

#### INCONTESTABILITY CLAUSE COVERS FRAUD.

Judge Porter, in the Court of Appeals of New York, in the case of *Wright vs. Mutual Benefit Life Ass'n*, Jan. 14, 1890, thought a provision in a life-insurance certificate that "no question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named," embraced the defense of fraud of the insured and beneficiary in obtaining the certificate. The association offered evidence to show that Houghton and Wright obtained the certificate by fraud for a speculative purpose, but the evidence was excluded and the letter of the contract enforced.

#### ASSIGNMENT OF POLICY TO CREDITORS.—RIGHT TO SURPLUS.—REMEDY OF HEIRS.

A debtor took out a policy upon his life, and, after holding it a short time, in good faith, transferred it by indorsement to certain of his creditors, and took from them an agreement by which they were to pay the premiums, and, from the proceeds, when paid, retain the amount due, and pay any surplus to his heirs or to his order. He died without making any further order as to the proceeds of the policy. *Held*, That the transfer was not in fraud of creditors, but was complete and valid, and transferred the surplus to the heirs. The surplus having been paid to the administrator, the proper remedy of the heirs to recover the same was an action in the nature of an application for an order requiring him to pay over the money to them, and not an action upon a common count for money had and received. *Johnson et al. vs. Alexander et al.*, Supreme Court of Indiana, Nov. 11, 1890.

#### CHANGE OF BENEFICIARY.

A certificate of membership and insurance for \$5,000 in a mutual benefit association was issued payable after his death to the plaintiff, Jennie Bowman,

his wife, "unless," as provided in the certificate, "said member shall in writing filed with this Association substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary." A year later the assured filed with the secretary of the association a request to change the beneficiary and substitute his executors. This change was duly endorsed on the certificate and on the files of the association. The wife sued for the money, but it was held that the change was regular and valid and must stand. This was the decision in *Bowman vs. Moore* in the Supreme Court of California, Dec. 30, 1890.

**LIMITATION CLAUSE.—STATE AND FEDERAL COURTS.**

A suit was begun prior to the ninety days named in the policy and was dismissed as premature. Plaintiff then, more than a year after the fire, brought suit again, claiming under the Iowa statute that it was a continuance of the first, but the U. S. C. C., S. D., Iowa, E. D., May, 1894, in *Harrison vs. Hartford Fire Ins. Co.*, held that the Federal courts are not bound by the construction given to state statutes by state courts, and (following *Riddlesbarger vs. Insurance Co.*, 7 Wall, 396), "The rights of parties flow from the contract. That relieves them from the general limitations of the statute and as a consequence from its exceptions also" decided that the action, not having been commenced within the twelve months next after the fire, as required by the limitation clause in the policy, was not sustainable.

**PREMATURE ACTION.—CONTINUANCE OF SUIT.**

A similar case to the above was *Wilhelmi vs. Des Moines Ins. Co.*, Supreme Court of Iowa, October, 1896, a couple of years later, wherein that court seems to have adjusted itself to the Federal decision above. The fire was Sept. 22, 1889. The suit was begun Dec. 26th following, and was thrown out of court finally on the 14th of October, 1892. The second suit was begun Dec. 21, 1892, and when it reached the supreme court the decisions below were reversed and it was held that the claimant was in fault because of his negligence in the prosecution of his suit; that the limitation clause was in effect and the company not liable.

**APPLICATION.—SICK HORSE.—REPRESENTATIONS.**

The case of *Indiana Farmers' Live-Stock Ins. Co. vs. Byrnett*, Appellate Court of Indiana, Mar. 9, 1894, followed to some extent the same Ptf. vs. *Rundell* reported in XXII Insurance Law Journal, 836, and the following points were made:—

1. In an action on an insurance policy, the complaint need not set out a copy of the application on which the policy was issued.
2. In an action to recover insurance on a horse, the court properly refused to charge that, if plaintiff admitted that his horse was diseased at the time he made his application and received insurance, such admission would bind him, and that he could not prove by others that it was not diseased at the time, as it deals with the questions of admissibility of such testimony and the competency of the witnesses, which were questions for the court, and not for the jury.
3. Instructions covered by others given are properly refused.
4. A provision in an application for insurance that the applicant "warrants" the application to contain a full and true description of the property to be insured is not a warranty, but a representation.

The same Ptf. vs. *Bogeman*, reported in XXII Insurance Law Journal, 836, in the Appellate Court of Indiana, Mar. 28, 1894, made the following point:—

Where the language of the application and policy construes the statements of the former as warranties, and also as representations, a false statement as to the amount paid by assured for the insured horse is to be deemed a representation, and is immaterial, where the policy is for one-half of the alleged value—said value being equal to the price said to have been paid—and provides that, “if the insurance shall be found to have been greater, the company shall be liable for no more than this proportion.”

#### REHEARING.

The case of the German Ins. Co. vs. Read's Executors, in the Court of Appeals of Kentucky, Oct. 23, 1890, was a rehearing of the matter which was decided four months earlier, and reported in XX Insurance Law Journal, 86. It referred to a single point, to wit: An instruction below in regard to valuations. The petition for a rehearing was overruled.

#### AGENTS OF THE COMPANY.

Whitney vs. National Masonic Accident Ass'n, in the Supreme Court of Minnesota, June 24, 1894, reported in XXII Insurance Law Journal, 196, on







## UNITED STATES CIRCUIT COURT OF APPEALS.

## SIXTH CIRCUIT.

TRAVELERS INS. CO., OF HARTFORD, *Plaintiff in Error,*

vs.

W. M. RANDOLPH, EXECUTOR OF A. G. MITCHELL, *Defendant in Error.\**

The assured was riding on the platform of a car moving about twenty-five miles per hour. Part of the time he had his hands in his pockets, and part of the time he was standing on the steps of the platform holding on to the railings. While so standing, he fell or jumped from the train and was killed. The chief contention of the company was that he voluntarily exposed himself to unnecessary danger and that his death resulted therefrom. The pleas of suicide and intoxication and breach of the railroad company's rules, which forbade passengers to ride on platforms, were also set up. The suicide and intoxication were held not to be proven, and the rules of the railroad company forbidding passengers on the platforms was found to be one that the railroad company did not itself enforce, and so was not binding on passengers.

Under a rule that all language in insurance policies limiting the liability of the company should be construed favorably for the insured and that all doubts or ambiguities should be resolved against the insurer, it was held that mere negligence, inattention or thoughtlessness is not a voluntary exposure to danger within the meaning of the policy, but there is required a degree of appreciation of the danger at the time to make it voluntary. A bodily injury, therefore, not intentionally inflicted on the assured but which may have been due wholly to negligence and thoughtlessness was covered by the contract.

The words, "voluntary exposure to unnecessary danger" are to be held as importing an exposure by the assured to unnecessary danger with the intention or design to risk the consequence of such exposure—consciousness of the danger and intention to risk the consequences of exposing one's self to it.

Repeating, the court said further, that there could be no voluntary exposure to unnecessary danger, within the meaning of the contract, unless the assured was conscious of the danger and intended, that is purposely determined, to risk it.

The voluntary riding upon the platform of a rapidly-moving railroad car, although there may be no necessity therefor, is not in itself, and as a matter of law, exposure to unnecessary danger within the meaning of the contract, but presents a question of fact for the jury.

If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides.

Before Justice Harlan, Circuit Justice; Judge Lurton, Circuit Judge; and Judge Sage, District Judge.

Opinion of the Court, delivered by HARLAN, J.

This is an action upon insurance contracts evidenced by an annual policy and two accident tickets issued to Albert G. Mitchell by

\* Decision rendered, January Term, 1897.

the Travelers Insurance Company, of Hartford, Connecticut. There was a verdict and judgment for the plaintiff.

By its policy of June 5, 1894, that company insured Mitchell, a bookkeeper by occupation, in the sum of fifty dollars per week, against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected through external, violent and accidental means, which should, independently of all other causes, immediately and wholly disable him from transacting any kind of business pertaining to his occupation. If death ensued from such injuries alone within ninety days, then the company agreed to pay the sum of \$10,000 to the legal representatives of the assured. But the policy declared that the insurance did not cover "disappearance; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark), nor accident nor death, nor loss of limb or sight, nor disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: disease or bodily infirmity; hernia, fits, vertigo, sleep-walking, medical or surgical treatment, except amputations necessitated solely by injuries and made within ninety days after accident; intoxication or narcotics, voluntary or involuntary taking of poison, or contact with poisonous substances or inhaling of any gas or vapor; sun-stroke or freezing; dueling or fighting; war or riot; intentional injuries (inflicted by the insured or by any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expeditions into wild and uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power, except cable cars; riding in or on any conveyance not provided for transportation of passengers; walking or being on a railway bridge or road-bed (railway employees excepted)."

The same provisions, substantially, are set forth in the accident tickets issued by the company.

The defendant pleaded that it did not owe the plaintiff in manner and form as alleged; and that proper proofs of death were not furnished.

It also pleaded that the assured committed suicide on the 9th day of November, 1894, by "voluntarily, and with intent to take his life, jumping off" a train of cars, en route from St. Louis to Memphis, Tennessee, and which at the time was moving thirty-five miles an hour—he being a passenger on such train;

That the assured "intentionally and of a purpose sprang or jumped" from said train with the intent of inflicting injury upon

himself, and as a result thereof he was dashed against the ground with great violence, receiving injuries from which he shortly afterwards died;

That when the train approached Memphis, at the rate of thirty-five miles an hour, the assured voluntarily and unnecessarily left his seat in the sleeping car, where he was safe and free from danger, and went out of such car and upon its platform, thence to the rear platform of the next car ahead, thence to the lower step of the last-named platform, the same being a very dangerous place, from which by any sudden jar or movement of the car, he was liable to fall or be thrown from the train; that in standing on said lower step of the platform it was necessary for him to hold to the handrailing provided on each side for the use of persons getting off and on the car; that whilst in that position, the cars moving at a high rate of speed, he was in great danger of losing his hold by reason of the moving of the car or from other causes, and of being thrown from the step and injured or killed, "all of which danger was obvious and well known to the said Mitchell;" that the assured went into said place of great and unnecessary danger without any reasonable cause therefor, and while there "fell or sprang" from the car step, receiving great injuries, from which he shortly died; and that by reason of this voluntary exposure of the assured to unnecessary danger the contract of insurance between him and the defendant did not attach or become operative, nor cover the injuries and resulting death of the assured;

That the insured, while the car was moving at the rate of thirty-five miles an hour, attempted to leave and did leave the same by "stepping or leaping" therefrom, and thereby he was thrown to the ground with great violence, and received injuries from which he shortly thereafter died;

That while standing upon the lower step of the rear platform of the car immediately in front of the sleeping car, as above stated, the insured was intoxicated, and, being so intoxicated, either "fell or sprang" from such step when the car was moving at the above rate of speed, and was dashed violently against the ground, receiving fatal injuries, from which he shortly died; and,

That the assured came to his death by reason of his standing upon the platform, as above stated, in violation of a rule of the railroad company which was then and had been for many years in force, forbidding passengers to stand or ride on the platforms of its cars while they were in motion.

The plaintiff filed replications which put in issue all the material facts set out in the several pleas.

Mitchell was a resident of the city of Memphis, where for many years prior to his death he had been employed as a bookkeeper. He was unmarried, about forty-six years of age, and lived with a widowed sister and her children in that city. It seemed to have been his habit when traveling any distance on railroads to buy accident tickets, and when his relatives went from home he bought tickets of that kind for them.

He left Memphis in June, 1894, to go to St. Louis, holding at the time two annual accident policies for \$10,000 each, namely, the one here in suit issued by the Travelers Insurance Company, and the other issued by the Fidelity and Casualty Company. Before leaving home he increased his accident insurance by buying \$18,000 of tickets that were good for a few days only, and left them in a package addressed to W. M. Randolph, his attorney, with a writing appointing the latter as his executor, without bond or report, and directing the disposition of the above sum. This package was found, after his death, in the safe of the Hill Shoe Company, of which he was assignee.

It does not appear what particular object Mitchell had in going to St. Louis, nor what he did while in that city. He remained there about five months. While there he bought the accident insurance tickets in suit. One of the persons who sold him the tickets testified that he did not know that Mitchell would have bought so much insurance if he, the insurance agent, had not forced it upon him. Before leaving St. Louis he placed his insurance policies in an envelope addressed to W. M. Randolph, his attorney at Memphis, and sent the package by express. He also telegraphed to W. M. Randolph & Sons from St. Louis, "Leave to-night on Chesapeake & Ohio; will be at your office to-morrow at 9."

He left St. Louis for his home on the evening of the 8th of November, 1894, and was due at Memphis at 7.55 the next morning. The train on which he traveled was composed of a sleeping car, two ordinary passenger cars, and a baggage car. He occupied a seat in the sleeping car. He arose quite early on the morning of the 9th, and was seen several times standing on the platform of the cars while the train was moving fifteen to twenty-five miles an hour. At one time he stood with both feet on the platform and with his back against the side of the door of the car. At another time, according to some of the evidence, he held on the railing, with one foot on the platform and the other on the top step of the platform.

The colored porter of the sleeping car was examined as a witness for the defendants. He testified that he first saw Mitchell, the morning of the 9th, standing on the platform of one of the coaches, when

the train was about twenty-five miles from Memphis; that he heard the deceased ask the conductor several times how far it was to Memphis; and that when he came out to wipe off the hand rails of the car, Mitchell and a little boy were on the platform together, Mitchell standing on the lower step, and the boy just going into the door of the ladies' coach. The witness said that Mitchell, when last seen by him, was on the lower step, holding with one hand to the rail attached to the body of the car, and with the other to the platform railing, "one foot up like a man going to jump off, and the other foot on the lower step"—"standing like a railroad man who was going to jump off." He also testified that in about "a minute, or a half minute, a short time," he observed that Mitchell "let all hold go, and fell back, released his hold and went back;" that he rushed to the front of the car to find the conductor and report what had occurred; that the train was immediately stopped, and was backed until it came to the place where Mitchell was lying across a side track; that the body was at once put into a baggage car, and Mitchell died in a few minutes thereafter, just before the train reached Memphis.

The little boy who was seen by the porter on the platform with Mitchell was thirteen years old at the time. In his deposition he stated that he went into the car to warm his hands, and "came back to the door and he [Mitchell] was not there;" that he went back to the stove, and in a few minutes the porter came running in, and said something about a man falling off.

It is proper here to observe that the sleeping-car porter was the only witness who testified that Mitchell, while on the platform, and just before he disappeared from the train, was in the attitude of a person about to jump from the moving car. The jury might well have concluded, from his examination as a witness, that he was mistaken upon that point, and that there was nothing in Mitchell's conduct indicating a purpose to put his life in peril by jumping or throwing himself from the train. But there was no room to doubt that Mitchell was riding on the platform while the train was moving at the rate of from fifteen to thirty miles an hour.

At the close of the evidence the defendant moved the court for a peremptory instruction in its behalf, assigning as the ground of the motion that Mitchell "voluntarily exposed himself to unnecessary danger, and that his injury and consequent death resulted therefrom." This motion was overruled, and an exception was taken by the defendant.

The first proposition by the plaintiff is that the evidence in his behalf made a case which, in the absence of all other testimony, entitled him to a verdict, and as the defendant elected to introduce

testimony in its own behalf, the court was without authority, at the close of the evidence on both sides, to direct a verdict for the defendant.

The authorities cited do not sustain this proposition. It is well settled that if at the close of the plaintiff's evidence the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defense: *Grand Trunk Railway vs. Cummings*, 106 U.S., 700; *Accident Ins. Co. vs. Crandall*, 120 U.S., 527, 530; *Columbia Railroad Co. vs. Hawthorne*, 144 U.S., 202, 206; *Campbell vs. Haverhill*, 155 U.S., 610, 612; *Union Pacific Railway Co. vs. Callahan*, 161 U.S., 91, 95. But the failure of a defendant at the close of the plaintiff's evidence to ask a peremptory instruction will not, of itself, preclude such a motion at the close of the whole evidence. It often occurs that the evidence on behalf of a defendant, in connection with that on behalf of the plaintiff, will justify a peremptory instruction to find for the defendant, when such an instruction would not have been authorized by the *prima facie* case made by the plaintiff's proofs.

The circumstances under which a court may withdraw a case from the jury have been elaborately discussed by counsel. The rule upon that subject has been defined in recent adjudications. The thought intended to be expressed in them is that the jury should be permitted to return a verdict according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction. A mere scintilla of evidence in favor of one party does not entitle him, of right, to go to the jury: *Improvement Co. vs. Munson*, 14 Wall., 442, 448. On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if upon any issue dependent upon facts there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial. In disposing of that motion, the court, in the exercise of a sound legal discretion, may interpose and prevent the injustice that may be done by such a ver-



dict. While the court may instruct the jury as to the law arising upon a given or hypothetical state of facts, it is for the jury, if the facts are disputed, or if there is substantial evidence both ways, even if there be a preponderance of evidence one way, to say what facts are established. And this is what was meant by the observation in some cases that the court should not withdraw from the jury a case depending upon the effect or weight of testimony unless the evidence should be of such conclusive character as to compel the court to set aside a verdict returned in opposition to it; *Insurance Co. vs. Doster*, 106 U. S., 30, 32. The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind. Hence, it has been held in an action for damages against a railroad company—one of the issues being the contributory negligence of the plaintiff—that the court erred in not submitting the question of contributory negligence to the jury, where the conclusion did not follow, as matter of law, that no recovery could be had upon any view that could be properly taken of the facts: *Kane vs. Northern Central Railway*, 128 U. S., 91; *Jones vs. East Tennessee R. R. Co.*, 128 U. S., 443. To the same effect are *Grand Trunk Railway Co. vs. Ives*, 144 U. S., 408, 417; *Richmond & Danville R. R. vs. Powers*, 149 U. S., 43; *Gardner vs. Michigan Central Railroad*, 150 U. S., 349, 361; *Northern Pacific R. R. vs. Everett*, 152 U. S., 107, 113.

The general question was considered in the recent case of *Sparf, etc., vs. United States*, 156 U. S., 51, 99. Referring to the rule defining the respective functions of court and jury in a case where there is some substantial evidence to support the particular right asserted, and in a case in which there is an entire absence of evidence to establish such right, the court said: "In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without entrenching upon the constitutional functions of the jury. The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of the case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury: *Pleasants*

vs. Fant, 22 Wall., 116, 121; Montclair vs. Dana, 107 U. S., 162; Randall vs. Baltimore & Ohio Railroad, 109 U. S., 478, 482; Schofield vs. Chicago & St. Paul Railway, 114 U. S., 615, 619; Marshall vs. Hubbard, 117 U. S., 415, 419; Meehan vs. Valentine, 145 U. S., 611, 625." See also Gunther vs. Liverpool Ins. Co., 134 U. S., 110, 116.

Our re-examination of this question has been in deference to the arguments of learned counsel. It should be observed, however, that the subject was very carefully considered by this court in *Mt. Adams & E. P. Inclined Ry. Co. vs. Lowery*, 74 Fed. Rep., 463. Upon a full review of the American and English authorities, this court, speaking by Judge Lurton, announced these propositions: That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts, which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a "proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new trial, set aside the verdict," and that the court "may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict;" that upon reason and authority "there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence;" and that "in the latter case it must be so insufficient in fact as to be insufficient in law."

Guided by the rules laid down in the adjudged cases, we proceed to inquire whether the circuit court should have sustained the defendant's motion for a peremptory instruction to find in its favor. The court was undoubtedly entitled to assume that Mitchell left his seat in the car and rode many miles on the platform while the train was running at considerable speed. The evidence to that effect was entirely uncontradicted. The only doubt that could arise in reference to the facts was whether, as stated by the colored porter, the assured stood on the lower step of the platform and jumped or threw himself from the train. If the case depended upon the accuracy of this statement, the court, in view of all the evidence, could not properly have directed a verdict for the defendant without usurping the

functions of the jury, and without infringing the constitutional right of the plaintiff to a trial of his case by a jury. The porter's statement that Mitchell jumped from the steps of the platform bore directly on the issue as to suicide. That question was fairly submitted to the jury, and their verdict was, in legal effect, a finding that he did not commit suicide. And we may here observe that the averment in one of the pleas that Mitchell was intoxicated was entirely unsupported by the evidence.

But the defendant's motion for a peremptory instruction distinctly presented the question, whether riding upon the platform of a car running fifteen to twenty-five or thirty miles an hour, even if the passenger while so riding holds to a railing, and thereby diminishes the danger of being thrown from the car, was, within the meaning of the policy and as matter of law, a voluntary exposure of himself to unnecessary danger. The principal contention of the defendant is that the jury should have been so instructed.

What do the words "voluntary exposure to unnecessary danger" in the contracts in suit import?

In *National Bank vs. Insurance Co.* (95 U. S., 673, 679), it was said that if a policy of fire insurance was so framed as to leave it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to a binding contract the court should lean against a construction that imposes upon the assured the obligations of a warranty. "Its attorneys, officers or agents," the court observed, "prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." The same rule was recognized in *Thompson vs. Phenix Insurance Co.* (136 U. S., 287, 297), which was a case of fire insurance, and was upheld in *Travelers' Insurance Co. vs. McConkey* (127 U. S., 661, 666), as applicable in a case of life insurance. This court enforced the same rule in *Manufacturers' Accident Indemnity Co. vs. Dorgan* (16 U. S., App. 201, 309), where this court, speaking by Judge Taft, said that all language in life policies limiting the liability of the company should be construed favorably for the insured; that all doubts or ambiguities should be resolved against the insurer.

The words "voluntary exposure to unnecessary danger," literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such

exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the word used, is consistent with the object of accident-insurance contracts, and is therefore the interpretation which the court should adopt. One of the accepted meanings of the word "voluntary" is "done by design or intention, purposed, intended:" Webster's Dict. Judge Clark, who presided at the trial, instructed the jury that "mere negligence or inattention is not an exposure to danger within the meaning of the policy—mere thoughtlessness—but it requires a degree of appreciation of danger at the time to make it voluntarily assumed, and a voluntary exposure. \* \* \* If you find that standing on the platform, under all circumstances of this case, taking into account his position on the train, the speed of the train, the track and everything else that makes up the situation where the accident occurred—if you find that that was dangerous, and that, being conscious of that danger, he took a position that exposed him to it and death resulted, your verdict should be for the defendants, otherwise for the plaintiff as to that issue." The company was not entitled to a more favorable interpretation of the contract than this instruction indicated.

This interpretation is in harmony with other clauses of the written contract. For instance, the company insured against "bodily injuries," effected through external, violent and accidental means, which, independently of all other causes, immediately and wholly disabled the assured from transacting business pertaining to his occupation as a bookkeeper, but expressly excepted "intentional injuries, inflicted by the insured or any other person." A bodily injury, therefore, not intentionally inflicted upon the assured, but which may have been due wholly to negligence or thoughtlessness, was covered by the contract. And it is equally clear that if death ensued from bodily injuries resulting from such negligence or thoughtlessness the case would be covered by the contract. But is it to be supposed that the contract included a case of death from bodily injuries inflicted by the accused upon himself carelessly but not intentionally, and yet that death, resulting from a careless or negligent exposure of the assured to unnecessary danger, with no intention upon his part to commit suicide or to injure himself, was excepted from the operation of the policy? This question must be answered in the negative; and such an answer means that, looking at the whole con-

tract, the words "voluntary exposure to unnecessary danger" are to be held as importing an exposure by the assured to unnecessary danger, with the intention or design, at the time, to risk the consequences of such exposure.

In *Miller vs. Insurance Company* (92 Tenn., 167, 187), which was a suit upon an accident policy, exempting the company from liability where the injury resulted from "voluntary exposure to unnecessary danger," the court held that these words were not "the entire equivalent of ordinary negligence," and that "a degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity."

In *Keene vs. New England Mutual* (16 Mass., 170), which was an action upon a policy of life insurance, exempting the company from liability when death or injury happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, the court said: "A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. \* \* \* There are other dangers which one need not encounter, if he knows of their existence long enough beforehand, as, for example, a runaway horse, or a coming car; and a mere inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious intentional exposure—something of which one is conscious, but willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence. Great negligence will not necessarily defeat a fire policy: *Johnson vs. Berkshire Ins. Co.*, 4 Allen, 388. And in the present policy against accidents, upon the evidence, although the jury might well find a voluntary exposure to danger, we cannot say that it would be bound, as matter of law, to do so."

In *Foll's vs. United States Mut. Acc. Ass'n* (62 N.W. Rep., 807, 809), the Supreme Court of Iowa held that voluntary exposure to unnecessary danger, in a life-insurance contract, means something more than contributory negligence, or the want of ordinary care on the part of the assured.

There are, it must be admitted, authorities that look the other way. But we are of opinion that the better reason is with the cases holding that the words "voluntary exposure to unnecessary danger" in accident policies such as the one here in suit, imports a consciousness of the danger and an intention to risk the consequences of exposing one's self to it. Whether, in the present case, the exposure was unnecessary, and whether the assured was aware of and

appreciated the danger and intentionally or purposely risked it, were questions of fact that were properly left for the determination of the jury under appropriate instructions by the court as to the law of the case. In making such determination the jury were entitled to look at all the evidence, and as a recognition of the danger and the intention of the assured to take the risk attending the situation may not unreasonably have been inferred from the circumstances and from his acts, the jury were entitled to infer a voluntary exposure to unnecessary danger from any facts showing that he could not have failed to recognize the existence of the danger and must have purposely or intentionally risked it.

Before leaving this part of the case it is proper to refer to the action of the circuit court touching certain special requests by the defendant for instructions.

The defendant asked the court to instruct the jury that if they found "that Albert G. Mitchell was an intelligent man, accustomed to railroad traveling, and while in the exercise of his own free will, and without any necessity therefor, was standing upon the platform of the car with his hands in his pockets, or upon the steps of the platform of said car, while in a train propelled by steam, and running at a speed of about twenty-five miles an hour, then this will be a 'voluntary exposure to unnecessary danger' in the sense of the policies, and if death resulted from the same, you will find for the defendants." This instruction was properly refused, because it assumed that the conduct of Mitchell, as described in the proposed instruction, was, as matter of law, a voluntary exposure of himself to unnecessary danger.

The defendant also asked the court to instruct the jury that if they found that "Mitchell was an intelligent man, and at the time exercising his own free will, and, without any necessity therefor and with a knowledge of the danger to which he was exposed, was standing upon the platform of the car with his hands in his pockets, or upon the steps of the platform of said car while on a train propelled by steam at a speed of about twenty-five miles an hour, then this would be a 'voluntary exposure to unnecessary danger,' and if death resulted from the same, you will find for the defendants." This instruction was given as requested, with the addition of the words "if the jury, under all the circumstances, find that the position was, in fact, dangerous." The modification made by the court of the proposed instruction was entirely proper. It was not for the court to say, as matter of law, that the position of Mitchell when riding on the platform was, in fact, dangerous. The track of that part of the road over which the train passed while Mitchell stood on the platform

was straight and level, and therefore the danger of being thrown from the car by sudden jerks of the train was not so great as it would have been if the road had been curved or uneven. The question as to the extent or character of the danger to which Mitchell exposed himself was a question of fact. At the trial below the defendant itself placed numerous witnesses upon the stand and interrogated them as to the danger of riding upon the platform of a rapidly-moving railroad train. It sought to establish by evidence that it was a position of great danger. It was eminently proper that such an issue of fact should have been left to the jury.

The defendant requested the following instruction to be given: "If you find Albert G. Mitchell was an intelligent man and exercising his own free will, and without any necessity therefor, and with a knowledge of the danger to which he was exposed, but which danger he may not then have realized, or been thinking about, and was standing upon the platform of the car with his hands in his pockets, or was standing upon the steps of the car, running by steam at a speed of about twenty-five miles an hour, then this would be a 'voluntary exposure to unnecessary danger,' in the sense of the policies, and if death resulted from the same, you will find for the defendants." The instruction was properly refused, for the reason, if for no other, that it was so worded as to confuse or mislead the jury. If the assured could have had actual "knowledge" of the danger to which he was exposed, and yet did not think of it, or realize it to any extent, then the object of the instruction was to affirm that the intention with which he so exposed himself was immaterial; whereas, as we have said, there could be no voluntary exposure to unnecessary danger, within the meaning of the contract, unless the assured was conscious of the danger, and intended, that is, purposely determined, to risk it. But, independently of this view, the instruction might well have been refused upon the ground that the subject had been fully covered by the general charge of the court.

There is another view of this question which is entitled to great weight. The policy expressly declares that the insurance does not cover "entering or trying to enter or leave a moving conveyance using steam as a motive power, except cable cars." It thus appears that the minds of the parties were directed to the possible conduct of the assured when about to use or when using railroad cars propelled by steam. When, therefore, the insurance company took care to declare that it would not be liable for injuries or death resulting from entering or trying to enter or leave a moving conveyance using steam, it is reasonable to hold that it did not intend to forbid absolutely riding on the platform of a railroad car, but

intended to insure against all accidents arising from railroad travel other than those arising from entering or leaving a car when it was in motion, leaving every question as to "voluntary exposure to unnecessary danger" to be determined by the facts of each case. Of course, the officers of the insurance company knew what every one else knew, that passengers on railroad cars often passed over the platforms of cars from one car to another while the train was moving rapidly, and sometimes stood or rode upon the platforms of rapidly-moving cars. If the company intended to exclude liability for injuries or death resulting from voluntary acts of the assured while on a railroad car that exposed him to danger, why did it expressly except only the "entering or trying to enter or leave a moving conveyance using steam," and omit all reference to the more common occurrence of riding upon the platform of such a conveyance? The answer to this question suggests reasons, founded in justice and fair dealing, why the general words, "voluntary exposure to unnecessary danger," should not be so enlarged by construction as to embrace, as matter of law, a case of riding upon the platform of a moving railroad car through mere carelessness or heedlessness and without any purpose or apprehension of being injured or killed.

In *Southard vs. Railway Pass. Association* (34 Conn., 574), it was said: "Now, it may be said that this specific exception from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth, leaves, by fair implication, death or injury from all other causes and under all other circumstances included in the contract of indemnity; thus logically inverting or complementing the maxim *expressio unius est exclusio alterius*." And in *Marx vs. Travelers Ins. Co.* (39 Fed. Rep., 321, 322), which was an action upon a policy similar to the one here in suit, the court said: "As to the condition exempting defendant from liability in case of death from violating a rule of a corporation, it is said that deceased was forbidden to ride on the platform by a rule of the railroad company, which was inscribed on a metal plate on the door of the car. Whether this can be taken to be a rule of a corporation, or what shall be a rule of a railroad corporation within the meaning of the condition, is not very clear. By another condition some limitations are imposed upon policyholders traveling by rail, as follows: 'Entering or trying to enter or leave a moving conveyance, using steam as a motive power; walking or being on a railway bridge or roadbed.' Having thus defined the acts which must be avoided by policyholders in traveling on cars, I doubt very much whether another can be added under the general designation of a 'rule of a corporation.'"



While we do not rest our decision upon the ground last stated, the considerations in support of that ground tend to sustain the general proposition that the voluntary riding upon the platform of a rapidly-moving railroad car, although there may be no necessity therefor, is not in itself and as matter of law a voluntary exposure to unnecessary danger within the meaning of the contract in suit, but presents a question of fact to be determined by the jury under all the evidence before them.

It is proper to add that at the close of the general charge the court was asked by the defendant to instruct "the jury on the subject of voluntary exposure, and especially as to his knowledge of danger, that men are intended or presumed to know that which is open and plain to be seen, and to intend the natural and probable consequences of their own acts." The court replied: "Well, that is good law. I said to the jury, in another form, that in determining whether he knew the danger, and was, to an extent, conscious of it, that they would look to whether it is one that a man of reasonable care and caution would have seen and appreciated, and from that they may infer that he knew it. On the contrary, as bearing on the same point, that they might look to the fact, if proven as a fact, that men of intelligence and reasonable care and prudence constantly rode in a position of that sort. That is a mere circumstance. It don't prove that the man who rode in the position didn't appreciate that it was dangerous." Counsel for defendant having observed that there was evidence in the case that the deceased "had his hands in his pockets at the time, and that he also warned a little boy," the court replied: "Yes, sir; I have said look to everything in the case, and I meant the most minute particle of the proof. I didn't go over it all but I presumed that when I said they would look over it all, it was their duty to charge their memory, so far as they can, and give it consideration."

Our attention has been called to numerous adjudged cases in which the court has instructed the jury, as matter of law, that certain acts upon the part of a passenger on a railroad car constituted such contributory negligence as precluded a right of recovery against the railroad company. The principles announced in those cases are not, in our opinion, applicable to a contract of life insurance that does not in terms exempt the insurer from liability where the death of the insured is caused by his negligence or want of due care. If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides. The contract in suit

covers the injury or death of the assured from all external, violent and accidental means, except in the cases specifically declared in the contract not to be covered by its provisions. Bodily injury or death resulting from the carelessness of the assured is not excepted from the contract. This question was satisfactorily disposed of by Judge Clark when overruling the motion for a new trial. After observing that the law, as a matter of public policy, imposes on the carrier of passengers the highest degree of skill and caution reasonably possible for the protection of its passengers, and that whenever the passenger's negligence contributes to bring about the accident that is an end of the case, he said: "On the contrary in cases between insurer and insured, the relation is one established by contract, and this contract or policy undertakes to insure the policyholder, generally, against death or injury resulting from violent, external and accidental means, and includes an accident resulting from the ordinary negligence of the insured, as well as that of others. The policy then provides that it shall not extend to nor cover accidents which result under special and exceptional conditions, and among such exceptions is that of an accident resulting from a 'voluntary exposure to unnecessary danger.' The policy protects the assured then against all violent and external accidents not embraced within one of these exceptions. The policy does not require and the assured does not contract for the exercise of reasonable care and caution; and no such consideration as that enters into the question except remotely and secondarily. The primary and general purpose of the contract is clearly one of insurance against accidents generally, and the question of whether the circumstances of a particular accident bring it within one of these exceptions is not a question whether the assured has exercised reasonable care or caution nor whether he has been guilty of contributory negligence, but it is a question of whether or not the insurance company has shown—the burden being on it to do so—that the assured voluntarily and unnecessarily exposed himself to danger, and that the accident resulted in consequence thereof. And it is to be borne in mind all along that these exceptions by which the benefits of the contract may be forfeited or lost to the assured are strictly construed against the company and liberally in favor of the assured. In fact, this principle pervades the entire law of insurance contracts of every kind whatever." In these views we entirely concur. They are supported by the decision in *Providence Life Ins. Co. vs. Martin* (32 Md., 310, 312), which was an action upon an accident policy. The court said: "Nor is it a good defense that the accident was caused by the mere carelessness or negligence of the assured. In cases where the foundation

of the action is an injury occasioned by the negligence of the defendant, and the liability of the latter grows out of such negligence, it is always a good defense to show contributing negligence on the part of the plaintiff, but here the liability is created by a contract, one of the chief objects of which was to protect the assured against his own mere carelessness or negligence. It has long been the universally settled construction of fire policies that they cover a loss where the fire may be caused by the carelessness, negligence and want of due caution on the part of either the assured himself or of his servants, agents or tenants, because one of the principal objects the assured has in view in effecting an insurance is protection against casualties arising from these causes. The same construction, for the same if not a stronger reason, must be given to a policy like the present, not only because of the character of the insurance effected, but because its positive language, and the terms of the exception, show that all accidents resulting from mere carelessness or negligence are insured against. The observance of due care and diligence on the part of the assured is no element of the contract on his part, and can in no way affect the right of action thereon." See also *Wilson vs. Northwestern Mut. Acc. Ass'n*, 53 Minn., 470, 479; *Freeman vs. Travelers Ins. Co.*, 144 Mass., 572, 576; 2 May's Ins., § 530.

It remains to consider the question relating to the clause of the policy exempting the company from liability if the assured was injured or came to his death in consequence of his "violating rules of a corporation." Upon this point the court charged the jury: "If the company had a rule that the passengers were not permitted to stand on the platform of the car, and that was known to him, it was his duty to obey it, and whether it was known to him or not, you may determine by looking to the fact of the extent of his acquaintance with traveling—how much of that he had done, how frequently; the fact that the rule was placarded on the doors of the car, if such was the fact, and whether or not it was a rule which a reasonable and prudent man would probably know. To constitute it a rule such as he is bound by, it must have been a rule which the company itself enforced, or used a reasonable effort to enforce, and it required that to keep it in force as a rule; and if the company habitually violated, or permitted it, without any effort to prevent it, to be habitually violated by passengers, then it would not be a rule which he was bound to obey. If it was known to him, and was a rule which was enforced, or a reasonable effort was made to keep it enforced, it was his duty to obey it, and if he failed to do so it would defeat his recovery."

The defendant excepted to this portion of the charge upon the ground that all the evidence in the cases tended to show that the railroad company had a rule forbidding passengers from riding on the platform of its cars whilst trains were in motion, and that the company and its agents attempted in good faith to enforce the same, and did not voluntarily permit said rule to be violated or nullified.

We think the specific objections made to the charge were met by what the court said to the jury. The objections conceded that the assured was not bound to obey any rule of the railroad company which the latter did not itself recognize as binding and in good faith attempt to enforce. That question was fairly submitted to the jury. The court assumed, and rightly, that the assured was not to be charged with violating any rule of the company of which he had no knowledge. To this part of the charge no exception was or properly could have been taken. Whether the assured had such knowledge of any rule of the railroad company forbidding passengers to ride on the platforms of cars was left to the jury to determine upon the evidence. That was a proper disposition of the question. It was well said in *Marx vs. Travelers Ins. Co.* (39 Fed. Rep., 321, 322): "If, however, it shall be conceded that the railroad company had at some time prior to the death of Marx adopted a rule forbidding passengers to ride on the platform of a car, and that such rule was within the general condition of the policy referring to rules of a corporation, it was not then of force. The testimony of the trainmen was to the effect that it was not at all observed. All passengers on the road who were so inclined, and often by the invitation of the trainmen, rode on the platforms of the cars as freely and as commonly as elsewhere. Under such circumstances it cannot be said that there was any rule of the railroad company as to riding on the platform. The cases cited to show that the consent of a conductor of a train or others in authority shall not be effectual to set aside such a rule, in so far as it may affect the liability of the railroad company for any injuries received while in that position, are not controlling. An insurance company offering indemnity for injury or death in case of accident, as to its policyholders, is not at all in the position of a carrier for hire as to its passengers. The latter is engaged in a special service of peculiar danger, as to which some rules of conduct on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the insured. Will any one say that on sea and land, at home and abroad, a policyholder must constantly consider whether

he is within all the rules of all the corporations, public and private, which he may in any way encounter? Whatever the answer may be to any such question, it is plain enough that a rule of a corporation, within the meaning of this policy, must be one which is known to the policyholder, and of force at the time of the alleged violation. The evidence at the trial did not establish this fact, and the policy cannot be avoided on the ground that the deceased was not observing its terms at the time of the accident." See also *Chicago, etc., Railway Co. vs. Lowell*, 151 U. S., 209, 218.

We perceive no error of law in the record, and the judgment of the circuit court is, therefore, affirmed.

FIDELITY & CASUALTY CO., <i>Plaintiff in Error,</i>	}
<i>vs.</i>	
W. M. RANDOLPH, EXECUTOR OF A. G. MITCHELL, DECEASED,	
<i>Defendant in Error.</i>	
STANDARD LIFE & ACCIDENT INS. CO., <i>Plaintiff in Error,</i>	
<i>vs.</i>	
SAME, <i>Defendant in Error.</i>	
PREFERRED ACCIDENT INS. CO., <i>Plaintiff in Error,</i>	
<i>vs.</i>	
SAME, <i>Defendant in Error.</i>	
UNION CASUALTY & SURETY CO., <i>Plaintiff in Error,</i>	}
<i>vs.</i>	
SAME, <i>Defendant in Error.</i>	

These were separate actions upon accident insurance contracts. They were tried with the above case of Insurance Company vs. Mitchell's Ex'or, just decided. The evidence in these cases was the same as in that case.

For the reasons stated in the opinion in Insurance Company vs. Mitchell's Ex'or, etc., just decided, the judgment in each of these cases is affirmed, and the companies are all held liable.

UNITED STATES CIRCUIT COURT OF APPEALS.  
SIXTH CIRCUIT.

ELIZABETH MAIER, *Plaintiff in Error,*

vs.

FIDELITY MUTUAL LIFE ASS'N, OF PHILA., *Defendant in Error.\**

The application was clear and stringent in regard to the materiality of the answers given by applicant to the questions therein, and warranted all to be true by whomsoever written. Applicant did not disclose the true condition, but signed leaving the solicitor to fill in as he pleased, and false answers were made stating that applicant was in good health, free from any and all diseases, and had never been afflicted with any sickness, when in fact he was subject to epilepsy, fits, habitual constipation, drunkenness, and had softening of the brain, and other disorders. The evidence of the solicitor himself showed that if the real facts had been disclosed the company would have declined the risk. Pretty much all the essential statements in the application were untrue. *Held*, That applicant was bound to read the application and the answers. His attestation of the application by his signature was a representation to the company that the answers were true, for which he was responsible. As the issue stipulated that his statements, which were the foundation of the application, were true, by whomsoever the statements were written, and as a contract of insurance was consummated on that basis, the court cannot disregard the express agreement between the parties and hold the company liable if the statements of the assured touching matters material to the risk are found to be untrue.

The assured by examining his policy and the copy of application thereto annexed would have discovered that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the actions of the agent, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statement.

When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein, either by parol or writing, and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy.

Before Justice Harlan, Circuit Justice, and Judges Taft and Lurton, Circuit Judges.

Opinion of the court delivered by HARLAN, J.

This is an action upon a policy of life insurance for \$10,000, issued Sept. 30, 1892, by the Fidelity Mutual Life Association, of Philadelphia, upon a written application to that association by the assured, Martin Maier, of Detroit, Mich. The beneficiary named was the wife of the assured, the present plaintiff in error.

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\* Decision rendered, Feb. 2, 1897.

In the answers to questions embodied in the application, which was made Sept. 26, 1892, it was stated, among other things, that the assured was then "in good health," and "free from any and all diseases, sicknesses, ailments or complaint, trivial or otherwise;" that he had "never had or been afflicted with any sickness, disease, ailment, injury or complaint;" that the last physician he had consulted or who prescribed for him was Dr. Morse Stewart, of Detroit, two years previously, and that his ailment then was "toothache;" that he had not consulted or been prescribed for by any other physician or medical man during the previous ten years; and that he did not use and had never used spirits, wines or malt liquors, and had always been temperate and sober.

The policy recites that it was issued in consideration of the application, "made part hereof, and a copy of which is hereto attached," and subject to all the requirements stated, "and the conditions hereon indorsed." One of the conditions indorsed on the back of the policy is, that "if any statement contained in the application on which this policy is issued be untrue in any respect, then this policy, except as herein provided, shall be ipso facto, null and void."

The application thus concluded:—

I hereby agree and bind myself as follows: That the statements above made or contained, by whomsoever written, are material to the risk, and warranted to be true; that I have signed this application in my own handwriting; that \* \* \* all provisions of law in conflict with or varying the terms of this agreement and policy applied for, are hereby expressly waived, and the policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health. That no verbal statement to whomsoever made shall modify this contract, or in any manner affect the rights of the association, unless the same be reduced to writing and be presented to and approved by the officers of the association at the home office in Philadelphia, no agent or examiner having any power or authority to make or alter contracts, waive, forfeit, or grant credit; that \* \* \* this application shall be the sole basis of the contract with the association if a policy be issued hereon, and that if any concealments or untrue statements or answers be made or contained herein, then the policy of insurance issued thereon and this contract shall be ipso facto, null and void; provided always, that the necessary payment be made to keep said policy in force, it shall be incontestable except as therein set forth.

MARTIN MAIER.

Dated at Detroit, this 26th day of September, 1892.

In presence of D. A. Rothschild, soliciting agent.

Immediately below the attestation to the application the following direction was printed with a rubber stamp:—

Review the answers to questions given in this copy of your application, and if any correction has been made, advise the president of the association.

The plea was the general issue with notice according to the Michigan practice that the defendant would give in evidence, by way of

defense, the above application of the accused, which, it was alleged, was duly signed by him and delivered to the defendant, and "on the faith of which, and in full reliance upon the statements thereon made, the said defendant did issue to the said Martin Maier the policy of insurance declared upon."

The notice further stated that the company would show on the trial that the application and statements therein were false and fraudulent in many particulars, among others in the following: That Maier was not at the time of his application in good health and free from any and all sickness, ailments or complaints, but was in bad health and suffering from epilepsy, attacks of an epileptoid character, fits, convulsions, habitual constipation, alcoholism, softening of the brain, nervous prostration, neurasthenia and kindred troubles and other diseases; that he had been afflicted with numerous sicknesses, diseases, ailments and injuries, including those above specified, and with a number of injuries, among others, injuries received on or about January 19, 1887, August 2, 1889, and July 10, 1890, all of which were serious; that he had consulted and been prescribed for by numerous physicians, during the period named in the application, among others, by Dr. George Duffield, Dr. James Campbell, Dr. Wilcox, Dr. W. H. Poole, Dr. Yarnell, and by others unknown to defendant, all within said period; that the statement that he had consulted Dr. Morse Stewart about two years prior to his application, for toothache only, was false and fraudulent, as he had consulted said Stewart, who prescribed for him, within two years of that date for an attack of epilepsy or an attack of an epileptoid character, and likewise had been treated for different serious troubles during the previous ten years by that physician, who had attended and prescribed for him on various occasions during that period; that the statement made by said deceased in his application that he did not then use, and never had used, spirits, wines or malt liquors, and had always been temperate and sober, was false and fraudulent, in that he had used spirits, wines and malt liquors, and each of them, and had not always been temperate and sober.

It appeared in evidence that Maier made the application for insurance at the suggestion of one Rothschild, who testified that he was, at that time, working for Mr. Montgomery, the Detroit agent of the defendant. But it does not appear that Montgomery had any knowledge of Rothschild's efforts to secure an application from Maier. Rothschild testified: "I met Mr. Maier in the street and I asked him to give me his application. He was in a hurry, and we stepped in a clothing store on Michigan Ave., and he says, 'Hurry up, I haven't much time.' I asked him a few questions. He finally



said, 'Well, you fill them up yourself.' I asked him about drinking and he said, 'I am not drinking anything at present, you understand,' so I didn't put that in, and all the other questions accordingly. He was in a hurry, only had two or three minutes to write it up, and he says, 'You finish it.' He says, 'I will sign my name now and you finish it and I will go away.' Q. "What, if anything, did you say to him about his having been afflicted with sickness or disease or ailments?" A. "He told me he had some toothache and I put it down." Q. "What, if anything, did you say to him as to who treated him for it?" A. "He said Dr. Morse Stewart, and I put that down." Q. "What, if anything, did you say to him about intoxicating liquors?" A. "I knew he did not drink any more at that time." Q. "Did you or did you not say anything to him about it?" A. "Yes." Q. "At that time?" A. "Well, no, I didn't, as he told me he didn't drink anything at the time when I took the insurance." Q. "Did you say that Mr. Maier told you so at that time?" A. "I don't know as he did. I knew he didn't drink anything at that time." Q. "Now, my question is, did he say anything on that subject at that time?" A. "No, he didn't say anything." On cross-examination he was asked if he did not know that Maier had been to the Keeley Cure for drunkenness, and he answered: "No, sir, I didn't know; I heard he was there." Being asked whether he did not know that Maier had been convicted in the police court for drunkenness, he answered: "I don't know anything about it. I knew when he came out of the Keeley Cure." Again: Q. "And he did not use and had never used spirits, wines and malt liquors, and had always been temperate and sober. Now, just what did he say to you about that?" A. "Only asked him whether he was drinking, and he says, 'No,' he didn't drink any more, and I cut that off. I knew he was not drinking, and I did not think it was material to put in that."

The evidence of Rothschild, in connection with other proof in the cause, leaves no doubt that if the facts as to Maier's habits and condition had been fairly disclosed in answer to the questions contained in the printed application, the company would have declined to issue the policy. Rothschild, therefore, according to the weight of the evidence, suppressed the material facts, and by reason of such suppression, Maier obtained the policy, and the unfaithful solicitor realized his commissions.

Nor can it be doubted under the evidence that Maier himself knew that he was not a proper subject of life insurance. It was shown from official records that on the 10th day of September, 1891, July 1, 1892, and September 10, 1892, respectively, he was tried in the

police court of Detroit, and found guilty of drunkenness, and that on the 26th day of September, 1892, the very day of his application for insurance, a warrant was taken out charging him with being a disorderly person, in that he was a tippler, and having been tried on the succeeding day in that court, was found guilty and fined \$7 and costs, \$30, or forty-five days in the Detroit House of Correction. The fine and costs were paid. It was also shown that in January, 1892, he was an inmate of an Institute at Northville, Mich., and was there treated by Dr. Yarnell for "alcoholism or excessive drinking of alcoholic drinks." According to the testimony of that physician his disease had then progressed "to the extent that his brain was considerably defective, very strong tendency towards softening of the brain or paresis." The evidence further showed, beyond dispute, that in 1890, and again in 1891, he was often visited and treated by Dr. Stewart for epileptic attacks, and that for some years prior to his application he was frequently, if not habitually, in a state of intoxication. There was, therefore, no escape from the conclusion that the statements in the application that Maier never had been afflicted with any sickness, disease, ailment, injury or complaint; that he had not consulted or been prescribed for by any physician except Dr. Stewart, during the preceding ten years, and that he did not use and had never used spirits, wines or malt liquors, and had always been temperate and sober, were untrue.

But it is contended by the plaintiff that the falsity of these statements cannot be attributed to the assured, so as to render the policy void, because the answers to the questions propounded to him were in fact prepared by the agent of the insurance company; and that the company is estopped to deny the validity of the policy, upon the grounds stated, if its agent knew the facts and suppressed them when preparing the answers, or failed, fraudulently or negligently, having an opportunity to do so, to bring out the facts called for by the questions embodied in the application.

We cannot accept this view of the contract between the parties. If the assured authorized the soliciting agent to prepare his answers to the questions propounded, and thereafter signed the application so prepared, neither he nor anyone claiming the benefit of the policy ought to be heard to say that he did not read the answers, or know their contents before signing the application. His attestation of the application by his signature was a representation to the company that the answers were true; for, by the terms of his application, he stipulated that the statements made in answer to questions, "by whomsoever written," were material to the risk and warranted to be true, and if any concealments or untrue statements or answers were

made, the policy, as well as the contract evidenced by it, should be ipso facto, null and void. And when the accused accepted the policy declaring upon its face that it was issued in consideration of the application made part of the policy, and subject to the conditions indorsed on the policy, the contract became complete, and its terms are to be respected, and cannot in an action on the policy be ignored or made of no effect. It is an essential fact in the case that in the body of the contract evidenced by the policy are found recitals which made the application, as well as the conditions indorsed on the policy, part of the contract of insurance. It was said in argument that the company should not be permitted to take advantage of the misconduct or wrong of its own agent, but the law did not prohibit the company from taking such precautions as were reasonable and necessary to protect itself against the fraud or negligence of its agents. If the printed application used by it had not informed the applicant that he was to be responsible for the truth of his answers to questions, and if the want of truth in such answers were wholly due to the negligence, ignorance or fraud of the soliciting agent, a different question would be presented. But here the accused was distinctly notified by the application that he was to be held as warranting the truth of his statements "by whomsoever written." Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them. But it is too often forgotten that in giving relief, under such circumstances, to one party, the courts make and enforce a contract which the other party did not make or intend to make, as the assured stipulated that his statements, which were the foundation of the application, were true, by whomsoever such statements were written, and as the contract of insurance was consummated on that basis, the court cannot, in an action upon the contract, disregard the express agreement between the parties, and hold the company liable if the statements of the assured, at least those touching matters material to the risk, are found to be untrue.

The views we have expressed are in harmony with the decisions of the Supreme Court of the United States. In *New York Life Ins. Co. vs. Fletcher* (117 U. S., 519, 529, 531, 534), the defense was that certain statements and representations respecting his health and condition were made by the assured in his application, the truthfulness of which he warranted, and agreed that they should be the

basis of any contract between him and the company, and that the policy should be void if such statements, or any of them, were in any respect untrue, and all moneys paid on it forfeited. The policy in that case was accompanied by a copy of the application, and recited that it was issued in consideration and upon the faith of the statements and representations contained in the application. The plaintiff in the suit pleaded that the answers in the application had been prepared by the agents of the company, and that they had not properly put down what he had said to them in answer to questions. The Supreme Court said: "It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in a position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be cancelled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri. But the case, as presented by the Record, is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and [attempted] to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of

the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

Referring to the previous cases of *Insurance Co. vs. Wilkinson* (13 Wall., 222), and *Insurance Co. vs. Mahone* (21 Wall., 152), the court said: "In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements." Again: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided."

It is a mistake to suppose that any different views are expressed in *Continental Ins. Co. vs. Chamberlain* (132 U. S., 304, 310, 311.) That case turned upon its special facts, and the decision was controlled by a statute of Iowa, one section of which provided that, "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or the policy to the contrary notwithstanding." The court said: "This statute was in force at the time the application for the policy in suit was taken, and, therefore, governs the present case. It dispenses with any

inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into the agent of the assured. If it could, then the object of the statute would be defeated." Again, in the same case: "The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of 'No other' having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

While the issues present questions of general law, upon which this court may exercise an independent judgment, we are gratified to find that well-considered decisions of the Supreme Court of Michigan are to the same general effect. In *Cleaver vs. Insurance Co.* (65 Mich., 527, 531, 533), it appeared that a policy of fire insurance provided that it should be void if other insurance on the property was procured without the consent of the company written upon the policy. Additional insurance was procured with the knowledge and assistance of the company's agent, but the company's consent was not indorsed on the policy, nor did it receive notice of such insurance. The policy declared, as a part of the contract, that the agent of the company had no authority to waive, modify or strike from the policy any of its printed conditions, nor revise the policy if it should become void by reason of the violation of any of its conditions. It is also provided: "And it is hereby mutually understood and agreed,

by and between this company and the assured, that this policy is made and accepted upon and with reference to the foregoing terms and conditions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing." The Supreme Court of Michigan said: "It is claimed here that the action of the agent was the action of the company, and that such action created an estoppel. But it is not shown that the agent had any authority to indorse upon the policy the written consent to additional insurance, or to waive in any way the provisions of the policy. On the contrary, the policy delivered to the insured expressly states that such agent 'has no authority to waive, modify or strike from the policy any of its printed conditions; nor, in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent power to revive the same.'" After distinguishing that case from *Kitchen vs. Hartford Fire Ins. Co.* (57 Mich., 135), the court proceeded: "If the agent under the circumstances of this case, by filling out the application for the Lansing insurance, and saying it was all right, can estop the defendant company from raising and enforcing this defense, then the clause prohibiting the agent from waiving the conditions of the policy, or from reviving it after it has become null and void, are rendered entirely useless and nugatory." Again: "This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Security Ins. Co. vs. Fay*, 22 Mich., 467. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving, altering or modifying the process of obtaining further insurance. The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them, upon the implied or assured powers of the agent, cannot help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite

contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy: *Merserau vs. Phoenix Mut. Life Ins. Co.*, 66 N. Y., 274; *Catoir vs. American Life Ins. & Trust Co.*, 33 N. J. L., 487. The circuit judge, as the case stood in the court below, should have directed a verdict in favor of the defendant."

In *Cook vs. Standard Life and Accident Ins. Co.* (84 Mich., 12, 17, 18), which was an action upon an accident policy, and in which the defense was a false statement by the assured as to his habits, the policy purported to have been issued in consideration of the statement of facts, warranted in the application to be true, and, upon conditions printed upon the back of the policy, which, it was provided, could not be waived or altered by the agent. The court, after distinguishing the case before it from *Peoria, etc., Ins. Co. vs. Hall* (12 Mich., 202), and *Ætna, etc., Ins. Co. vs. Olmstead* (21 Mich., 246), in which cases it said, "the power of the agents was in no manner limited by the terms of the policies themselves," proceeded: "In the present case the policy provides that the agent of the company cannot waive or alter any of the agreements and conditions printed on the back of the policy. This question was fully discussed by Mr. Justice Morse in *Cleaver vs. Insurance Co.* (65 Mich., 527, 532), and it was there said: 'It cannot be successfully maintained but that the company has the right and the power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law, or equity, why such limitations and restrictions shall not be considered as known to the insured and binding upon him.'" "The court below on the trial proceeded on the theory that notice to Mr. Eadus or to Mr. Patton was notice to the company, and charged the jury that the defendant had a right to waive the conditions of the policy, and that by issuing the policy to Mr. Cook with this knowledge on the part of its agents, and receiving the premiums, it waived the conditions relating to intoxication. This was not a statement of the law applicable to the case as laid down in *Cleaver vs. Insurance Co.*, *supra*, and to which we must adhere."

In *Gould vs. Insurance Co.* (90 Mich., 302, 308), the court, after observing that the plaintiff, in accepting the policy of insurance, and in her subsequent dealing with the agent relative to the furnishing of proofs of loss, must be presumed to have had knowledge of the agent's want of power to waive any terms and conditions of the policy, said: "This restriction upon the agent's power to waive the



provisions of the policy, was plainly printed upon the face of the policy, and it cannot be successfully maintained that the company had no right to restrict the powers and duties of its agent. It must be held in the present case, that this power was expressly limited by the policy, and known to the insured, and binding upon her. The case falls clearly within the ruling of this court in *Glover vs. Insurance Co.*, 65 Mich., 527. As it was the duty of the court, under this holding, to direct the verdict in favor of the defendant, we need not pass upon the other questions raised." See also *Mallory vs. Insurance Co.*, 97 Mich., 416.

After this cause was argued and submitted, the attention of the court was called to the recent decision of the Supreme Court of Michigan in the case of *Van Houten vs. Metropolitan Life Insurance Co.* The opinion has not yet appeared in the published reports, but we have been furnished with a copy of it for examination. Nothing decided in that case is in conflict with anything said in the case before us. The contract in the *Van Houten* case does not seem to have contained any provision warranting the statements in the application to be true, "by whomsoever written." The applicant answered all the questions that were propounded to him, and, under the circumstances disclosed, had the right to assume that the company did not require any answers by him to questions not propounded to him by the agent. The company's representative assumed, without authority from the applicant, to answer for the applicant questions to which the attention of the latter was not called. The answers made to the questions put to the applicant were not impeached on any ground. The claim was that the answers made by the agent of the company upon his own responsibility, and based upon his own knowledge of the condition of the applicant, and not brought to the attention of the applicant, were untrue. The Supreme Court of Michigan recognized the general rule, that every one is presumed to have read what he signs. But the facts in that case seem to have been such as to authorize the submission to the jury of the question whether the applicant was not misled by the conduct of the company's agent into the belief that what he was asked to sign, and did sign, embodied only his own answers to the questions actually propounded to him. The Supreme Court of Michigan said: "The agent in this case had known the deceased for twenty-five years, had no knowledge of his being ill before the illness which resulted in his death, and, relying upon his own knowledge of the life of the assured, chose to answer these questions himself without interrogating him, or calling his attention to them, or informing him that there was any importance to be attached to them. In fact, it does not appear that he informed him

that there were any other questions to answer, while those he answered were answered correctly. The applicant had the right to assume that all the questions were asked, and was under no obligation to read the paper to ascertain if there were others. The application was in very small type and very closely printed. The questions and answers were below the application, and were twenty-two in number. While every person is presumed to have read what he has signed, still, we think that there was testimony in this case from which the jury might legitimately infer that the assured was misled by the agent of the defendant, in making the application." This is not inconsistent with anything determined in the present case, nor with the prior adjudications of the Supreme Court of Michigan, in the cases above cited.

We are of opinion that the circuit court, in conformity with the established practice in the courts of the United States, as well as in the courts of Michigan, properly instructed the jury that, upon the evidence and in view of the legal principles applicable to the contract in suit, the defendant was entitled to a verdict. There was no ground whatever upon which a verdict for the plaintiff could possibly have been sustained, and, therefore, it was the duty of the court, upon motion, to give a peremptory instruction for the defendant : *Travelers Ins. Co. vs. Mitchell*, just decided ; *Mt. Adams & E. P. Inclined Ry. Co. vs. Lowery*, 74 Fed. Rep., 463, 465, et seq. A verdict for the plaintiff could not have been upheld, unless it was true that the preparation by the company's soliciting agent of the alleged false answers in the application, or the agent's knowledge of all the facts, estopped the company from relying upon the provision of the contract, declaring the policy void, if the statements in the application, by whomsoever written, were untrue. In view of the undisputed facts, and, as a verdict for the plaintiff would have been utterly indefensible under any reasonable view of the evidence, the question whether the plaintiff could recover could not be said to have depended upon the weight or preponderance of evidence, but became a question of law, which was correctly decided by the circuit court when it directed a verdict for the company. Judgment affirmed.

## SUPREME COURT OF ALABAMA.

SCOTTISH UNION &amp; NATIONAL INS. CO. }

vs. }

DANGAIX.\*

The agent quit the employment of the company and presently persuaded seventy-three of his customers to cancel its policies and insure with him in other companies, and to assign to him their claims on the plaintiff company for the return premiums.

**Held,** That the policyholders had the unquestioned right to cancel and demand return premium, and an equal right to assign their causes of action; and that their assignee had also the same right to sue and must be permitted to recover. The other points in contention are subordinate.

NOTE.—The judge appeared to be so impressed with the incongruity of the case that while compelled by points of law to affirm the decision appealed from, he was constrained to vindicate himself and to rebuke Dangaix; for the details of which see p. 311 following.

This action was brought to recover certain return or unearned premiums on policies of insurance, which had been issued by the defendant corporation to different persons, the holders of said policies having canceled them, as allowed under the terms of the policies, and demanded the return of a certain proportion of the premiums paid. The plaintiff claimed as assignee of these various policyholders. The action was commenced on March 15, 1893. The complaint contained seventy-five counts. Each of the first seventy-three counts sought to recover separately the amount of the return or unearned premiums due to individual policyholders, after the cancellation of their respective policies, which claims for the unearned premiums had been regularly transferred and assigned to the plaintiff. The seventy-fourth and seventy-fifth counts sought to recover the aggregate amount due to the several policyholders upon such cancellation. The defendant pleaded the general issue, and the following special pleas: (1) "For answer to the complaint the defendant says it is not indebted in manner and form as stated in the plaintiff's complaint." (2) "For further answer to the complaint the defendant says the plaintiff is not the owner of the account, or claim sued on." (3) "For further answer, the defendant says that the policies of insurance named in the complaint were procured by the plaintiff as the agent of the defendant, and were issued by the defendant through the plaintiff as their agent; and, for the procurement of the policyholders named in the complaint, the plaintiff secured from the defendant a portion of the premiums paid by said policyholders on said policies of insurance, which said portions of

\* Decision rendered, June 5, 1894.

said premiums are still held by the plaintiff; and the defendant avers that the plaintiff, after he ceased to be defendant's agent, procured said policies of insurance to be canceled for the purpose of depriving the defendant of the benefits thereof, and then bought the unearned premiums in violation of the right of the defendant, which he had no lawful right to do; and hence the defendant avers that plaintiff never procured any lawful title to said claims for unearned premiums, and has no right to maintain this suit thereon." (4) "For further answer, the defendant says the plaintiff has heretofore brought suit for a portion of the account held against the defendant on account of canceled policies and the return of unearned premiums thereon, in the justice's court, before L. J. Haley, a notary public and ex-officio justice of the peace, who had jurisdiction of the parties and of the subject-matter of the suit, and judgment was rendered by said L. J. Haley, N. P., ex-officio justice of the peace, against this defendant, for eighty-one dollars and seventy-four cents (\$81.74) and costs of suit, and said judgment is still subsisting and unreversed, and the plaintiff cannot now have or maintain the above suit, which is for a part of the same account held by plaintiff against the defendant at the time said suit was instituted by the plaintiff against the defendant before said L. J. Haley, notary public and justice of the peace." The plaintiff demurred to the second plea, on the ground that it was not verified by affidavit as required by law. To the third plea the plaintiff demurred upon the grounds: (1) That it presents no defense to the plaintiff's cause of action. (2) That it does not deny the averments of the complaint. (3) That said plea sets up no matter which precludes or estops the plaintiff's recovery. (4) That the plea sets up no duty, which plaintiff owed defendants, the violation of which would preclude the plaintiff's recovery. (5) That the averment of the plea that the plaintiff never procured any lawful title to the claim sued upon was a conclusion of law. To the fourth plea the plaintiff demurred on the ground that it was not shown which of the claims sued upon in the present action were embraced in the judgment of the justice of the peace. The demurrers to these several pleas were sustained, and issue was joined upon the pleas of the general issue. The plaintiff was the only witness examined on the trial of the cause, and his testimony tended to show that the several claims sued on had been regularly transferred to him by the policyholders; that the policies so issued gave to the holders thereof the privilege of canceling their policies, and upon such cancellation they were entitled to a certain proportion of the premiums which had been previously paid; that the plaintiff was formerly the agent of the defendant company, and as such agent

procured the several policyholders to take out their policies in the defendant company. The contention of the defendant on the trial was, that the policies, which had been canceled by the respective holders, had been obtained through the agency of the plaintiff when he was the agent of the defendant company; that a few days after the plaintiff ceased to be the agent of the defendant company, he persuaded the several policyholders to cancel their policies held in the defendant company, and induced them to take in their stead policies issued by another insurance company of which the plaintiff was the agent; and that the claims sued upon were the claims due to the several policyholders upon the cancellation of their policies which had been canceled at the instance of the plaintiff. These facts were sought to be brought out upon the trial of the cause, by several questions propounded to the plaintiff as a witness on his cross-examination. Each of such questions was separately objected to by the plaintiff, and the court sustained each separate objection, and to each of these several rulings of the court the defendant separately excepted. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the court upon the evidence and the rendition of judgment in behalf of the plaintiff.

LANE & WHITE, *for Appellant.*

JOHN P. TILLMAN, *for Appellee.*

HARALSON, J.

1. The demurrer to the second plea was properly sustained, for that the plea denied the ownership of the claims sued on, and was not verified as required by rule 29, page 810 of the Code.

2. There was no error in sustaining the demurrer to the fourth plea. Each cause of action in the complaint (seventy-three in number) is distinct and separate from every other one, as much so as if seventy-three promissory notes had been declared on, separately, in the same complaint. The principle which forbids the splitting of the same cause of action by bringing two or more suits upon it has no application here, as the theory, on which the plea is filed, assumed.

3. The real contest in this case, evidenced by the procedure in the court below and the arguments filed in the cause, was upon the demurrer to the third plea,—as to whether or not the facts therein set up, and as pleaded, constitute a good defense to this action, and preclude a recovery by the plaintiff. The bill of exceptions states that “the plaintiff introduced in evidence each one of the several policies

named in the complaint, separately, together with the receipt for the return of the premiums and the authority to collect the same by the plaintiff indorsed on it, and a transfer and assignment of Dangaix, Crowder & Co., to the plaintiff of all their interest in said return premiums. Plaintiff also proved the other averment in said complaint." This statement shows that every allegation in the complaint was proved; which entitles the plaintiff to a judgment, unless it appears that he is precluded by matters set up in said plea.

4. It is a principle of universal prevalence that an agent must not put himself, during the agency, in a position which is adverse to that of his principal: 1 Pars. Cont., p. 93. This rule cannot, perhaps, be more comprehensively and concisely stated than as we find it in the American notes to *Keech vs. Sandford* (1 White & T. Lead. Cas. Eq., 53): "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated:" *Davis vs. Hamlin*, 108 Ill., 40. We have been unable to find any decided case, or to find the principle asserted in any text-book on agency, which lays down the proposition that one who has acted as an agent of another, whose agency has terminated, may not, thereafter, if he act in good faith and without fraud, engage in business in competition with, and even to the injury of, his former principal. The law has not attempted to prescribe rules for the conduct of one who leaves the service of his first employer and enters that of another. The only restraint the law lays on the retiring agent is, that he must tell the truth when he speaks of his former employer and his business, and shall be guilty of no fraud or deceit at his expense, for the profit of himself or another. If he does, he is personally responsible for the damage he causes. An insurance agency is a profitable and useful business employment. A good and capable agent of the kind often controls a large patronage and enjoys a valuable good will, which he may use or sell. If he should cease to represent one company, and engage to represent another, to the great disadvantage of the first, there is no law to prevent his doing so. Every one who employs an agent does so with the certain knowledge that his agency may terminate at any time, except in so far as it is restrained by contract, and that the agent may transfer himself with all his information, skill and patronage, to another rival in business, or set up on his own account, in a competing line. Such persons are hired, often, in consideration

of the trade that follows them, and this is legitimate, to the extent that it is fairly influenced.

5. We have thus stated the law as favorably as may be to the claims of the plaintiff. On the other hand, it is certainly true, that there are obligations which continue and follow an agent after the termination of his agency. We have a fair illustration of this principle in *Edmonstone vs. Hartshorn* (19 N. Y., 9), which was a suit by an agent for his salary. It was shown that he had been employed by the defendant to reside in the island of Cuba, as his agent for procuring orders for the manufacture of engines; that he was to be paid \$2,400 per annum in equal monthly installments; that after remaining in Cuba some eight months, plaintiff returned to New York and presented his bill to defendant for the residue of his salary. It was shown in defense that, when the plaintiff left Cuba, he was engaged in a negotiation with a Mr. Bequir for the construction by defendant of a steam engine to be set up on his plantation; that several letters had passed between Bequir and the plaintiff in reference to the character and price of the engine, and the time of delivery. The terms proposed by the plaintiff were accepted by Bequir, in a letter written before the plaintiff left Cuba, but not received by him until after his arrival in New York and the presentation by him to the defendant of his claim for his unpaid salary; that a few days afterwards, the plaintiff gave the order for the construction of Bequir's engine to a rival establishment, by which it was constructed, and the defendant could have complied with Bequir's order within the time limited by it for delivering the engine, and that the profit would have exceeded the entire amount of the plaintiff's salary. Judgment was rendered for the plaintiff. On appeal, that judgment was reversed,—five out of the eight judges concurring. It was held that, if the plaintiff on his arrival in New York desired to take no further care of defendant's business, it was his plain duty to have communicated to him the fact that such a corporation existed; and when in New York, he received Bequir's letter of the 8th of June, with which, except as agent of defendant, he had no concern, he should have transmitted it or communicated its contents to him, and to that extent, at least, he had a duty unperformed which he remained bound to perform to defendant though his agency was at an end. The court held he was not entitled to recover. In the case of *Insurance Co. vs. Anderson* (Super. N. Y., 6; N. Y. Supp., 507), the defendants had been the agents of the plaintiff, and, as such, insured Hoe & Co. with the plaintiff company, issuing to them two policies to run for three years. By the agreement between plaintiff and defendants,

the latter were to receive 30 per cent on all premiums received by them on policies issued through their agency. They received this per cent on the premiums for these two policies, for the entire term they were to run. Before the expiration of the policies, defendants left the service of plaintiff and became the agents of another insurance company, and solicited Hoe & Co. to cancel their policies with plaintiff, and take others in their new company, which they did, and plaintiff, retaining the customary short rate, for which the policies provided in case the insured should at any time desire to cancel them, paid the balance of the premiums to the insured. The plaintiff sued the defendants for damages for procuring the cancellation of the policies. The court held that the defendants were, under the terms of their contract, liable to plaintiff for 30 per cent of the returned premiums, and it was no error to so direct. This case on appeal was affirmed, the court holding that the power of an agent to create rights by contract for his principal includes an implied duty to observe, and not to defeat or destroy them: *id.* (N. Y. App.) 29 N. E., 231.

6. Under the policies described in the complaint, it is not denied that the policyholders had the absolute right to a cancellation of their policies at any time, and were further entitled, by the terms of their contracts of insurance, to have their unearned premiums refunded to them, immediately upon the cancellation of their policies. This was their legal right, and however wrong and inexcusable in a moral and legal sense it may have been for the plaintiff to induce them to cancel their policies and insure with him in other companies, this could not affect their right to cancel, if they elected to exercise it. It is certainly true, that having exercised it, they could have brought and maintained their respective suits against defendant, to recover these premiums, on its refusal to pay them. If the policyholders had the right to sue, they had the right to sell and transfer their causes of action to another; and to sustain this plea, we would have to deny their assignee the right to sue, which, without more, under the established rules of pleading, we cannot do. There was no error in sustaining the demurrer to this plea, nor in excluding the evidence offered on the trial to support its averments. The facts set up in said plea were not available under the general issue.

7. The authorities to which we have referred maintain the principle, to which we give sanction, that when the plaintiff procured these policies to be issued by the defendant company, and was paid by it to procure them, there was an implied obligation on him, supported by the consideration he had been paid by defendant,



as binding as if it had been expressed, and which was continuous during the life of the policies, even after the termination of his agency, that he would not deprive defendant of the fruits of the services it had employed him to render. The policyholders, as we have said, had the unquestioned right to cancel their policies and demand repayment of their unearned premiums; and if they did so, of their own accord, at any time, whether before or after the termination of plaintiff's agency, the plaintiff was in no sense responsible for the act; but, for him, when he quit the defendant's employment, and for purposes of his own gain, to turn about and induce those who had insured with defendant, to cancel their policies and insure with him in another company, or in other companies, thereby depriving defendant of the benefits of premiums on policies which he, as its agent, had procured, for a certain per cent of the premiums paid to and still retained by him, was a violation of duty he owed defendant, which finds no sanction in law. Such a course is at war with all proper business principles. If the defendant had known that plaintiff would pursue this course, every one knows that it would not have employed him. We have felt impelled to say this much, lest a bare ruling on this plea might seem to imply a sanction to the course alleged to have been pursued by plaintiff to acquire the title to those causes of action, on which he has obtained a judgment which we affirm.

8. If the defense attempted to be set up in said plea had been presented by a plea of recoupment properly pleaded; or, if on a proper statement of the facts in a plea to show the fraud, supported by affidavit, it had been made to appear that the transfer to him of these causes of action had been fraudulently procured, by plaintiff, and denying his right and title to them, it might have been, that a defense would have been presented in such form as to resist the assault of a demurrer. But, this we need not decide, since such pleas are not before us. Affirmed.

## COURT OF APPEALS OF NEW YORK.

HANNA

vs.

CONNECTICUT MUT. LIFE INS. CO.\* }

Admission by claimant in the papers presented to the company's agent that the assured died from alcoholism and extreme prostration was held to be conclusive against the claim; an express condition of the policy had been violated and the company was not liable.

The action was to recover upon a policy of insurance issued by the defendant upon the life of the plaintiff's husband. The complaint alleged the death of the insured from consumption of the bowels; that due proof of his death had been made to the defendant, and a demand made for payment of the insurance moneys. The defense interposed was that an express condition of the policy of insurance had been violated, which excepted death as a consequence of intemperance; and it was alleged that the death of the insured was "caused by alcoholism and extreme prostration, superinduced by excessive and intemperate use of alcoholic and spirituous liquors and beverages." Upon the trial, the plaintiff, being sworn as a witness, testified to the fact of her husband's death. Being then cross-examined, she was shown papers, and testified to having delivered them to the agent of the defendant for the purpose of proving the death of the insured. The papers to which her answer had reference included certain certificates made by her, by an attending physician, and by a friend, and which were severally sworn to. In the plaintiff's certificate, among other facts stated, were these: That the "remote cause of death was alcoholism;" that the "immediate cause of death" was "alcoholism and extreme prostration;" that the "duration of the last illness" was "two weeks." It was also stated by her therein, that the deceased was "found at Earl's Hotel, New York, suffering from diarrhea, and brought to the hospital where he died." She then gave the names of three physicians who had attended the deceased during the last year prior to his death. In the annexed certificate of the attending physician were answers by him to the effect that the deceased had died in the Long Island Hospital; that he had known him during his stay in the hospital, and had attended him seven days; that the duration of his last illness was two weeks; that the remote cause of death was alcoholism;

\* Decision rendered, October 27, 1896.

that the immediate cause of death was alcoholism and extreme prostration ; that the deceased had no other disease, injury, or infirmity ; that dissipation had predisposed the deceased to disease ; and that the use of spirituous liquors had the effect of causing death. The annexed " friend's certificate " stated the cause of death of the deceased to have been alcoholism and extreme prostration. The plaintiff, being recalled as a witness in her own behalf, testified that at the time of her husband's death she was at Scarborough, on the Hudson ; that during the month she had been there, she had not seen her husband, and that she did not know, of her own knowledge, the cause of his death, but had obtained the information contained in her sworn certificate from the friend whose certificate was annexed to her own. She also testified that her husband had been troubled for years with diarrhea, and that among the physicians who had attended him, was a Dr. Moore, who had died, and that by his advice, her husband had used brandy to relieve his sufferings. Kessler, the friend whose certificate had been annexed, was also examined in plaintiff's behalf, and testified to having been personally acquainted with the deceased in his lifetime ; that he had obtained the information as to the cause of his death from the certificate of the doctor at the hospital ; and that he did not know what disease the deceased had been suffering from for a number of years prior to his death. A physician named O'Connell was then examined as a witness in behalf of the plaintiff, and testified to having known the deceased in his lifetime, to having treated him for diarrhea, and to having advised the use of whiskey in conjunction with other remedies. His attendance upon the deceased, he said, covered a period of two or three weeks in the spring of 1886, which was over four years prior to the death of the insured. Other evidence was also given by the plaintiff, through a medical expert, who did not know the insured, that, in certain cases of diarrhea, brandy and whiskey are often recommended as stimulants. The plaintiff having rested her case, the defendant's counsel moved for a direction of a verdict in its favor. The trial judge dismissed the complaint, and denied the request of the plaintiff to go to the jury on the facts of the case. To both of his rulings, the plaintiff excepted. The plaintiff's exceptions were heard in the first instance at the general term, where they were overruled and a judgment ordered dismissing the complaint. The plaintiff has further appealed to this court, and contends that the burden was upon the defendant to show that there had been a violation of the provisions of the insurance policy, which was not met in the case, and that upon the case, as made by her, there was a question for the jury, as to whether the deceased had

violated the conditions of the policy in respect to the use of spirituous liquors.

ALEX. THAIN, *for Appellant.*

JOHN M. BOWERS, *for Respondent.*

GRAY, J.

It is undoubtedly the general and well-settled rule in such cases that the defendant is bound to establish to the satisfaction of the jury the defense that the policy has been avoided by some violation on the part of the insured of its conditions, and, if the evidence which went to make up the plaintiff's case upon the trial warranted any other inference as to the cause of death than that stated in the certificate, it was error to dismiss the complaint. Even if it was inferable from the evidence that, although death may have been caused by the use of spirituous liquors, nevertheless, as such use had been under the advice and direction of a physician, the jury should have been permitted to pass upon the question. But the difficulty with the plaintiff's case is that there was no evidence with respect to the cause of the death of the insured other than it was the result of intemperance. That evidence was furnished through the plaintiff to the defendant in the certificates which she delivered to the defendant's agent when making her demand of payment of the policy. Upon those proofs, as so furnished, the insurance company had the right to rely, as her representations, unless and until explained. They operated as admissions by her of a material fact and were competent evidence against her, under the rule as to admissions against interest. In *Spencer vs. Association* (142 N. Y. 509, 38 N. E., 618), Chief Judge Andrews, in speaking of the burden resting upon the defendant to meet the affirmative issue interposed by it, said: "The only proof upon which the defendant relied was the admission in the original proofs of loss that the illness of the deceased commenced February 6, 1890. This was competent evidence in support of the issue, because it was an admission by a party to the record against her interest. \* \* \* The burden of proof was not changed by the admission. Unexplained, it would have been conclusive, and the defense would have been made out." This plaintiff was not concluded by the proofs of death, which she had presented. *Prima facie*, they were true statements, but it was open to her to give evidence, changing or correcting the facts therein, appearing to have been stated by, or for her. In fact, they called upon her to show that her allegation in the complaint as to the death being caused by consumption of the bowels was true. Had that been done, and had it thereby appeared by some evidence that the cause

of death was, or could have been, other than as stated in the certificates, and an inference permitted that the statements in the proofs as to the cause of death were incorrect, a question would have been presented for the jury to determine. But the case when the plaintiff rested, was destitute of any evidence which even tended to show that the representations and statements made and furnished by the plaintiff to the defendant were not true. The plaintiff had not seen her husband for a month prior to his death, and therefore was unable to say that he had not died from the cause stated in the certificate of the physician, which she presented to the company, and upon which she based her own certificate. It is true that she testified to the fact that, in the past, her husband had suffered from diarrhea, and had used spirituous liquors by the advice of a physician and to relieve his sufferings, but that was not at all incompatible with the fact that his death eventually was caused by intemperance. The testimony of the physician, who was examined as a witness in her behalf, was valueless to contradict the certificate, because his attendance upon the deceased had only been for a short period, and that more than four years before the death. It is a singular and a very pregnant fact, that the plaintiff did not attempt to explain away the damaging effect of her admissions in the certificate by some evidence, either of some other physician who had known the deceased, or some personal acquaintance. It is also singular that the friend whose certificate as to the cause of death the plaintiff had furnished to the defendant, and who was also examined upon the trial, was not asked to testify as to the temperate or intemperate habits of the deceased. The result was that, when the plaintiff rested her case, but one inference was permissible, and that was that the facts which the plaintiff had represented to the defendant in the certificate accompanying her demand for payment were true and incapable of being contradicted. It is true that in her own certificate she had answered the question as to the particulars relative to the last illness, that the deceased was "found at Earl's Hotel, suffering from diarrhea, and brought to the hospital where he died;" but, as at that time she was absent, and had been so for two previous weeks, it only amounted to the statement of a fact not inconsistent with death from the intemperate use of spirituous liquors. To have submitted the case to the jury would have been without justification in the law, and a verdict rendered for the plaintiff could not have stood the test of an application to set it aside as being without evidence to support it. The judgment should be affirmed, with costs.

Andrews, C. J., and O'Brien and Haight, J. J., concur. Bartlett, Martin, and Vann, J. J., dissent. Judgment affirmed.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ALLEN

vs.

MASSACHUSETTS MUT. ACCIDENT ASS'N.\* }

Restrictions in an application for accident insurance, providing that the company should not be liable until after the receipt and acceptance of the application, and that it was not responsible for money paid to any one but its treasurer, held to be good. The mere signing of an application and payment of money to an agent does not constitute a contract of insurance.

The express stipulation, which the applicant has filled up and signed, overrides conversations with the agent and other parties.

WILLIAM A. GILE and C. T. TATMAN, *for Plaintiff.*

A. E. DENISON, *for Defendant.*

HOLMES, J.

This is an action upon an alleged contract of accident insurance. On July 31, 1895, the plaintiff signed an application for \$7,500 death benefit, and \$37.50 weekly indemnity, and delivered it to a local agent of the defendant in Worcester, paying him \$7.50. The agent said that the application would be sent on that afternoon, and that the policy would be delivered the next day. By the eighteenth clause, the plaintiff agreed that the defendant should not be liable before the receipt and acceptance of the application by the secretary in Boston, and that it was not responsible for money paid to any other than the treasurer in Boston, or those authorized by him in writing, the certificate fee excepted. On August 3d, after it had learned of the accident, a letter was written by the defendant to the agent, declining the plaintiff's application, and offering insurance to a less amount. No acceptance had been communicated to the plaintiff at an earlier date.

On these facts, it is plain that no contract had been made, and that the judge was right in directing a verdict for the defendant. Even if the defendant had received the application, and had been intending to accept it, and had changed its intention when it heard of the accident, it had a perfect right to do so. The application had some minutes made upon it at the home office, but these only briefly noted the accident and the above-mentioned letter to the agent. They did not show an acceptance.

Besides the above-mentioned statement of the agent that the policy would be delivered on August 1st, the plaintiff offered to

\*Decision rendered, October 22, 1896.

prove that the agent told him when he signed the application that he was insured from that moment. This evidence was excluded, and rightly. The eighteenth clause of the application signed by him told the plaintiff by construction that the agent had no power to accept it, and, even if the agent had had all the powers of the defendant, it would not have been permissible to override the plaintiff's express written agreement by contemporaneous talk: *Batchelder vs. Insurance Co.*, 135 Mass., 449. The contract on which the plaintiff had to recover, if at all, was an acceptance of his application. The conversation did not tend to prove any other.

The evidence of what the agent had said to a third person as to having received the policy was hearsay. Exceptions overruled.

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SUPREME COURT OF MINNESOTA.

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GEARE ET AL.

vs.

UNITED STATES LIFE INS. CO.\*

The application of the insured for a policy of life insurance (made a part of the contract of insurance), among numerous other questions and answers as to the health, habits, and history of the insured, contained the following: "Does the person expressly waive all provisions of law forbidding any physician or surgeon from disclosing any information which he has acquired? Ans. Yes." The policy having lapsed by reason of the non-payment of a premium, it was subsequently reinstated upon the faith of the following certificate of the insured and the beneficiaries, but the language of which was prepared by the insured: "In consideration of the restoration and renewal of policy No. \* \* \*, the undersigned hereby renews, reaffirms, and warrants each of the statements, answers, and representations as expressed in the original application for said policy, and doth further warrant that the person whose life was desired to be insured under said policy has been and continued since the time of said original application, and now is, of good health, and of correct, sober, and temperate habits." *Held*, That the waiver in the original application applied only to the past, and did not include information thereafter acquired by a physician in attending the insured as a patient. Also, that the effect of the reinstatement of the policy upon the certificate was merely to revive the original policy as it existed before the lapse, modified only by the representation as to the health and habits of the insured subsequent to the original application. Hence the waiver does not extend to information acquired by an attending physician prior to the date of the renewal certificate, but subsequent to the date of the original application.

FLANDRAU, SQUIRES & CUTCHEON, for Appellant.

W. H. YARDLEY, for Respondents.

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\* Decision rendered, Oct. 21, 1896. Syllabus by the Court.

MITCHELL, J.

The defendant offered to prove by the attending physician of the insured that in November, 1890, he had certain diseases. The court excluded the evidence as inadmissible under the statute: Gen. St., 1894, § 5662. The defendant admits that the evidence was within the statute, and was inadmissible unless the patient had waived his privilege; and the plaintiffs admit that a patient may waive this privilege. Hence the only question is whether the insured had waived it. The policy in suit was issued in February, 1889. The application of the insured for the policy, which was made a part of the contract of insurance, contained, among others, the following question and answer: "Does the person expressly waive all provisions of law forbidding any physician or surgeon who has attended him from disclosing any information which he has acquired? Ans. Yes." Clearly, this waiver would not include the offered evidence, because it applies only to the past. On August 18, 1891, the policy lapsed and became void by reason of the nonpayment of a premium. But on the 14th of October, 1891, the policy was by the defendant reinstated and restored upon the following certificate by the insured and the beneficiaries, which was prepared by the defendant itself, and presented to them for execution: "In consideration of the restoration and renewal of policy No. —, now forfeited for nonpayment of premium when due, and which restoration and renewal is hereby applied for, and by said company to be granted upon the faith hereof, \* \* \* each of the undersigned hereby renews, reaffirms, and warrants each of the statements, answers, and representations as expressed in the original application for said policy, and doth further warrant that the person whose life was desired to be insured under said policy has been and continued since the time of said original application, and now is, in good health and of correct, sober, and temperate habits." The contention of the defendant is that this certificate renews and repeats each and every statement in the original application as of the date of the renewal, and so as to make them speak as of that date, while the contention of the plaintiffs is that the effect of the transaction was merely to revive and reinstate the original contract of insurance as it existed before its lapse, modified only by the representation contained in the last clause of the certificate as to the subsequent health and habits of the insured; and hence that the representations and statements (including the waiver) still continue to speak in the revived contract as of the date of the original application. We are of opinion that the construction contended for by the plaintiffs is correct, and must be adopted as most consistent with the apparent intention of the



parties, which seems to have been merely to revive the lapsed contract upon its original terms, modified only by the additional representation as to the health and habits of the insured since the date of the original application. If the contention of the defendant is correct, it follows that the language of this certificate amounts to an affirmation that all the representations and statements contained in the original application still continued to be true on October 14, 1891; as, for example, those as to occupation, residence, and age. As to the last, this would lead to an absurdity. Moreover, under any such construction of the meaning of the certificate, the last clause, relating to the continued health and habits of the insured, would be wholly superfluous, for the questions and answers in the original application contained a most exhaustive investigation into the physical history of the insured and his relatives. The view most favorable to the defendant of which the language of the certificate is capable is that it is doubtful and ambiguous. But, if so, then, under a familiar rule, these doubts and ambiguities must be resolved in favor of the insured or his beneficiaries. The principle involved is much more far-reaching than the mere question of waiving a statutory privilege, for, as already suggested, if defendant's construction of the waiver is adopted, it necessarily and logically follows that it must be held that this certificate amounts to an affirmation that each and all of the statements contained in the original application still continued to be true. To allow this to be effected by such ambiguous and general language of the insurer's own choosing, referring to a document which was in its exclusive custody, would be very dangerous. Order affirmed.

## SUPREME COURT OF IOWA.

RUNKLE ET AL.  
 vs.  
 HARTFORD INS. CO.\*

Inconsistent defences may be pleaded, but a demurrer is not the proper pleading to reach them.

If a pleading contains a general statement of the facts relied on, the omission of details cannot be set up against it.

Proofs of loss in the possession of the company, and produced by it on the trial, meet the requirements of the policy and the law, and it cannot be pleaded that competent proofs were not served on the company.

Anticipating a dissolution of partnership, the two members of a firm made a division of the insured goods, and one-half was removed to a building across the street, the other half which was burned being in the sole custody of one of the partners, the partnership not yet having been dissolved. *Held*, Not essential, neither the rate nor hazard being increased.

McVEY & CHESHIRE and RICKEL & CROOKER, *for Appellants*.

CHARLES W. KEPLER and J. W. JAMISON, *for Appellees*.

DEEMER, J.

On the 5th day of February, 1894, the defendant issued a policy of fire insurance for the sum of \$3,500 to the firm of Wetzel & Bovey, upon their stock of general merchandise contained in a two-story brick building in the town of Lisbon, Linn county, Iowa. On the 29th day of May, 1894, the said building, with its contents, was totally destroyed by fire. After the fire, the firm of Wetzel & Bovey assigned their policy, and the claim arising thereunder, to the plaintiffs, in trust, for the benefit of their creditors. This action was brought by the said assignees to recover the amount of the policy. In their petition, they claim that the value of the goods destroyed was \$3,750, and they allege that their assignors mailed proofs of loss, duly signed and sworn to, to the defendant company, on the 18th day of June, 1894. The defendant admitted the execution of the policy, and the destruction of the property by fire, but denied each and every other claim of the plaintiffs. The policy of insurance contained this condition: "This entire policy shall be void \* \* \* if the interest of the insured be other than the unconditional and sole ownership, \* \* \* or if any change, other than by death of the insured, takes place, in the interest, title, or possession of the subject of insurance (except change of occupation without increase of hazard),

\* Decision rendered, Oct. 21, 1896. —

whether by legal process or judgment, or by voluntary act of the insured, or otherwise." The defendant pleaded that the interest of Wetzel & Bovey at the time of the fire was not the sole and unconditional ownership of the property destroyed; that there was a change in the ownership of the property; and that Wetzel had no interest in it at the time of its destruction by fire; and that the goods were in the sole possession of Bovey at the time of the fire. Defendant further pleaded a condition rendering the policy void in case of fraud or false swearing by the insured, touching any matter relating to the insurance, or the subject thereof, whether before or after the loss; and it said that this condition had been violated by the assured, because their proofs of loss contained a statement that they could not set forth a statement of the items, or character of the goods destroyed, which statement was false and untrue. They also pleaded a statement, made to their adjusting agent, with reference to the ownership of the goods; but they did not claim that this statement was untrue, as we understand the record. In reply, the plaintiffs denied the affirmative allegations of the answer, and further pleaded that the statements made to the adjusting agent, which are referred to by the defendant, were obtained by fraud and misrepresentation, practiced upon them by the defendant's agent. On these issues the case went to trial to a jury, resulting in the verdict and judgment from which this appeal is taken.

1. The defendant's first contention is that the court erred in overruling its demurrer to that part of the reply pleading that the statements made to the agent of the company were obtained through fraud. It is said that this is a plea in the nature of a confession, and avoidance, and that there is no express admission, that the statement, was in fact made; in other words, that the pleading does not give color. Without setting out the reply in *hæc verba*, we think it sufficient to say that there is an implied admission in it, that the plaintiffs did sign the statements which are relied upon by the defendant, and that there is sufficient color to the pleading. It is not necessary that the confession be in express terms. If the reply, by reasonable implication, admits the facts sought to be avoided, this is sufficient. It is said, however, that the reply is a general denial, and that, for this reason, no confession will be implied. But this view overlooks the fact that inconsistent defenses may be pleaded. True, they ought to be separate divisions or counts, but, if not so framed, a demurrer is not the proper pleading to reach them. See *Morgan vs. Insurance Co.*, 37 Iowa, 359.

Defendant further contends that the reply is insufficient, because it does not set forth the facts constituting the fraud relied upon by

them to defeat the effect of the statements made to the agent. This position is without merit, because the pleading does contain a general statement of the facts relied upon, and is sufficient.

It is also said that the reply contained simply a statement of the evidence, and was not defensive matter. If this proposition be conceded, it follows that there was no prejudicial error in overruling the demurrer. Aside from all this, it is clear that the statements referred to in the answer were not issuable facts. They were simply admissions made by plaintiffs' assignors, which defendant was privileged to introduce in support of the issue tendered by it, and a reply thereto was wholly unnecessary.

2. Error is assigned upon the admission of the proofs of loss in evidence, because it is said there is no evidence that they were served upon the defendant. The record shows that defendant was given notice to produce the papers, and that "the counsel for plaintiffs also offered in evidence, a paper marked 'Exhibit B,' which was handed to counsel, by counsel for defendant, on notice to produce; it being the proof of loss served upon the defendant, and referred to in the plaintiffs' petition." This seems to meet the claim made by defendant's counsel. If it be conceded that this is not sufficient to establish service of the proofs of loss upon the defendant, yet neither the statute nor the policy requires formal proof of service. All that is required of the assured by either policy, or statute, is that they give or render to the company proofs of loss. As they were found in the possession of the insurance company, and were produced by it upon the trial, the requirements of the contract and of the law were fully met. The defendant does not claim, either in its objections, or in argument, that it did not receive the paper in time.

Further complaint is made of the introduction of this paper because it is said some of the statements made therein are untrue. If this were so, it would be no reason for excluding the paper. Defendant would need it as a predicate for its defense.

3. Complaint is made of the court's refusal to submit seven certain special interrogatories submitted by defendant. To a better understanding of the question presented, it is well to recite some of the facts disclosed by the record. It seems that, at the time the insurance was written, Wetzel & Bovey was a partnership composed of Henry Wetzel and J. G. Bovey. On or about May 6, 1894, the members of this firm had some talk about dissolving partnership; and, as neither was able to buy out the other, they concluded upon a division of the stock. Pursuant to this arrangement, they each selected a man to make division of the goods, and these men so selected proceeded with their work. In order to accomplish it, they

placed the goods in two piles, and those that were to go to Wetzel were removed from the building in which they were insured to one across the street. At the time of the fire all the goods owned by the firm had been divided, except to the amount of about \$100. It was claimed by the defendant that this constituted such a change, both in the title and possession of the goods, as that the policy was avoided; while, on the other hand, plaintiffs contended that it was expressly agreed between the members of the firm that no dissolution should take place, and neither should release or relinquish his partnership interest in, and to any part of, the goods until the partnership debts were paid, or until each had been indemnified by satisfactory security that the other would pay his share of the partnership indebtedness; and the plaintiffs contended that this condition precedent to a full dissolution and change of interest had not been carried out when the fire occurred. There was no question but that the division before alluded to was made, and that Bovey was in the manual possession of the goods destroyed by fire. The issue was upon the question as to whether the dissolution was complete, and as to whether Bovey was in possession for himself, or for the firm of which he was, or had been, a member.

The interrogatories submitted by the defendant were as follows: "(2) Did Wetzel & Bovey, prior to the fire, divide the greater part of the stock described in the policy between them? Ans. —. (3) What part of the stock, in value, of Wetzel & Bovey, described in the policy, was undivided at the time of the fire? Ans. —. (4) Who was in possession of the stock remaining in the building described in the policy at the time of the fire? Ans. —. (5) Who was in possession of the stock removed from the building described in the policy, to a building across the street, at the time of the fire? Ans. —. (6) Were the statements contained in defendant's Exhibit No. 1, true or false? Ans. —. (7) Did Wetzel & Bovey, or either of them, have an invoice of the goods in controversy, or part of them, when the proof of loss was made and sworn to? Ans. —."

It is manifest that neither the second, third, fourth, nor fifth interrogatories, had they been submitted to the jury, and answered, as the defendant claims they should have been, would have been conclusive. They simply called for evidentiary facts, most of which were undisputed. The court was not required to submit interrogatories for findings of fact, not necessarily determinative of the case; nor to submit particular questions not ultimate in their nature, or which could not well be considered or answered without danger of

conclusion or misrepresentation: *Thomas vs. Schee*, 80 Iowa, 237, 45 N. W. 539; *Winter vs. Railroad Co.*, 80 Iowa, 443, 45 N. W. 737. See, also, *Whalen vs. Railroad Co.*, 75 Iowa, 563. The sixth interrogatory related to statements of plaintiffs, made to an agent of the company, and not to the proofs of loss referred to in defendant's answer, and was manifestly improper, as it related simply to an item of evidence which the defendant used for the purpose of proving a dissolution of the partnership. But, aside from all this, the defendant at all times insisted that the statements contained in what was known as "Exhibit 1" were true. It did not claim that any false swearing was done in this. It introduced the paper for the purpose of establishing the truth of one of its defenses, and did not rely upon the falsity of the statements therein contained. Moreover, the false swearing which will avoid a policy must be done willfully and knowingly, and with intent to defraud the company. Now, the company does not claim that the statements made in Exhibit 1 were false. On the contrary, it insists that they were true. But, if they were false, it is clear that they were not made with intent to defraud; for, if true, they would have shown that the firm had no interest in the property at the time it was destroyed. The seventh interrogatory called for an answer which was not determinative of the case. In their proofs of loss, the insured stated that they could not set out specifically the items and character of the goods destroyed. It was claimed by defendant that this was untrue, because they had recently taken an inventory of the goods which they had in their possession. Now, in the first place, there was nothing in the policy, nor in the law, requiring them to make an itemized list of the goods destroyed; and secondly, if there had been such a requirement, a finding that they had an invoice of the goods, would by no means be conclusive on the question of fraud, or false swearing; for it is well settled, that, in order to avail itself of this defense, the insurer must show that the assured knowingly and intentionally swore falsely. There must be a willful intent to defraud, and not a mere mistake or oversight. The question of fraud, or false swearing, was fairly submitted to the jury, by proper instructions, and they manifestly found that the plaintiffs' assigns did not make any false statements for the purpose of deceiving the defendant. An affirmative answer to the seventh interrogatory would not have been in conflict with the general verdict. See *Cormac vs. Bronze Co.*, 77 Iowa, 32, 41 N. W., 480; *Hawley vs. Railroad Co.*, 71 Iowa, 720, 29 N. W., 787; *Dreher vs. Railroad Co.*, 59 Iowa, 601, 13 N. W., 754; *Scagel vs. Railroad Co.*, 83 Iowa, 380. Again, defendant was not prejudiced by

the court's refusal to submit this last interrogatory. The jury, by their general verdict, found that the statements in the proofs of loss, even if untrue, were not made for the purpose of deceiving the defendant; and an affirmative answer to the seventh interrogatory would not have been controlling.

4. Error is assigned on the admission and rejection of evidence. The questions to which objections were sustained in most instances called for a mere repetition of the testimony of the witness, and, for that reason, the court correctly ruled. Other questions asked by defendant's counsel were not proper cross-examination, and were properly rejected. Some of the questions propounded to the witness Morrison by plaintiffs' counsel were not strictly cross-examination; yet, in view of the issue of fraud tendered by the reply, we are led to believe that the court did not abuse its discretion in such matters, and that, in any event, the answers were not prejudicial.

5. Certain of the instructions are complained of. We have examined these complaints, and find that they relate more to the brevity of the charge than to its correctness. It is said that it was a question of law for the court whether the partnership was dissolved or not. We do not so think. It was a mixed question of law and fact, upon which the jury was properly instructed. It is insisted, however, that the court ignored the issue of change of possession. True it is that it did not specifically refer to this issue; but, under the facts of the case, the real question was one of change of ownership, for, if there was no dissolution of the firm, then the possession of one member was the possession of the co-partnership. Each member of the firm, until its dissolution, was an agent for the firm, and his possession was the possession of the principal. We see no error in the instructions given.

6. The defendant asked 24 instructions, each of which was refused by the court. We cannot set them out without unduly extending this opinion. It is sufficient to say that, in so far as they embodied correct rules of law, they were given, in substance, by the court on its own motion. What we have said in the course of this opinion sufficiently answers most of the propositions argued by counsel. But one of the instructions asked calls for specific mention. It announced the rule that the division of the stock, and the removal of substantially one-half thereof to another building, if found by the jury to be an increase of risk, would avoid the policy. The error of this instruction becomes apparent when we state that there was no evidence adduced to show that the risk would be increased thereby. It cannot be said, as a matter of law, that such a division and removal of the goods would of themselves increase the

rate or the hazard: 1 Wood, Ins., §§ 241-260; Martin vs. Insurance Co., 85 Iowa, 648.

Other questions are discussed by counsel which we do not notice, for the reason that we have sufficiently indicated our views with reference thereto in what has already been said. The verdict has support in the evidence, and, as we find no prejudicial error, the judgment is affirmed.

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## SUPREME COURT OF IOWA.

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FITCHNER ET AL.

vs.

FIDELITY MUT. FIRE ASS'N.\*

The policy was for \$1,000 on building and \$1,000 on merchandise. In the application there was written, "\$12,000 total concurrent insurance permitted," when it was really the understanding between the insured and the agent that the limitation was to be on the merchandise only. *Held*, That it was a mutual mistake and the policy must be reformed by making it read "\$12,000 total concurrent insurance permitted on the merchandise."

The insured did not read the application at the time he signed it, nor his policy afterward which contained a copy of the application, and by which the mistake might have been discovered, but held it without complaint for fourteen months. *Held*, Not such a want of reasonable care as will defeat the right of reformation.

The knowledge of a soliciting agent who is not empowered to issue policies is the knowledge of the company, which must be bound by his mistakes.

A fictitious mortgage made and recorded by a partner and always kept in his custody, there being no debt or obligation, no mortgage or delivery, is not such an encumbrance as violates the policy.

DUDLEY & COFFIN, *for Appellant*.

McVEY & CHESHIRE and J. P. CONNER, *for Appellees*.

GIVEN, J.

1. The plaintiffs were the owners of a store building and a stock of merchandise therein. In September, 1890, P. A. Doughty, a soliciting agent for the defendant and for other insurance companies, having examined said property, met with H. C. Laub, a member of the plaintiff firm, for the purpose of arranging for insurance on said building and merchandise, and upon other property belonging to Mr. Laub. Mr. Doughty desired to take all the insurance that Mr. Laub wished to place, but, Laub having promised to take \$1,000 in a company not represented by Mr. Doughty, it was agreed that Doughty should take but \$5,000 on the building.

\* Decision rendered, Oct. 21, 1896.



Mr. Doughty prepared eight or ten applications for Mr. Laub to sign, working until late in the night. Among these applications was one to the defendant company for \$1,000 on said building, and \$1,000 on said merchandise. This application was upon a printed blank, which was partially filled up by Mr. Doughty before the same was signed by Mr. Laub on behalf of the plaintiffs, and partially afterwards. Doughty presented the application, and the premium paid thereon by Mr. Laub, to the defendant, at its main office, whereupon the defendant issued to the plaintiffs a policy in conformity with said application, which policy, with the application indorsed thereon, was sent to the plaintiffs, and retained by them. About the 20th of November, 1891, the property insured was totally destroyed by fire, and proofs of loss were duly made. Said application and policy were both made to read, "\$12,000 total concurrent insurance permitted." Prior to the loss, plaintiffs had taken out concurrent insurance upon said buildings and merchandise in excess of \$12,000. Plaintiffs allege that it was agreed between Mr. Laub and Mr. Doughty that the amount of concurrent insurance upon the building was unlimited, and that the amount of total concurrent insurance allowed to be taken on the personal property was limited to \$12,000, and that, contrary to the terms of said contract, defendant, by mistake, wrote said application and policy, limiting the amount of concurrent insurance to \$12,000 on both properties. Plaintiffs pray that said policy may be reformed to read, "'Twelve thousand dollars (\$12,000) total concurrent insurance on stock allowed,' and that plaintiff may have judgment against the defendant in the sum of two thousand dollars (\$2,000), with interest thereon from November 20, 1891."

2. Appellant's first contention is that, to entitle appellees to a reformation of this contract, they must establish their case beyond a reasonable doubt, citing authorities holding that in such cases "the proof of mistake should be so clear and convincing as to leave no room for doubt." We will not set out the evidence bearing upon the issue as to the alleged mistake. It is sufficient to say that by the testimony of Mr. Doughty and Mr. Laub, who alone were present at the making of the application, there can be no doubt whatever that it was agreed that \$12,000 concurrent insurance was permitted on the stock of merchandise, and that, by mistake in filling the application, Mr. Doughty omitted to add the words "on the merchandise." It is equally clear that both Mr. Doughty and Mr. Laub proceeded in the matter under the belief that the application was written in conformity with the agreement. Both acting upon this belief, the mistake was mutual on the part of Mr. Laub and the agent.

3. Appellant's next contention is that if plaintiffs, by the exercise of reasonable care, could have avoided this mistake, equity will not relieve by way of reformation; and it is claimed that the plaintiffs did not exercise reasonable care to avoid the mistake, in that Mr. Laub did not read said application at the time he signed it, and for that the plaintiffs held the policy, with the application copied thereon, without complaint, up to the time the loss occurred. Mr. Laub could have discovered this mistake by reading the application as it was at the time he signed it, and either of the plaintiff firm could have discovered it by reading the policy, or the application as copied thereon, after the policy was sent to them. It appears, however, that this they did not do, and did not discover the mistake until after the loss occurred. Counsel for appellant correctly say: "We are aware of the fact that it has been held in some cases that an applicant is not guilty of negligence in failing to read his application when it is written by the agent of the company. We are also aware of the fact that it has been held by this court that the failure of the assured to read his policy is not *prima facie* negligence." It is argued that, as Mr. Laub was a man of business ability, the omission to read either the application or the policy was negligence such as to defeat plaintiffs' right of reformation of the contract. We fail to see why, if the applicant is not negligent in failing to read his application, he should be deemed negligent in failing to read the policy, for surely the same reason applies to both. We think that the mere failure to read these documents was not such a want of reasonable care on the part of the plaintiffs as will defeat their right to reformation of the contract as to the alleged mistake, clearly established as it is. In this connection we may refer to *Donnelly vs. Insurance Co.*, 70 Iowa, 693, 28 N. W., 607; *Key vs. Insurance Co.*, 77 Iowa, 174, 41 N. W., 614; *Boetcher vs. Insurance Co.*, 47 Iowa, 253.

4. Appellant insists that, to entitle the plaintiffs to reformation, it must appear that the mistake was mutual. It may well be questioned, under the cases already cited, whether such is the rule in this state; but this we do not determine, as we think that this mistake is clearly shown to have been mutual. Both Mr. Doughty and Mr. Laub believed that the application was written as intended, and had either observed, on examination, the omission, it would, no doubt, have been corrected. We will see, further on, that the knowledge of Doughty was the knowledge of the defendant; and therefore we think it may be said that the mistake was mutual, as between the plaintiffs and defendant.

It is also contended that there was no contract entered into, and therefore nothing to reform. It is argued that, as Mr. Doughty had

no power to contract, the defendant is not bound by his agreements; that the application was a mere offer by the plaintiffs to take the insurance on the terms stated therein; that it did not become a contract until accepted; and that, in accepting it, the defendant did so upon the terms named therein, and is not bound by any other. It is true that Mr. Doughty had no authority to conclude the contract, that the application was in the nature of an offer, and that no contract existed until the offer was accepted by an officer or agent of the defendant having authority to make such contracts. The argument, however, ignores the repeated holding of this court that in such a case the company is bound by the knowledge of its agent as to existing facts, whether expressed in the application or not. See *Hagan vs. Insurance Co.*, 81 Iowa, 321, 46 N. W., 1114, and cases therein cited; also *Stone vs. Insurance Co.*, 68 Iowa, 738, 28 N. W., 47; *Key vs. Insurance Co.*, 77 Iowa, 175, 41 N. W., 614. Appellant quotes from *Ostrander on Insurance* (section 45) as follows: "The knowledge of the solicitor in regard to existing facts, whether expressed in the application or not, will create an estoppel, but agreements made by the solicitor in regard to future performance are nugatory." In taking the application, Mr. Doughty acted as agent for the company, and it was his duty to correctly state therein all existing facts known to him, material to the proposed contract. The offer of the plaintiffs as to concurrent insurance was an existing and material fact known to the agent, and therefore known to his principal. In writing the application Mr. Doughty acted by authority for his principal, and therefore his mistake was the mistake of his principal. Being bound by the knowledge of Doughty as to existing facts, the defendant must be held to have known that plaintiffs' offer to take the insurance on condition that \$12,000 total concurrent insurance on the merchandise would be permitted, and to have accepted the offer on that condition. This case is distinguishable from those wherein the agent assumed to agree to an unauthorized condition or use of the property, as in *Garretson vs. Insurance Co.*, 81 Iowa, 727, 45 N. W., 1047. A condition as to concurrent insurance is found in most, if not all, policies, and is not an unauthorized condition. In this view of the case, it is as though the transaction had been between the plaintiffs and an officer of the defendant authorized to make contracts. It is a contract with the defendant, and there was a mutual mistake in reducing it to writing, and the plaintiffs are entitled to have it reformed and enforced as it was actually made.

5. Plaintiffs took other insurance on the building, which appellant contends was in violation of the policy, and that, therefore, they are

not entitled to recover. Reforming the policy by inserting the words "on the merchandise" after the words "\$12,000 total concurrent insurance permitted," leaves it without limitation as to concurrent insurance on the building, and this is the only reformation asked. Appellant says the lower court rightfully refused to reform the policy so as to permit the additional insurance on the building, and complain that the court, notwithstanding the additional insurance on the building, held the policy enforceable. The court is not asked to reform the policy as to concurrent insurance on the building, and, taking the policy as we find it should be reformed, the additional insurance on the building is no violation of its conditions.

It is also insisted that plaintiff's remedy is adequate at law, and it is said the reports of this court are full of cases where waiver and estoppels have been plead, proved, and sustained in law actions. This case presents more than a mere waiver or estoppel. It presents a case of mutual mistake in the writing of a contract, and courts of equity uniformly exercise their powers to correct such mistakes upon proper proofs.

6. This application stated that there was no incumbrance upon the property, and the policy provides that if any incumbrances existed the policy should be void. It appears that in March, 1888, plaintiffs, Fitchner and Laub, and their wives joined in the execution of an instrument in the form of a mortgage written by Mr. Laub, payable to Eliza Ann Hughes, on the lot and building covered by the policy. Mr. Laub filed this instrument for record, and, when recorded, received it back, and has ever since retained it. It is not entirely clear why this instrument was executed and recorded, but it appears beyond question that there was no indebtedness from the plaintiffs, or either of them, or their firm, to Eliza Ann Hughes, or any person for her, and that said instrument was never delivered to Eliza Ann Hughes, but has been continuously in the possession of the plaintiff Laub, except while in the hands of the recorder. The instrument seems to have been prepared by Mr. Laub, and executed, at his instance, to a fictitious person, for the purpose of in some way securing him against any misconduct on the part of his partner, Mr. Fitchner. There being no debt to secure, no mortgagee, and no delivery, we think the instrument is not such an incumbrance upon the property as violates the policy. Our conclusion is that the decree and judgment of the district court should be affirmed.

## SUPREME COURT OF IOWA.

CORKERY

vs.

SECURITY FIRE INS. CO.\*

1. Where an insurance company defended an action on the ground that when the policy was issued there was, contrary to its provisions, a chattel mortgage on the property insured, evidence that plaintiff told defendant's agent to make the policy payable to the mortgagee as his claim might appear, as in a former policy, of which the one in suit was a renewal, was admissible to show that the agent had actual knowledge of the mortgage when he delivered the policy.
2. Evidence that the plaintiff told defendant's agent to go to the office of another company, in which plaintiff's goods were insured, and make the policy correspond with the one there recorded, and that said agent examined the record of the existing policy, which recited: "Mortgage Clause. Loss, if any, payable to M.," renders the entry competent on the issue as to the agent's knowledge that the property insured was mortgaged to M., though such entry referred to a former mortgage which had been satisfied.
3. In an action on a policy of insurance, defendant's denial of an allegation that the fire was without fault or negligence on plaintiff's part does not raise an issue as to the cause of the fire, so as to admit of testimony concerning the amount of plaintiff's indebtedness at the time of the loss, for the purpose of proving that the fire was purposely set.
4. A policy on "carriages, \* \* \* and all such goods usually kept in a livery barn and sale stable," does not include goods held in trust or on commission.
5. Where a policy insuring "carriages, \* \* \* and all such goods usually kept in a livery barn and sale stable," prohibits other insurance without permission therefor indorsed on the policy, but permits "\$3,000 additional concurrent insurance," the fact that the insured procures policies in other companies to the authorized amount, which cover, not only the goods insured in the first company, but also "goods held in trust or on commission," does not render the subsequent policies nonconcurrent.
6. Where plaintiff claimed that he notified the agent who issued the policy that there was a mortgage on the property insured, and requested him to provide for it in the policy, but that the agent failed to do so, an instruction that the jury "should consider the fact that plaintiff retained said policy without having an indorsement thereon as to said mortgage, in determining whether he notified" the agent of its existence, was properly refused.
7. Where an insurance company refuses to pay on the basis of the amount of loss stated by the insured in his proofs, the latter is not concluded by such statement, but may recover on the basis of the actual value of the property destroyed.

Action to recover upon a policy of insurance of certain personal property, in a certain building, against loss or damage by fire. Plaintiff alleges the issuance of the policy by the defendant to him; the loss of the property by fire, without fault or negligence on his part; the value of the property destroyed; that proofs of the loss,

\* Decision rendered, Oct. 20, 1896. From *Northwestern Reporter*.

and request for arbitration, were made as required in said policy; and that defendant refuses to pay said loss. Plaintiff asks judgment for \$1,000, with interest. Defendant answered admitting the execution of the policy; that the building was burned; that plaintiff made a pretended account of the loss, and a request for arbitration; and that defendant has refused to pay any sum whatever on account of said loss. Defendant denies that the fire occurred without fault or negligence on the part of the plaintiff, denies that the property was of the value alleged, and denies that the plaintiff has sustained damages to the amount claimed. The defendant alleges, as a complete defense, that said policy provides that if at the date thereof a mortgage or other lien existed, or be thereafter executed, upon the property covered by said policy, it should become void and of no effect; that plaintiff obtained said policy through one Rudolph Koehler, defendant's agent at Le Mars, Iowa; that prior thereto, to wit, about the 15th day of June, 1893, plaintiff executed and delivered to one Moreton a chattel mortgage upon the property covered in whole or in part by said policy, which mortgage continued to exist, in full force and unsatisfied, at the date of said fire, and for a long time thereafter; that the execution, delivery, and existence of said mortgage were unknown to defendant and its said agent at the date of said fire, and for some time thereafter. The defendant alleges, as further complete defenses, that by the terms of said policy it is stipulated that it should be void and of no effect if, without permission therefor in writing thereon, the assured should then have, or thereafter make or procure, any other contracts of insurance, whether valid or not, on property covered in whole or in part by said policy; that the only stipulation with reference to other insurance, in writing, upon said property was written in said policy, to wit, "\$3,000 additional concurrent insurance permitted." Defendant alleges in separate paragraphs, and each as a separate defense, that plaintiff took out four other policies of insurance, covering the property insured in this policy, and other property held in trust or on commission, which policies continued in force at the time of said fire, and that the same were not concurrent with this policy, wherefore, defendant alleges that this policy is rendered void and of no effect. Plaintiff, in reply, admits that this policy was obtained through Rudolph Koehler, defendant's local agent; admits the execution of said mortgage, and that the same was unsatisfied at the date of said fire; but alleges that, before and at the date of the execution of said policy, Koehler and the defendant knew that said notes and mortgage had been executed and were unpaid, and, while in possession of such knowledge, caused said policy of insurance to be executed

to plaintiff; that neither before nor at the date of the execution of said policy did defendant or its said agent make inquiry of plaintiff with respect to said mortgage, or any other mortgage, nor did plaintiff make any false statement with respect to said mortgage, or conceal from the defendant the existence of the same; that plaintiff did not make verbal or written application to the defendant for said policy, nor make any representation to it whatever, and that said mortgage was duly filed for record on the 16th day of June, 1893, wherefore plaintiff contends that defendant is estopped from alleging said mortgage as a defense. The case was tried to a jury, and a verdict and judgment rendered in favor of the plaintiff for \$1,000. Defendant appeals.

J. H. STRUBLE, *for Appellant.*

ARGO, McDUFFIE & REICHMANN and I. T. MARTIN, *for Appellee.*

GIVEN, J.

1. Following the order of the trial, we first inquire as to errors assigned and argued upon the admission and rejection of evidence. Plaintiff, having testified that the policy in suit was executed in renewal of a former policy, was permitted to state, over defendant's objection, that he told Mr. Koehler to make this policy payable to Mr. Moreton, mortgagee, as his claim might appear in case of loss; that he told him to renew the policy, and to put the Moreton mortgage in the same as it was before. Appellant seems to understand the evidence objected to as relating to the former policy, and to a former mortgage to Mr. Moreton that had been satisfied. We think it relates to the policy in suit, and the mortgage referred to in the answer, and was admissible to show that Mr. Koehler had actual as well as record knowledge of that mortgage when he delivered this policy. One of the policies referred to in the answer was issued by the Oakland Home Ins. Co. through one Dun, its local agent. Mr. Kilburg, an employe in Mr. Dun's office, testified that he wrote said policy, and made the entries thereof in Mr. Dun's record of policies, which record he produced and identified. He also testified that plaintiff told him that Mr. Koehler would come and get a copy of said record of that policy; that some time in the summer of 1892 Mr. Koehler did come, and he showed him said entry in the book. Said entry shows, among other things: "Mortgage Clause. Loss, if any, payable to H. J. Moreton." Defendant objected to this entry as incompetent, which objection was overruled. The entry having been read by Mr. Koehler, it was competent because of what it contained as tending to prove knowledge on his part of the existence of

the Moreton mortgage. It is argued that as this entry was of a policy issued April 13, 1892, and the mortgage in question was not executed until June 15, 1893, the entry must refer to the former mortgage that had been satisfied. This may be conceded, but the entry was competent because of plaintiff's evidence that he had told Mr. Koehler to go to Dun's office and make this policy correspond with theirs; to make it payable to Moreton as his claim might appear. Defendant sought to show upon examination of the plaintiff, and by the record of certain mortgages, the amount of plaintiff's indebtedness at the time of the fire, for the purpose of showing "that the fire wasn't in good faith; that it wasn't an accidental fire." There was no issue as to the cause of the fire. Defendant's denial that it was without fault or negligence on plaintiff's part does not imply that plaintiff purposely caused the fire. There is no such issue, and the evidence was properly excluded. We discover no error in the rulings on taking the evidence.

2. Plaintiff rested without introducing any evidence in support of his plea of estoppel set up in his reply as to said mortgage. Defendant moved for a verdict because of the absence of such testimony. After argument and recess, and after the court had announced that the burden was upon the plaintiff to show the circumstances relied upon as an estoppel, plaintiff's counsel asked leave "to introduce some other testimony relating to the matter," to which defendant objected, and the objection was overruled. Defendant contends that there was no showing that the further testimony was "to correct an evident oversight or mistake," and that it is only in such cases that the court has, under section 4006, McClain's Code, discretion to allow further testimony. That the omission to introduce this testimony was an oversight is evident from the record. Much time and care had been taken in introducing plaintiff's evidence that preceded, and, although it was not said in words that the omission was an oversight, it was evidently so; and the court acted within the discretion given it, in permitting plaintiff to introduce further testimony.

3. The policy in suit is upon the following of plaintiff's property: "Upon his carriages, buggies, wagons, sleighs and parts thereof, harness, saddles, bridles, blankets, robes, whips, and all such goods usually kept in a livery barn and sale stable, all while contained in the two-story frame, shingle-roof livery barn, situated on lots nine (9) and ten (10), block thirteen (13), Le Mars, Iowa." Said policy contains the following: "This policy shall be void and of no effect if, without permission therefor in writing hereon, the assured shall now have, or hereafter make or procure, any other contract of insurance,



whether valid or not, on property covered in whole or in part by this policy." "Contribution. This company shall not be liable for a greater proportion of any loss than that which the amount hereby insured shall bear to the whole sum for which the assured shall have policies or contracts of insurance on said property, whether the same be specific or by general or floating policies, or subject to clauses of average or coinsurance, or whether such policies or contracts be valid or not, or by solvent or insolvent insurers." "\$3,000 additional concurrent insurance permitted." It is shown by stipulation that plaintiff had and procured other policies of insurance against loss by fire, as follows: In the Liverpool & London & Globe, August 22, 1893, to August 22, 1894, "\$1,000 on his busses, carriages, buggies, wagons, sleighs, cutters, harness, saddles, bridles, blankets, robes, whips, and all parts of said goods usually in a livery and sale stable, carriage fixtures and trimmings, also goods held in trust or on commission, tools and appliances used with barn, all while contained in the two-story frame, shingle-roofed barn, and its additions thereto, situated on lot No. 9, and a portion of the right of way of the Illinois Central R. R., in block 13, Le Mars, Plymouth County, Iowa;" also upon the same property, in the London Ins. Corporation of England, for \$500, April 26, 1893, to April 26, 1894, and in the Royal Ins. Co., of England, for \$1,000, April 22, 1893, to April 22, 1894; also a policy in the Oakland Home Ins. Co., for \$500, April 13, 1893, to April 13, 1894, "on his busses, carriages, buggies, wagons, sleighs, cutters, harness, saddles, bridles, blankets, robes, whips, and all parts of said goods usually kept in livery and sale stables, carriage fixtures, and trimmings; also goods held in trust or on commission, tools and appliances used in a livery stable—all while contained in the two-story frame, shingle-roofed barn, and its additions thereto, situated on lot 9 in block 13, and on right of way of Illinois Central R. R., Le Mars, Iowa." The court instructed the jury that, "under the evidence in this case, each policy covers identical property, and hence are all concurrent." Defendant complains of this instruction, and that the court did not submit its defenses based upon said other insurance to the jury. It is contended that these policies are not concurrent, for that they cover property not included in the one in suit, namely, "busses and goods held in trust or on commission." The policy in suit is upon "his [plaintiff's] carriages, \* \* \* and all such goods usually kept in a livery barn and sale stable." This we think includes plaintiff's busses kept in the building described, but does not include "goods held in trust or on commission." Plaintiff testifies that at and before the fire he was taking care of other people's horses and vehicles in his barn, but surely this property

was not held in trust or on commission within the meaning of these policies. Neither party understood the plaintiff as holding insurance on such property. Plaintiff, on being inquired of as to the value of the property claimed to have been destroyed, and whether the same was new when purchased, stated, "Why, I was agent for some companies in selling new goods." He was asked as to certain articles, "You were dealing in those articles, many of them on account, were you?" to which he answered, "I had account goods." This answer was in connection with inquiries as to whether he purchased for cash or on credit, and relates to purchases, and not to goods on commission. There is no evidence that any such goods were lost, or included in the claim of the plaintiff. Defendant claims that these policies are nonconcurrent, because they do not specify the amount of insurance, separately, on the goods held in trust or on commission. It is conceded that, if they specified the sum thereof applicable to the property covered by the policy in suit, they would be concurrent; but it is insisted that, as they are, an adjustment cannot be readily made. The provision as to contribution provides for such adjustment, and the fact that it may not be so easily made as if the policies each covered only the same property is no reason for holding them to be nonconcurrent. We have seen that plaintiff is not claiming for such goods, but the question remains whether the fact that these subsequent policies cover additional property, namely, goods held in trust or on commission, "renders them nonconcurrent, and a violation of the policy in suit." "Concurrent" is defined by Webster as "acting in conjunction, agreeing in the same act, contributing to the same event or effect, co-operating, accompanying, conjoined, associate, concomitant, joint and equal, existing together and operating on the same objects." Taking the provisions of this policy quoted above together, and it seems clear that it was not intended that the additional insurance authorized should not include other property. The provision as to contribution precludes such a conclusion. The term "concurrent," as used in this policy, was used in the sense of contributing to the same event or effect, but not jointly and equally. Defendant cites *Ogden vs. Insurance Co.*, 50 N. Y., 388. In that case "other insurance was permitted," not other concurrent insurance, as in this. It was held that other policies covering the same property as that covered by the defendant's policy and other property were "other insurance." That policy contained a provision that "in case of loss the insured shall not recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property." The rule of contribution

announced is "that for the purpose of apportioning the loss in case of overinsurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first-mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total of all the parcels." The loss in that case being total, and the aggregate amount of the insurance not being greater than the value of the property destroyed, it was held that the plaintiff was entitled to recover the full amount of the policy sued upon. In this case the loss is total, and we think the value of the property destroyed is equal to, if not greater than, the aggregate amount of all the policies. The other insurance in this case was such as was expressly permitted, namely, concurrent, and, therefore, there was no error in so instructing the jury.

4. Defendant, maintaining that it is established that plaintiff had the policy in suit in his possession from and after its delivery, without any indorsement in writing waiving the clause as to mortgages, asked an instruction, which was refused, to the following effect: That it was the duty of the plaintiff to have examined said policy, and that he is presumed to have examined it; that no fraud, mistake, or omission on the part of defendant in the issuance and delivery of said policy being pleaded, the jury should consider the fact that plaintiff retained said policy without having an indorsement thereon as to said mortgage, in determining whether he notified defendant's agent of the existence of said mortgage, or requested him to write anything in said policy with reference thereto prior to the fire. There was no error in refusing this instruction, nor the similar instruction asked by defendant numbered 5. The principal dispute as to said mortgage was whether defendant's agent had omitted to provide therefor in the policy. Plaintiff's claim is that, though notified of the mortgage, and requested to provide for it in the policy, he omitted to do so. This alleged mistake and omission was in issue, and the jury was sufficiently instructed as to the facts.

5. Defendant's further contention is that the verdict is not sustained by the evidence, and that it is excessive. We think that under the evidence and instructions the jury was warranted in finding for the plaintiff. The verdict is for \$1,000. The value of the property was the subject of extended inquiry, and that issue was submitted to the jury under proper instructions. Defendant contends that plaintiff is concluded by the statement of the amount of his loss as made in his proofs of loss, namely, \$3,683.08, and that the verdict, being for more than defendant's share of that amount, is excessive.

As defendant refused to pay upon the basis of that amount, the plaintiff is not concluded thereby, but may recover in this action upon the basis of the actual value of the property destroyed.

The foregoing disposes of all the questions urged in argument, and, as we find no errors prejudicial to the appellant, the judgment of the district court is affirmed.

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## SUPREME COURT OF GEORGIA.

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WESTERN ASSUR. CO. )

vs. )

WILLIAMS.\* )

1. The original declaration contained enough to amend by, and there was no error in allowing the amendment.
2. The consent of a fire-insurance company, given, whether in writing or in parol, by its duly-authorized agent, and acted upon by the insured, that the goods insured might be removed into another building without vitiating the policy, is, if sufficiently proved, binding upon the company, notwithstanding stipulations in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The evidence that the agent was duly authorized would, however, have to be such as to show that he had express authority in the given instance to represent the company in giving its consent otherwise than in the manner provided for in the policy, or that an implied authority so to do might rightly be inferred from some previous course of dealing in like cases by the agent with the company's knowledge and assent, manifest by ratification or otherwise.

W. K. MILLEY, *for Plaintiff in Error.*

C. H. COHEN, *for Defendant in Error.*

SIMMONS, J.

1. Williams held a policy of insurance from the defendant upon certain household and kitchen furniture and other personal goods situated in his dwelling house, No. 313 Fifth Street, in the city of Augusta. On August 20, 1892, he called on an agent of the defendant and informed him that he was temporarily abandoning house-

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\* Decision rendered, July 16, 1894. Syllabus by the Court.

keeping, and desired to move his furniture, etc., covered by this insurance, to a certain storehouse in Augusta. The agent told him he could move the furniture as desired; that he would so enter it on the books of the company, and he (Williams) could consider the transfer as made, and bring his policy to him at some future time and he would make the entry thereon. On August 27th thereafter the property was entirely destroyed by fire. On the next day after the fire he called upon the agent and asked for the insurance papers to prove his loss, and was informed by the agent that the defendant denied all liability under the policy. He thereupon brought his action against the company for \$1,000, the amount of the insurance. His declaration was demurred to on various grounds, which are set out in the official report, and he amended the declaration by alleging that the agent granted him written permission to move the goods to the storehouse in which they were situated when burned; that, in performance of and in pursuance of said contract with the agent, he removed the goods; that before attempting to remove them he received the consent of defendant, through its duly-authorized agent, to the removal; and that in performance and pursuance of the parol contract as aforesaid, and relying solely upon the consent of defendant and on the contract of defendant, he removed them. The demurrer was renewed and overruled, and the defendant excepted. There was no error in allowing the amendment. The original declaration contained sufficient allegations to authorize the amendment. It did not add a new cause of action, nor change the common-law action for damages into an equitable proceeding. The effect of the amendment was simply to allege that the contract for the removal of the goods was in writing, and that the agent was duly authorized to make it.

2. The policy stated that the insurance was upon the property described "while located and contained as described herein, and not elsewhere." It was contended on the part of the defendant that the agent had no authority to consent to the removal of the property unless such consent was indorsed upon the policy, it being stipulated in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the

insured unless so written or attached." Although this clause of the policy excludes any inference that powers of the agent extend to the waiver of conditions contained in the policy, except in the mode prescribed therein, yet it may be shown that such authority was in fact granted, and the waiver, whether in writing or parol, when given by a duly-authorized agent, and acted upon by the insured, is, if sufficiently proved, binding upon the company, notwithstanding the stipulations above quoted. This clause puts the insured upon notice that the agent has no authority to waive a condition of the policy except in writing attached to the policy, and the insured would therefore have no right to rely upon any waiver not made in that manner, unless it could be shown that the company did in fact authorize the agent to make the waiver otherwise. To establish such authority on the part of the agent, the insured would have to show that it was expressly granted by the company in the given instance, or would have to show some previous course of dealing in similar cases by the agent with the company's consent, manifested by ratification or otherwise. The declaration in this case, as we have seen, alleges that the consent of the company to the removal of the furniture was given through its "duly-authorized" agent. The declaration, it is true, does not explain how this authority was given, but we think the allegation of authority is sufficient. Taking all the allegations of the declaration together, we think the court did not err in overruling the demurrer. On this subject see *Richards, Ins.*, pp. 81, 92, 95, 194; *Biddle, Ins.*, p. 1081; *May, Ins.*, § 137. The ruling in *Car-rugi vs. Insurance Co.* (40 Ga., 135), that a consent by the agent, which the policy required should be in writing, could be shown by parol, was based upon the assumption that the agent had authority to make the consent. There was no stipulation in that case limiting the authority of the agent, as this policy does. The stipulation which the court had under consideration related simply to the manner in which the consent should be evidenced, and did not say that agents should have no power to give such consent otherwise than in the manner provided by the policy. Judgment affirmed.

## SUPREME COURT OF GEORGIA.

HOME FRIENDLY SOCIETY

vs.

BERRY.\*

1. Where one residing in Atlanta, Ga., who was already a member of a beneficial society, having its headquarters and principal office in Baltimore, Md., and who was the holder of a certificate of membership which embodied and embraced a policy of insurance by the society upon his life, made at different times two written applications for membership in the same society, and in each of them made several material representations, among them that he was not a member of that society, and thus obtained on each application a separate certificate of membership and policy of insurance upon his life, which declared upon its face that, if the representations upon which the certificate was granted were not true, the certificate should be void, both these certificates should, after the death of the member, be treated as void, and of no effect, unless the company had notice at some time before receiving the last dues upon some one of the three certificates that the same identical person was a member when he applied for and procured one or both of the additional certificates, and the cumulative insurance which they provided for.
2. Notice to the society's local agents at Atlanta, who received the applications and collected the dues on all three of the certificates of membership, but who, so far as appears, had no power to represent the company in making contracts or in waiving conditions expressed therein, the applications having, separately and at different times, been forwarded to Baltimore for acceptance, and the certificates of membership having there, separately and at different times, been issued by the society's general officers, would not be notice to the society of the falsehood of the representation as to nonmembership contained in the applications, unless it appeared that no such representation was actually made to the agent who received and filled out the applications, but that he inserted the false statement without authority from the applicant, and without his knowledge.
3. Where two writings are in evidence, their construction being for the court, it is no invasion of the province of the jury for the presiding judge to announce that the writings are or are not necessarily inconsistent in substance and meaning as to a particular element, such as the representations they respectively make touching a person's age.

Laura Berry sued the Home Friendly Society for \$510, besides interest, and 25 per cent upon the principal, and \$100 for her attorney's fees in bringing the suit, upon three certificates of membership in the society, issued to Stephen Berry, her husband, she being the beneficiary named in each. The first of these certificates was for \$148, dated May 27, 1889, and numbered 16,029; the second, for \$270, dated October 21, 1889, and numbered 24,993; the third, for \$92, dated December 15, 1890, and numbered 55,280. Copies of these certificates were attached to the declaration. In each of them

\* Decision rendered, June 30, 1894. Syllabus by the Court.

it is stated that one-fourth of the amount of the insurance was payable within the first six calendar months the certificate was in force; one-half after six calendar months, and the full amount after one year. Also, that the certificates were issued in consideration of the representations and agreement in the application therefor, which application was made part of the policy. Also, that if any of the statements made in the application upon which the certificate was issued should be found untrue, then the certificate should be null and void, and all money paid and all rights and benefits which may have accrued to the member should be forfeited. Further, that if the representations upon which the certificate was granted were not true, or if the conditions of the certificate were not in all respects observed, the certificate should thereupon become void. Further, that the policy was incontestable, after two years from date, for any cause. The second of the certificates contained the provision that only one-half of the stipulated sum would be paid for sickness or death caused by consumption or rheumatism for one year from the date of the certificate, and the third contained a similar provision, except that eighteen months was substituted for one year. The third also contained the provision that the certificate should be void if the member should, without written permission of the president or secretary, engage in certain occupations, "or while there is in force upon the life of the insured a certificate previously issued by this society, unless the certificate first issued contains an indorsement, signed by the president or secretary, authorizing this certificate to be in force at the same time." The first and second certificates did not show such indorsement. The third also contained the provision that, in case of mistreatment or mistake in age, the society could only be held liable for the amount on its tables at the proper age, and the beneficiaries must prove the proper age satisfactorily. The defendant pleaded that in the application for the policies plaintiff's husband represented and warranted that he had no other insurance in said company, or any other company, when in truth he did hold policies in other companies, having two policies in the defendant company at the time of the issuance of the last policy and one at the time of the issuance of the second policy; that in said application he falsely represented his age, in one claiming to have been born in 1848, in the other in 1851, and in the other in 1852, when in truth he was born in 1846; that he represented himself as being in good health at the date of the application, and having no disease which affected his health, denying he had or suffered from any of the diseases mentioned in the application, when in truth at the date of each of the applications he was suffering from



many diseases, and especially was afflicted with consumption, and had been so afflicted for a long time, and afterwards died from its effects; and made many other false and fraudulent representations in the application, which, under the terms of the application and policies, if any of said statements, representations, and warranties were untrue, rendered the policies void. Defendant had no notice that any of them were false, and not until he died did it know he was holding all of said policies, but up to that time believed each of the policies was held by separate and distinct persons; and, if it had known the same person held all of them, it would have cancelled them, and this fact was concealed in order to defraud it, which made the policies all void. Further, that the last policy, by its terms, did not bind defendant to pay more than one-half of the amount for which it was issued, for the policyholder died in one year from the date of its issue. It appeared from the evidence that Stephen Berry died November 14, 1891. The evidence was conflicting as to his age. He was a negro, and seemed to have been formerly a slave. He died with consumption. It did not appear how long he had had it. His wife testified that he was just sick a little while; just took his bed two weeks before he died. The physician who attended him in his last illness testified, among other things, that during two years he attended him for different troubles, two or three attacks of biliousness, and one or two of bronchitis, and he was relieved and got all right again, and worked until about a month before the last illness; that witness never examined his lungs until his last illness, and then discovered they were gone; that witness thinks his left lung was almost entirely gone; that he meant, by putting down in his report that Berry had consumption for two years, that that was a conclusion he came to; that he could not say how long Berry had consumption; he might probably have suffered with it all his life, or but for a short time. Another witness testified that Berry was sick some two or three years before his death, but kept on working; that Berry said he was taking medicine; that he did not remain big and fat and stout, but began to get lean; that he seemed to have good health before he took sick, but never was a large man, was always sorter thin, but from the disease he was not stout like he was,—kinder grew weak, witness supposed. A physician who examined Berry for insurance testified that Berry was in perfect health, to the best of his (witness') knowledge and belief, and had no organic trouble that witness could discover; that witness made the examination at the instance of defendant, and defendant paid him for it; that his examination was in September, 1889; that there was no absolute rule as to the length of time consumption

might continue before death, though ordinarily it was a disease of slow progress, but sometimes lasted but a few months. The applications for membership were put in evidence. The first, dated May 10, 1889, stated the age at 37 years; the second, dated October 12, 1889, at 38 years; the third, dated December 15, 1890, age next birthday, 42 years. The applications stated that the applicant was never very sick, and was not, at the time of the application, a member of defendant or any other beneficial society. Also, that if the applicant failed to conform to any of the rules of the society, or had concealed anything relating to his health, or should make any misrepresentations as to the questions preceding (one of which was as to his age), he bound himself, his heirs and assigns, to surrender all claims to moneys previously paid, and forfeit all benefits absolutely to the society. Also, the declaration of the applicant, that he was in first-class health, and free from all diseases, at the date of the application. There was a verdict for plaintiff for \$464 principal, \$36.08 interest, \$116 damages, and \$100 attorney's fees. Defendant moved for a new trial, which motion was overruled, and it excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and the following: Error in the following charges: "There is no necessary disparity in the statement of Stephen Berry's first and second application. There is a disparity of several years between the age stated in the second and third applications." "Stephen Berry represented in those three applications that he had no other insurance or life membership in defendant's company. If this was a material misrepresentation, in the sense I have charged, it would avoid the second and third policy, unless the plaintiff shows such conduct on the part of the company that will waive this representation." "If the defendant knew the identity of Stephen Berry in each of the three policies, and continued to accept premiums from him after such knowledge was had, they should be held to have waived insistence on the truth of the representation as to other insurance with them. Indeed, it would be a fraud upon the assured in the company, after the knowledge that he was, in point of fact, the same Berry insured with them three times, to go on collecting premiums from him from week to week and year to year, and then set up that the policies were void on that ground. And in determining whether the company knew it or not you are at liberty to consider any knowledge which the evidence discloses the defendant's agents in Georgia had on that subject, provided the knowledge of such agents was acquired in the course of the defendant's business in reference to such applications and policies, and within the scope of their employment; and you

may look also to the recitals contained on the face of the applications themselves. If, however, the company did not know that the Stephen Berry of the three policies was the same Stephen, and in good faith went on collecting premiums on all three of them, believing the assured was a different individual in each; and you further believe from the evidence that the representation that there was no other insurance with them, changed the nature, character or extent of the risk,—the company would not be bound by the last two policies, and you would disallow plaintiff's claim *pro tanto*."

DORSEY, BREWSTER & HOWELL, *for Plaintiff in Error*.

WESTMORELAND & AUSTIN, *for Defendant in Error*.

PER CURIAM. Judgment reversed.

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## SUPREME COURT OF MICHIGAN.

WARNER

vs.

NATIONAL LIFE ASSOCIATION, OF HARTFORD.\*

Policy provisions do not avoid statutory requirements. A contract made within a state is the contract of that state, and notices sent to policyholders under such contracts must comply with the laws of such state. Such statutory provisions form a part of the contract of insurance and cannot be waived by the parties. A notice not in conformity with the statute is insufficient and does not bind the policyholder, who may pay a belated premium at any time within the life of the statutory notice.

Action by Willard E. Warner against the National Life Association, of Hartford, to recover on a policy. There was judgment for plaintiff, and defendant brings error. Affirmed.

JOHN H. BISSELL (Wm. A. Sutherland, of counsel), *for Appellant*.

C. E. WARNER, *for Appellee*.

McGRATH, C. J.

The defendant is what is termed an "assessment company." John C. Warner held a certificate or policy upon his own life, which recited that it was issued in consideration of an advance payment, and of the further payment "at the home office at Hartford, Conn., on the first week day of the months of February, April, June, August, October, and December of each year, of a premium for such an

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\* Decision rendered April 17, 1894.

amount as the association may deem requisite for the prompt payment of all losses in the department in which this policy is issued, and for the proper maintenance of the contracts in said department, including an amount for expenses as hereinafter provided." The policy further provided: "It is understood and agreed that a failure to make any payment specified in said policy on or before the day due (except as hereinafter specified) shall work a forfeiture of this policy, and all moneys paid on the same shall be forfeited to the association, for the benefit of the persisting members." And further: "Notice that a premium is payable to the association at Hartford, Connecticut, on the first week day of each of said months of each and every year, is given in the policy, and accepted, and any further or other notice is expressly waived. And, in the event that the holder of this policy does not receive a notice of the amount of premium which will be due on the days specified herein, an amount equal to the last premium paid shall be paid to the association on or before the day due, as a condition precedent to the continuance of the policy in force." John C. Warner died February 13, 1893. At the time of his death he had carried the policy for 12 years. On November 10, 1892, a notice was sent to, and received by, the insured, containing the following: "Bimonthly premium of your policy (No. 2,721), of \$7.76, will be due and payable at this office on or before the first day of Dec., 1892." On December 1, 1892, the insured mailed a draft for the amount named in the notice, to the company, but it did not reach the company until the morning of December 2, 1892. On that date the company wrote to the insured, informing him that his remittance had not been received in time; inclosing him a blank health certificate, and stating that he would be obliged to sign and return the good-health certificate before he could be reinstated. On December 3, 1892, the insured wrote to the company, stating that he was unable to say that he was then in sound health, and alleging that, in sending the draft, he supposed that he was sending it November 30. The company replied insisting upon the certificate, and returned the draft.

The contract of insurance was made in the state of New York, and is governed by the laws of that state. The statutes of New York provided that: "Each notice of assessment, premium or periodical call made by any such corporation, association or society, upon its members or any of them, shall truly state the cause and purpose of the same, and if the amount paid on the last death claim paid has not been paid in full at its maximum face value, the name of the deceased member, and the maximum face value of the certificate or policy, and the reason why not paid in full:" Laws 1892, c.

690, § 210. The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in a regular life company fixes both time of payment of premium and amount thereof. Yet the same statute provides that no life-insurance company can declare forfeited or lapsed any policy by reason of the nonpayment of any premium without notice, and prescribes what such notice must contain. It further provides that, in case payment is made within the life of the notice, it shall be taken to be in full compliance with the requirements of the policy, anything therein contained to the contrary notwithstanding. These statutory provisions form a part of the contract of insurance, and cannot be waived by the parties. In their absence the parties are bound by the stipulations in the contract. Fixed premiums, payable bimonthly or otherwise, are incidents of regular life policies. Assessments are essential incidents of co-operative associations organized under this statute, and notice through some medium is requisite. The statute relating to assessment companies does not undertake to fix the time of the notice, but it does fix and determine what the notice must contain. The statute contemplates that through these notices the policyholders shall be advised of the cause and purpose of the assessments; and the statute cannot be avoided by a condition attached to the policy, that, in case no notice is given, the assured shall be required to forward to the association an amount equal to the previous assessment. In the present case the association did not give notice of the assessment, which was a sum greater in amount than the previous assessment; and, not having given such notice in the manner prescribed by the statute, it cannot be allowed to declare a forfeiture of the policy by reason of its nonpayment. In *Miner vs. Association* (63 Mich., 338, 29 N. W., 852), where the by-laws required the notice to include a list of all deaths subsequent to the last assessment, and to specify the amount due from the member to the benefit fund, it was held that a notice omitting such information was insufficient, and its service raised no liability on the part of the member served to pay the assessment demanded. The statute in question here entitled the policyholder to be informed of the cause and purpose of the assessment before any liability to pay the sum named arose.

It is urged that plaintiff failed, in his declaration, to allege,—and, upon the trial, to prove,—facts from which the jury could determine the amount, if any, due upon the policy. The policy provides that, within a specified time after proof of loss, there shall be due and payable, solely from the funds accumulated from the payments of its insured in this department, “the sum of two thousand dollars.”

It further provides that: "Twenty-five per cent of the net receipts from all premiums paid under this policy during fifteen years from its date, together with all amounts deducted where losses occur within five years from the date of the policy, shall be set aside as a reserve fund, the same to be invested and accumulated for the exclusive benefit of the policyholders. Any portion of said fund may, however, be applied at any time to the payment of death claims that may accrue in excess of the actuary's table of mortality, or whenever the net premiums received from any bimonthly payment, which shall have been made according to the contract, shall be insufficient to pay any and all death claims then due. \* \* \* It is also agreed that, if the whole of said funds received from the policyholders of this department should ever be insufficient to pay all such accrued policy contracts, then the same shall be divided pro rata among the holders of such matured policy contracts, and paid to the proper claimants therefor; and such payments shall be in full satisfaction of each of said claims, and fully discharge this association from every liability on account of the same, and the contract upon which they are based." The statute provides that upon the death of the policyholder "the corporation shall be obligated to the beneficiary for such payment at the time and to the maximum amount specified in the policy or certificate." Laws N. Y., 1892, c. 690, § 210. The agreement is not to pay the proceeds of a single assessment, or to pay a specific sum, provided a single assessment shall produce such sum. It is true that the amount is payable from the mortuary fund in that department, but the policy holds out that there is a reserve fund which may be drawn upon whenever the net premiums received from an assessment shall be insufficient. The policy contemplates a pro rata distribution, not in the ordinary course, but only upon the happening of a contingency, and provides against such contingency, if it should ever happen. Plaintiff is not required to prove that a contingency has not happened, which the policy itself regards as remote.

The judgment is affirmed. The other justices concurred.

## SUPREME COURT OF MISSISSIPPI.

LIVERPOOL & LONDON & GLOBE INS. CO. }  
*vs.*  
 SHEFFY.\* }

An insurance company is an artificial creature acting through human agencies, and that which a general agent does, the company itself may be said to have done. Oral assent to additional insurance by a general agent is equivalent to written assent.

A new inventory made simultaneously with the insurance and a new set of books transcribing the accounts from the old and duly kept thereafter; these kept in an iron safe, and produced after the fire, are compliance with the iron-safe clause notwithstanding the old books were outside the safe and were burned.

MOORE & JONES, *for Appellant.*

NUGENT & McWILLIE and CHAS. & A. Y. SCOTT, *for Appellee.*

WOODS, J.

Two questions are presented by this appeal, viz.: First, did the insured forfeit his right to a recovery on the policy sued on by reason of his procurement of subsequent and additional insurance without having the consent of the appellant indorsed in writing on its prior policy? And, second, has the insured forfeited his right to recovery on the policy issued by appellant by a violation of what is known as the "iron-safe clause," contained in the contract of insurance? We shall not enter upon any discussion of the disputed facts. The jury has found these issues for the appellee, and we are satisfied with that finding. The fact that the subsequent insurance in the Orient Company was brought to the attention of the appellant's agent, with whom alone the insured dealt at all times, and the other fact that request was made of this agent that he indorse the appellant's consent to this additional insurance in writing on the policy sued on, and the still further fact that the agent told the insured that such indorsement in writing was unnecessary, and that in case of loss the appellant company would pay without regard to such a technicality, we now assume to be true.

1. The naked inquiry, then, is, could the agent of the insurer waive the condition of the contract requiring consent for additional insurance to be made in writing indorsed on the policy? Or, to put

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\* Decision rendered, March 26, 1894.

it otherwise, is the insurer estopped from claiming a forfeiture by the acts and conduct of its agent? We do not understand that there is any disagreement between counsel as to the character of the agency in this case. Clearly, Roberts, Davis & Co. were general agents. They represented and stood for the company. They received applications, they issued policies, they collected premiums, they received notice of other insurance, and gave consent thereto, and in general they did for the company whatever it could do in the matter of making and continuing contracts for insurance. The company, being an artificial creature, could only act through human agencies, and what these general agents did in this case, as indicated above, the company itself may be said to have done. The power to make the contract of insurance by the general agent necessarily involves the power also to modify or vary the same by subsequent contract. The clause in the contract which requires written consent for additional insurance to be indorsed upon the policy is no more unchangeable at the pleasure of the parties than any other provision or condition of the contract. The contract of the insurance evidenced by the policy is no more sacred than any other contract, and we have yet to learn that ordinary contracts between men may not be altered, varied, or wholly abrogated at the election of the parties to them. The condition of the policy requiring consent in writing for additional insurance is inserted for the benefit of the insurer, and we are at a loss to conjecture any reason for holding that the insurer may not waive it at his pleasure. It is a mere method or manner of evidencing the insurer's consent, and it is impossible to conceive why the insurer may not waive this mere manner of consenting, and substitute another. Is it because of some supposed superior dignity of the written over parol? The supposition is vain and idle. The parol contract may modify or put an end to the written contract, just as the written may modify or end the parol. Every new contract, whether written or parol, supersedes the old, whether in parol or writing, according to the will and purpose of the parties. From what we have already said touching the power of the general agents of the appellant company, it seems to us to necessarily follow that such agents may waive the condition requiring consent in writing for additional insurance. This case, on its facts as found by the jury, goes far beyond the most of the reported cases in which this question has been passed upon by many courts of last resort in accordance with the views which we entertain. Here the insured actually applied to the company, or its general agents standing for it, to have the proper written consent indorsed, and was refused on the declared ground that



it was unusual and unnecessary, and that any loss would be promptly adjusted without regard to that technicality. It would be unconscionable to now allow the company to assert a forfeiture for the doing of or the omitting to do that which the insured did or omitted at his own suggestion. To state the offense thus illumined shocks conscience and offends judgment. May, in his work on Insurance, states the prevailing tendency of judicial opinion in these words: "In many policies the notice of insurance is required to be in writing, and indorsed on the policy, and it has formerly been frequently held to be essential that these particulars should be literally complied with; \* \* \* but the courts have become more liberal in favor of the assured in their construction of this sort of stipulation in policies of insurance. While, as we have seen, the old rule required the consent to be given in writing, and indorsed on the policy, it is the decided tendency of the modern cases to hold that, if the notice be duly given to the company, or its agent, of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy because their consent thereto was not indorsed as literally required by the stipulation." May, *Ins.*, §§ 369, 370. Wood on Fire Insurance (volume 2, p. 802) has this language: "It has formerly been held that not only notice of other insurance, prior or subsequent, must be given, but also that it must be indorsed upon the policy when so provided therein. But the tendency of the courts latterly is towards a more liberal construction in favor of the assured, and there is now no question but that oral notice, and an oral assent, or acts amounting to an assent, without an indorsement upon the policy, is sufficient." Flanders on Fire Insurance states the rule thus: "Where, however, the underwriter has notice of the additional insurance, and, although not formally giving his consent thereto, yet by his acts, such as collecting assessments, treats the policy as in full force, it will be a waiver of the right to resist a recovery upon that ground." *Fland. Ins.*, pp. 47, 51, 56, 57. In the very recent and excellent work of Biddle on Insurance the writer's conclusion from an exhaustive examination of adjudged cases is thus stated: "Probably any condition asserted in the policy for the benefit of the insurer may be waived by him:" 2 *Bid. Ins.*, p. 1086. To the same effect are the following authorities selected from the many examined: *Cobb vs. Insurance Co.*, 11 Kan., 93; *Pitney vs. Insurance Co.*, 65 N. Y., 6; *Young vs. Insurance Co.*, 45 Iowa, 377; *Insurance Co. vs. Earle*, 33 Mich., 143; *Insurance Co. vs. Lyons*, 38 Tex., 254; *Hadley vs. Insurance Co.*, 55 N. H., 110. The rule now announced was foreshadowed and bound

up in the cases of *Rivara vs. Insurance Co.*, 62 Miss., 720; *Association vs. Matthews*, 65 Miss., 301, 4 South, 62; and *Insurance Co. vs. Bowdre*, 67 Miss., 620, 7 South, 596.

2. Has there been any violation of that provision of the policy designated the "iron-safe clause?" That clause is as follows: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a record of business transacted, including all purchase and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business. \* \* \* And in case of loss the assured agrees and covenants to produce such books and inventory, and in event of a failure to produce the same the policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Now, the evidence shows very clearly that the application of the insured for the policy in suit was completed and signed and the policy delivered not earlier than the 17th day of December, 1892. We may properly assume, so far as the rights of the insurer are affected by the date of the contract, that it was actually made on the day named. On that very day the insured took a new inventory of his stock of goods, and this last inventory, as well as the two preceding ones, dated respectively September 17, 1892, and December 17, 1892, were kept in the iron safe, and were produced after the loss. On the 17th day of December, 1892, the insured opened a new set of books, transferring to them all footings or balances from his old books, and thereafter, from said 17th day of December, entered fully in the new set of books itemized statements of every transaction occurring in the conduct of the business. The forfeiture under the iron-safe clause is by the appellant contended for because of the failure of the appellee to keep the old books, showing the itemized statements of the transactions antedating the policy sued on, in the iron safe, and to produce them after the loss occurred. Why these old books of accounts were not kept in the safe, but were left outside, and consumed in the fire which occasioned the loss, is made clear by the evidence. It is perfectly apparent that the insured did actually what this iron-safe clause required of him to do. This clause made it obligatory upon him to keep the last inventory of his business, and to keep a set of books showing a record of business transacted, including all purchases and sales, both for cash and credit, and to keep the inventory and books securely locked in a fire-proof safe; and this condition the insured fully complied with. His duty was

to keep a set of books showing a record of business thereafter transacted, including future purchases and sales. He did not consent to preserve indefinitely his old books, showing all the past transactions. So far as this contention may be concerned, it was immaterial whether he had any books of account antedating the policy. He had his inventory, showing the amount of stock he had on hand when the policy was issued, and he was to keep a record of his future business transactions with a view of disclosing, when necessary, when and where and how the stock went. Of course, the last inventory may have been fraudulent or fictitious, and the making this appear would defeat the right to recovery by the insured; but that is not the point involved by the present discussion. The point in this contention is whether the keeping of the last inventory, and a set of books showing future transactions of the insured in his mercantile business, was compliance with the iron-safe clause on the part of appellee. That it was we entertain no doubt.

Affirmed.

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SUPREME COURT OF MICHIGAN.

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SMITH ET AL.

vs.

PINCH ET AL.\*

The statutes of Michigan forbid insurance on the life of any person more than sixty-five years old, or in favor of any one not having an insurable interest. They also provide that the person insured must have signed the application for the insurance. The Old People's Mutual Benefit Society, of Elkhart, Ind., doing business in Michigan, issued a certificate there on a woman seventy years old, to a beneficiary having no insurable interest, and the insured did not sign the application. The society paid the money to the beneficiary illegally named, but it was held that as the contract was one which could not be enforced between the parties in courts of justice, and one of the parties to the illegal contract had seen fit to pay over to the other, the wager does not afford a basis in equity for outside parties to lay claim to the reward of iniquity. The contract was merely a wager upon the life of the assured which could not be enforced either at law or in equity, and the heirs cannot recover.

JESSE M. HATCH (John C. Patterson, of counsel), *for Appellants.*

SHERNER & FOX, *for Appellees.*

CHAMPLIN, C. J.

This case comes before us upon a general demurrer for want of equity to the complainants' bill of complaint. The bill is filed by the heirs at law and the administrator of Abigail Smith, deceased.

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\* Decision rendered, April 25, 1890.

It charges that the Old People's Mutual Benefit Society, of Elkhart, Ind., a corporation of the state of Indiana, and doing business in Michigan, on the 1st of August, 1883, issued a policy of insurance upon the life of Abigail Smith, then residing in Lee, Calhoun County, Mich., insuring her life for the sum of \$3,000, payable upon her death to Elvira Smith, of Walton, Eaton County. That Abigail Smith died October 18, 1887. The bill further states and charges that Elvira Smith was a daughter-in-law of Abigail Smith, but Abigail was not a member of Elvira's family, or dependent upon her for support, nor a creditor; and that Elvira Smith had no insurable interest whatever in the life of Abigail Smith. That at the time the application was made and policy issued Abigail Smith was over 70 years of age, and was incompetent and incapable, in law, of making contracts, and was then under guardianship. That she never made or signed the application for insurance, and never paid any of the premiums; but such premiums were paid by said Elvira Smith and Benjamin W. Pinch. That since the death of Abigail the heirs at law and administrator have claimed the money due on said policy, and have notified the insurance company not to pay it to any other persons; yet, notwithstanding, the said company had paid the moneys due and payable upon such insurance policy to Elvira Smith or Benjamin W. Pinch, her assigned agent or attorney, and he now holds the same, and refuses to pay it over to the heirs at law of Abigail Smith, or to her administrator. It further relates that the contract of insurance was made and executed in the state of Michigan, and by the charter and by-laws of the company Abigail Smith then and there became a member of the society, and possessed of all the rights and privileges of the society for herself and personal representatives, heirs, and assigns. The legislature of 1887, by Act No. 187, passed an act to review the laws providing for the incorporation of co-operative and mutual benefit associations; which law went into effect on the 26th day of September, 1887. Section 16 of this act provided that corporations organized, existing, or doing business in this state under or by virtue of the provisions of that act should not issue any policy or certificate of membership upon the life of any person over the age of 65 years, nor upon any person not capable, in law, of making contracts, nor upon any life in which the beneficiary named has not an insurable interest; nor unless the person whose life is proposed for insurance shall have made and signed an application for such certificate or policy. There are other restrictions and regulations in the section, and it contains the provision following: "Any certificate or policy issued in violation of the above provisions shall

be void as to the beneficiary therein named; but the amount thereof shall, in case of death, be payable to the heirs of the member."

The rights and equities of the heirs of Abigail Smith are based upon the above clause of the statute. It is admitted by counsel for all parties that the contract of insurance is utterly null and void, as against public policy; and counsel for complainant concedes that, unless the above statute applies to this case, the contract cannot be enforced by complainants. The statute does not in its terms, nor by implication, apply to the policy or contract of insurance in this case. This so-called contract was made more than four years before the law of 1887 took effect. The act applies only to corporations organized under it, and this corporation was not. It is not retro-active in its terms, and cannot be made to apply to insurance contracts made, or attempted to be made, prior to its enactment. The contract of insurance set up in the bill is against public policy, and void. Complainants are not parties to it, neither have they been injured by it. It could not be enforced between the parties in courts of justice; and the fact that one of the parties to the illegal contract has seen fit to pay over to the other the wager does not afford a basis in equity for outside parties to lay claim to the reward of iniquity.

It is stated in the bill that, by virtue of the application and issuing of the certificate, Abigail Smith became a member of the society, and that her life was insured by such certificate for \$3,000, pursuant to the said charter, by-laws, and certificate of membership; and it is charged that on her death her administrators and heirs at law are entitled to the money. This position is inconsistent with the statement that Abigail Smith not only never signed the application, but was legally incapable of entering into a contract; but if she was, by the proceeding, constituted a member, the character of the transaction is not altered. The insurance was effected, and the beneficiary named had no insurable interest, and the contract was merely a wager upon the life of Abigail Smith, and cannot be enforced, without the aid of a statute authorizing it, either at law or in equity. The decree dismissing the bill of complaint is affirmed, with costs. The other justices concurred.

## SUPREME COURT OF PENNSYLVANIA.

LONG

vs.

NORTH BRITISH &amp; MERCANTILE INS. CO.\* }

A policy expired Nov. 1, 1887. The agents wrote plaintiff that it would be renewed unless they received notice to the contrary. No notice pro or con was received. A new policy was issued and sent to the agents who were accustomed to give plaintiff thirty days credit on premiums. In this case he was given until Nov. 10th. The property burned Nov. 26th, and on the 28th, the agents received plaintiff's check for the amount of premium. *Held*, That the authority of the agents to waive the policy condition in regard to payment of premium was conceded by the evidence, and that the state of the facts constituted an agreement for insurance, and the company was liable.

FRANK FIELDING, *for Appellant*.MURRAY & GORDON and R. D. SWOOPF, *for Appellee*.

McCOLLUM, J.

The vital question in this case is whether the evidence was sufficient to justify the jury in finding a contract of insurance. In passing on this question, the previous dealings and relations of the parties, as well as their acts and declarations, bearing directly on the pending dispute, must be taken into consideration. In other words, the latter must be construed in the light of the former. Long was engaged in the mercantile business at Olanta, and held a policy of insurance issued by the appellant company on his stock of goods for \$2,000. This policy expired on the 1st of November, 1887, and prior to that time the company, through its agents at Curwensville, informed him by letter that the insurance would be renewed if he did not give notice to the contrary. As he did not give any notice of a desire to terminate the insurance, the policy in suit was issued by the company, and forwarded to its agents, who charged the commission to him, and in their account with the company charged themselves with it. Whether these charges were made before their interview with him on the 8th of November the testimony does not inform us; but we learn from it that their custom was to carry policies 30 days or more, if requested by the assured, in which case he became their debtor for the amount of the premiums, and the company accepted them as its debtors for it. In their former transactions with Long he was allowed 30 days in which to pay the premiums, and his policy remained with them; but it was mutually

\* Decision rendered, Jan. 5, 1891.

understood that it was in force for the term described therein as effectually as if he had paid the premiums upon it and taken it away. It was on this understanding that the credit was sought and granted, and that the premium was subsequently paid and received. In view of their custom and previous dealings with the appellee, their possession of the policy in suit, and the non-payment of the premium thereon, were consistent with a contract of insurance and his claim that he was their debtor for the premium and they were keeping the policy for him. When he called at their office on the 8th of November, he did not allege that the renewal of his insurance was not authorized by him, nor refuse to pay the premium for it; but he inquired if he could have 30 days to remit for it, and was assured that he could have until the 10th of December. They admit that but for the fire they would have accepted the premium from him at any time on or before that day. The fire occurred on the 26th of November, and on the 28th they received his check for the premium, and held it until the 12th of December, without intimating to him that it was not satisfactory. Upon their books this premium was charged to him under date of November 1st, and credited under date of December 9th, and in their account with the company a corresponding charge and credit appear. These credits were entered after the fire, and by the direction of Special Agent Piper, who was charged with the duty of investigating the claim in dispute.

The foregoing facts are conceded, or appear in the uncontradicted evidence, and assist materially in interpreting and reconciling the conflicting testimony. We are satisfied, upon a careful examination and study of all the evidence, that it was the duty of the court to submit to the jury the question whether a contract of insurance existed between the contending parties. The authority of the agents to waive the condition in the policy respecting the payment of the premium was conceded in the appellant's sixth point, and is not questioned here. It could not be successfully disputed, upon the admitted course of dealing between all the parties concerned: *Insurance Co. vs. Hoover*, 113 Pa. St., 591.

The ruling complained of in the second specification was upon a question in the cross-examination of appellant's agent and witness, who had testified that there was no agreement of insurance, and who had received after the fire, and without objection, the appellee's check for the premium, and held it two weeks, without presenting it for payment. The question was designed to test the accuracy of his previous statement, and his intelligence and integrity touching the matters under investigation, and we are not prepared to say that it exceeded the limits of a proper cross-examination.

There is no error in the ruling on the offer of evidence contained in the third specification. It did not appear, and the offer did not propose to show, that Bloom was acting for Long, or by his authority, in obtaining the stamped envelopes; but if he had been so acting, and the appellant desired to prove his declarations, the offer should have embraced at least the substance of them, that the court might judge of their relevancy and invalidity: *Williams vs. Williams*, 34 Pa. St., 312. The remaining specifications do not require separate consideration. The answers to the appellant's points in relation to the delivery of the policy, the withholding of the check, and the explanation of the book entries were fair, full, and correct; and, as it is admitted that there was a tender of the premium on the 10th of December, it is profitless to inquire whether the receipt and retention of the check were the equivalent of it.

The judgment is affirmed.

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### SUPREME COURT OF MISSISSIPPI.

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LONDON ASSURANCE CORP. )

vs. }

COWAN.\*

Plaintiff instructed defendant, a correspondent and a holder of an open marine policy, to insure \$50,000 on cotton in presses against fire, such cotton being also insured by plaintiff. Defendant procured policies which had clauses exempting the companies issuing them from loss if the property was covered by any marine policy. Defendant charged the premiums to plaintiff in open account and plaintiff sued to recover. *Held*, That defendant in procuring worthless policies was careless and negligent, and that he must bear the penalty and pay back the money.

Appellant, a marine insurance company, issued to appellee an open policy of insurance on cotton, which, by its terms, was to cover all such cotton as he might have, from time to time, during the season of 1890-91, at eight cents per bale; appellee being a cotton broker of Vicksburg, Miss. In November, 1890, appellant wrote and wired appellee: "Please insure \$50,000 on cotton in presses against fire, in your name, and charge expenses to our account." No directions were given as to how to take out the policies, or what kind of policies, or as to any conditions they were to contain, and no inquiries were ever made as to the nature of the policies. Cowan undertook to comply with the request, and obtained fire policies, in his own name, on cotton in the presses, to amount specified, and paid premiums on same to the amount of \$1,199.50, and charged same to appellant.

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\* Decision rendered, March 19, 1894.



On the face of each of the policies so taken out by Cowan was a clause providing that the policy "shall not apply to, or cover, any cotton which may, at the time of loss, be covered, in whole or in part, or under the protection of any river or marine insurance, or policy of any marine company." Some time after a settlement was had between appellant and appellee, appellant discovered the provisions in the policies which exempted said insurance companies from loss on any cotton covered by any marine insurance. Appellant notified appellee at once of the fact that, by reason of such exemption in said policies, no insurance ever attached thereunder, and demanded the payment of the premiums paid on same. Appellee declined to pay, and this suit was instituted to recover same. There was a condition in plaintiff's policy to defendant making it liable for the full amount of the policy, without reference to other insurance, and there was no modification as to this until late in the season. To plaintiff's declaration, defendant pleaded the general issue, and gave notice that he would offer evidence to prove the following affirmative matter: That, as plaintiff was an insurance company, it knew, or ought to have known, all usual provisions and conditions; that it requested the insurance on the cotton, and no instructions were given to defendant as to special conditions to be contained in the policies, nor was defendant cautioned as to special conditions to be contained in the policies, nor was defendant cautioned at all—wherein plaintiff was negligent; that defendant possessed no special knowledge of insurance, and is not engaged in that business; that the services were gratuitous, and that defendant literally obeyed his instructions, and that it was plaintiff's negligence that the policies were not valid and good; and that plaintiff had not suffered loss. On the trial, plaintiff asked the court to give a peremptory instruction to find for plaintiff. This instruction was refused, and the court gave a peremptory instruction to find for the defendant.

Judgment and verdict accordingly, and plaintiff appealed.

BOOTH & ANDERSON, *for Appellant.*

DABNEY & McCABE, *for Appellee.*

COOPER, J.

This is a hard case, and we regret that, under the law, the defendant cannot be relieved. It is well settled by authority that the appellee would have been liable to the appellant, as insurer, if there had been a loss of the property he had assumed the duty of insuring, and if he was guilty of neglect in not procuring valid insurance. But this liability on his part would have sprung, not from contract, but from tort. And though, in admeasuring the damages, the

amount of premium which the appellant would have paid for the insurance, if the same had been insured, would have been deducted from the value of the property lost, this would have been done only to find the true loss, and not because of the appellee's right to such sum, as a premium. The radical and insuperable difficulty in appellee's defense is that his right to charge against appellant the premiums must rest upon the fact that he secured insurance according to the directions of appellant. We are unable to distinguish this case from that of *Storer vs. Eaton* (50 Me., 219), the reasoning in which meets our approval. If the appellee could not have recovered the premiums in an action against the appellant, we can perceive no principle upon which he can reach that end by charging up the premiums in a current account. The judgment is reversed.

ON SUGGESTION OF ERROR.

CAMPBELL, C. J.

It is not true, as stated by the argument in support of the suggestion in this case, that "the court is impatient at the sight of one," and there is nothing in the action of the court in dealing with them to justify such a notion. It is true that rarely has a suggestion of error availed anything, except to show the indisputable correctness of the decision assailed; and the reason is, plainly, because the court, having had the benefit of argument by learned counsel engaged in the case, and the three judges having considered and discussed the case afterwards in the consultation room, in all its aspects, as presented by counsel, and as may occur to either of them, know more of the case than the counsel do, and have the great advantage of perfect impartiality in their investigation, with the sole desire to reach the truth. This case is a fair illustration. It is a very plain case, when analyzed, and yet the zeal and ingenuity of learned counsel have completely deceived them, and by considering what might have been, and what would, in that contingency, be, the legal result, they have convinced themselves that the like result should follow now. We dealt with the case actually existing, and presented by the record, which is simply this: Cowan, with perfect honesty, but carelessly and negligently, supposing he was entitled to do so, withheld from the corporation money he had no legal right to retain; and when this discovery was made he was called on to pay, and, refusing, was sued. That he could not recover his unwarranted disbursements, if he was plaintiff, is clear, and there is no escape from that test in determining the validity of his defense; and that is the whole case, and we do not concern ourselves with what might be the law in a different state of case. The decision will stand as made.

## MISCELLANY.

Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

## CHANGE OF BENEFICIARY.

In the case of *Hirsch et al. vs. Clark*, in the Supreme Court of Iowa, Oct. 28, 1890, it was held that where the application for membership in a mutual-benefit association, which was made a part of the contract, directed payment of the benefit to the applicant's wife, "subject to such future disposal" as he might thereafter direct, and the benefit certificate was in terms payable to the wife, naming her, and no mode of changing the beneficiary was specified by the laws of the association, or by the certificate, though the practice was to require a surrender of the old certificate, and to issue a new one, payable to the new beneficiary, a paper signed by the member, expressing his surrender of the certificate, and directing payment to new beneficiaries, and mailed to the officers of the association, just before his death, is a valid change of beneficiary, and will protect the association in making payment accordingly, though the certificate itself remains in the hands of the wife, who refuses to deliver it up, and though the direction to make the change did not reach the officers of the association until after the death of the member.

—A son made advances to his father, who changed his certificate in a life association, making said son beneficiary to the extent of such advances. Later the father got a new certificate, naming a third wife as beneficiary, except as to the amount paid by the son to keep up the assessments. *Held*, That while there was moral obligation resting on the father to reimburse the son for money loaned, he had a legal right to change the beneficiary, and the wife was entitled to the money, less the assessments paid.—*Fleeman vs. Fleeman et al.*, in the Superior Court of Buffalo, Jan. 10, 1891. The case was not appealed and the policy was settled on the basis of this decision.

## CHANGE OF "OCCUPATION."—DELAY TO ASSESS MAKES ASSOCIATION LIABLE.

Temporary hunting by a merchant for recreation is not such a "change of occupation" as avoids the policy. The language of the policy has respect to employments rather than to individual acts. If an assessment association delays to make an assessment in accordance with a decree ordering it, and continues such delay until the decrease of membership makes it yield an amount insufficient to pay a claim in full when a prompt levy would have brought money enough, the organization incurs a legal obligation to pay the amount of such deficiency. Such was the decision of the Supreme Court of Illinois, Oct. 31, 1890, in *Union Mut. Acc. Ass'n vs. Frohard*.

**SUSPENSION BY FAILURE TO PAY ASSESSMENTS.**

A member of the Knights of Honor is, *ipso facto*, suspended by his failure to pay an assessment. Being suspended he is not a member, and, dying, his certificate is void. Appellate Court of Illinois, March 13, 1891, in the case of *Hansen vs. Supreme Lodge, Knights of Honor*.

**NON-RESIDENT MAY SUE AS A POOR PERSON.**

In the case of *Harris, Resp't, vs. Mutual Life, Impl'd Appl't*, in the N. Y. Supreme Court, Gen'l term, First Dept., March 13, 1891, it was held that while the court has power to allow a non-resident to sue as a poor person, such leave should not be granted except in a reasonably clear case, and the attorney making the application should not be assigned as counsel except in exceptional cases, and then only where it appears that the person seeking the leave knows that the counsel assigned is bound to act without compensation, and the counsel certifies that he will so act.

**FEDERAL COURTS AND STATE LAWS.**

Judge Colt, of the U. S. C. C., D. Mass., in the case of *Hunten et al. vs. Equitable Life*, for an accounting, February 9, 1891, held that the equitable jurisdiction of the U. S. courts cannot be changed by state statute, and that the Federal courts will adopt such changes only so far as they are consistent with the modes of procedure established by the courts of the United States.

**NON-PAYMENT OF PREMIUM VOIDS POLICY.**

It was held with some emphasis in the case of *D'Orlu vs. Bankers' & Merchants' Mutual Life Ass'n*, in the U. S. C. C., N. D. California, February term, 1891, that the time of payment of the premium as provided in the policy is of the essence of the contract of insurance, and that non-payment at the time designated involves a forfeiture when it is so provided by the express terms of the contract.

**SUBROGATION.—ASSIGNMENT OF CAUSE OF ACTION.—REMOVAL OF CAUSES.**

In the U. S. C. C., D. Indiana, in the case of *Over vs. Lake Erie & W. R. Co.*, September 21, 1894, it was held that insurance companies on payment of policies on goods destroyed in transit become subrogated pro tanto to the equitable right of action against the railroad, but the full legal title to the cause of action remains in the owner and is not assignable. Where, in an action against a railroad company for goods destroyed in transit, the insurance companies, which have become subrogated to the equitable rights, are joined with the owner, who has the full legal title, so as to defeat the right of the railroad to a removal of the legal cause of action to the Federal court on grounds of diverse citizenship, the Federal court will separate the legal cause of action, and will not allow the joinder of parties having only equitable claims to defeat the right of removal.

**FRATERNAL-BENEFICIAL SOCIETIES.—MISSOURI STATUTE DEFINING AN INSURANCE COMPANY.**

Under the statute of Missouri (Rev. St. 1889, c. 42, art. 10, relating to the organization of "benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations," and providing that fraternal-beneficial societies so organized may issue beneficial certificates to provide for the relief

of disabled members, or the families of deceased members, and shall not be subject to the insurance laws of the state, the fraternal-beneficial societies intended are such as are organized among the members of the same or a similar calling to promote the social, moral, and intellectual welfare of their members, and to advance their interests in other respects, and incidentally to provide for the relief of the sick and disabled, or their families; but an association organized for the sole purpose of engaging in the business of assessment insurance, though called a "fraternal-beneficial society," and having in its constitution some provisions for literary and social entertainment and for visiting the sick, is not within the purview of the statute, and is not entitled to exemption from the provisions of the insurance laws. *National Union vs. Marlow*, U. S. C. C. of Appeals, Eighth Circuit, May 11, 1896.

**SERVICE OF PROCESS.—DELAY OF TRANSPORTATION.—LIABILITY.—ACCUMULATION OF FREIGHT.**

In the case of *St. Louis, I. M., & S. Railway Co. vs. Commercial Union Ins. Co. et al.* in U. S. C. C. for the Eastern District of Arkansas, March 16, 1891, it was held—

1. As the laws of Arkansas establish a distinct system for foreign insurance companies (Mansf Dig. Ark., c. 83), which are required by section 3834 to file with the auditor a stipulation that service of process may be made on an agent specified by the company, such companies are not included in Act Ark., April 4, 1887, c. 135, requiring foreign corporations to file with the secretary of state a certificate designating an agent to receive service of process for the corporation.

2. A compress company was in the habit of receiving cotton at its sheds in L., and had a contract with defendant railroad company to transport it to its compress, which was across the river. By reason of defendant's delay to furnish transportation, cotton accumulated in the sheds, and the street adjacent thereto, and was destroyed by fire. *Held*, That the mere fact of such delay did not make defendant responsible to the owners or insurers of the cotton for its loss.

3. Nor will it be rendered so liable by the mere fact that it was in the habit of issuing through bills of lading in exchange for the receipts of the compress company while the cotton was stored in such sheds, or in the street, where there is no evidence that it assumed possession or control of the cotton before it was put on the cars by the compress company.

**REMOVAL TO FEDERAL COURT.—RES ADJUDICATA.**

In the case of *Herndon et al. vs. Aetna Ins. Co.*, in the Supreme Court of North Carolina, May 5, 1891, it was held that where an application for removal to the Federal court has been denied on the ground that the allegations therein as to the citizenship of the parties were insufficient, the court below might in its discretion have allowed an amendment at the proper time, but after an appeal from the order of denial, and an affirmance by the supreme court, the matter has become *res adjudicata*, although it was an interlocutory or incidental order, and an amendment cannot be allowed.

**DEATH OF BENEFICIARY BEFORE INSURED.**

Where a husband, after the death of his wife, in whose favor he had insured his life, does not surrender the policy, and makes no change in the beneficiary, the presumption is that he intended her personal representatives to take, and on his death the policy is payable to them, and not to his own personal representative. See *Waldheim vs. John Hancock Life Ins. Co.*, in the City Court of New York, General term, March, 1891.

## RIGHT TO DO MULTIFORM INSURANCE BUSINESS.

The Fidelity & Casualty Ins. Co., of New York, went into the state of Illinois to do business and staid there under the dictum of the Supreme Court of that state in its decision, October 29, 1894, in the case of *People ex rel. Stevens vs. The Company*. The ruling of the court is thus summarized :—

In the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.

Under Act, May 31, 1879, which requires every foreign insurance company to comply with "the general insurance laws of this state governing fire, marine, and inland navigation insurance companies doing business in the state of Illinois before it shall be lawful for such companies to take risks or transact any kind of insurance business in this state other than that of life insurance," a company incorporated in New York to do fidelity, life, accident, employer's liability, steam-boiler, and plate-glass insurance may, on complying with the provisions of such act, carry on its different kinds of business in Illinois.

## SUBSTITUTION OF BENEFICIARY.—EQUITIES IN FAVOR OF FIRST BENEFICIARY.—ESTOPPEL.

The Supreme Court of California, December 7, 1894, in the case of *Jory vs. Supreme Council American Legion of Honor*, made the following points in a benefit-insurance case :—

1. Where the by-laws of a benefit-insurance society allowed the insured to change the beneficiary in the certificate, on surrendering it and complying with certain rules, and the insured complied with all the other rules, but did not surrender the certificate, because the first beneficiary had possession thereof, and refused to give it up, equity will, as between the rival beneficiaries, consider the rules complied with, and the substitution made.

2. Where, by the rules of the insurer, the insured has a right to make a substitution of beneficiaries on surrendering the original certificate, equity will not allow a beneficiary who has possession of the certificate, and refused to surrender it, with intent to prevent such substitution, to profit by her own wrong in preventing a compliance with the rules.

3. If sound equities exist in favor of the original beneficiary of an insurance certificate, the insured is estopped to substitute a second beneficiary, whose status is purely that of a volunteer.

4. In the absence of contract, the payment of insurance assessments by the beneficiary is gratuitous, and creates no equities in his favor which are available against one afterwards substituted as beneficiary.

5. Where there was sufficient evidence of a demand for a return of the certificate, aside from the statements of the insured, the admission of such statements in evidence is not prejudicial.

## AUTHORITY OF AGENT.

On the expiration of a fire policy the insured applied to the agent for renewal and paid him the premium. The premium was remitted to the company and retained by it, but no renewal of new policy was sent. Three months later insured notified agent that no new policy had been received. A month and a half later the property burned. *Held*, That under the Wisconsin statutes the company was liable, anything in the by-laws or the instructions to agents to the contrary notwithstanding. So in *Zell vs. Herman Farmers' Mutnal Ins. Co.*, Supreme Court of Wisconsin, January 28, 1890.

**MUTUAL INSURANCE COMPANY.—POWERS.—ISSUANCE OF CASH POLICIES.—RIGHTS OF HOLDERS.**

The case of *Corey et al. vs. Sherman et al.*, in the Supreme Court of Iowa, Oct. 8, 1894, is in the main local to that state, but some of the ten points made are of general application, and we insert them all.

1. Where no objection was made, on the hearing of a bill in equity, that there was an adequate remedy at law, but issue was joined on the allegations of the bill, the objection is waived.

2. Code, § 2549, provides that one may sue for the benefit of the whole where the question is one of a common or general interest, or when the parties are very numerous, and it is impracticable to bring them all before the court. *Held*, That this authorizes a suit by some of the holders of policies in an insurance company, on behalf of themselves and others not named, to set aside assessments, and the appointment of an assignee, where the policies are all similar and the holders, numbering over 2,000, have like interests in the object of the suit.

3. Code, §§ 1058-1076, provide the method by which any number of persons may incorporate for the transaction of any lawful business. Section 1160 provides that any number of persons may make mutual pledges and give valid mutual obligations for their own insurance from loss by fire, wind, etc. *Held*, That a corporation whose articles state that its purpose is the mutual insurance of its members against fire, wind, etc.; that a guaranty fund for the payment of the losses shall consist exclusively of money raised by assessment or mutual pledges, not to exceed \$50,000, to be divided in shares of \$100, transferable among the members, each share having a vote, and being subject to assessment for losses; that any one may become a member on subscribing to such mutual pledges, and shall remain so only for the period of his insurance; which articles are properly signed and recorded,—is not a stock company, but a corporation organized under Code, §§ 1058-1076, to carry on the business of a mutual insurance company.

4. Where the by-laws of an insurance company give the direction of its affairs to a body selected from members who were guarantors, other members, by acquiescing in such arrangement, waive their right to share in the control.

5. The fact that losses are to be paid from a guaranty fund which is assessable, in case the assessment on policies is insufficient, but that any moneys paid therefrom shall be treated as an advancement, to be subsequently repaid, does not make the company a stock company.

6. Code, § 1160, prohibits mutual-insurance companies from insuring property not owned by one of their members, and from receiving premiums or issuing dividends. Section 1159 provides that no company organized on the mutual plan shall take any risks or do any business on the stock plan. *Held*, That cash-premium policies issued by a mutual-insurance company to persons who did not become members of the company are void.

7. Regular members of a mutual-insurance company are not estopped, by having received the benefit of their insurance, to deny their liability to assessment for losses on policies issued by the company to nonmembers, of which they had no knowledge.

8. In an action to set aside assessments for losses on policies issued by a mutual-insurance company on a cash-premium basis, in the absence of notice that the company was issuing such policies, members are not estopped by their laches from questioning the authority of the company to issue them.

9. Persons insuring in a mutual-insurance company on a cash-premium basis are conclusively presumed to know the provisions of the articles of incorporation and the statutes bearing thereon.

10. Code, § 1160, provides for the establishment of mutual-insurance companies, and that the other "provisions of this chapter shall not be applicable to such companies." *Held*, That section 1146, requiring that premium notes shall state on their face that they were given for insurance, being a part of the chapter excluded, is not applicable to premium notes given to a company organized under section 1160.

## ACCIDENT INSURANCE.—DUE DILIGENCE.—VOLUNTARY EXPOSURE.—VIOLATIONS OF RULES OF RAILROADS.

It appeared that the insured, while crossing railroad tracks in going to the station, when part way over, had his view obstructed of the further track, and, as he was approaching it, was called to by an employe of the railroad company, to "look out for the express," and was shouted to by others, and, hastening forward, was killed by the express train. *Held*, That the question whether he had used "all due diligence for personal protection," as required by the policy, was for the jury.

An act is not voluntary, within the terms of the policy excepting loss "from voluntary exposure to unnecessary danger," if it is such as a man of ordinary prudence would be induced to do by the circumstances.

The meaning of the word "accidental," as used in the policy, is for the jury.

The mere crossing of railroad tracks for the purpose of reaching the railroad station is not within the exception in the policy of the hazard "of standing or walking on the road-bed or bridge of any railway."

Under the defense that deceased was killed "while, or in consequence of violating the law or the rules of a company" within an exception in the policy, it may be shown that there was a custom of crossing the tracks at the place in question to reach the station.

The charge "that, if the jury find that plaintiff's assignor was passing the crossing in question, upon an express or implied invitation or inducement of the railroad company, or by its permission, he was rightfully there," is not erroneous where it appears from the rest of the charge that it was meant "rightfully" as regarded the railroad company. *Duncan vs. Preferred Mut. Acc. Ass'n*, Superior Court of N. Y. City, General term.

## REINSURANCE OF ENDOWMENT POLICIES INVALID.

The Supreme Court of Iowa decided, Oct. 15, 1894, in the case of *Dishong vs. Iowa Life and Endowment Ass'n*, that a mutual-insurance association which has issued no policies with the endowment clause, cannot, by an agreement with another association, assume payment of such policies issued by the latter prior to the act of 1886, prohibiting their further issue, so as to render its members liable for assessments therefor.

In such case the fact that the members of the latter association holding such policies in pursuance of the agreement between the two associations, paid assessments levied against the members of both associations for deaths occurring in either, does not estop the other association to deny its liability under the endowment clause in the policies, it never having recognized any liability thereon.

## INSOLVENCY OF COMPANY.—ACTION BY RECEIVER.—LIABILITY OF STOCKHOLDERS.

In the case of *Smith vs. Hopkins et al.*, in the Supreme Court of the State of Washington, November 10, 1894, the following points were made:—

1. In an action by the receiver of an insurance company to recover assets belonging to the company, it is no defense that the proceedings for the appointment of the receiver were brought by the insurance commissioner instead of by the state.

2. Nor can he defend by showing that the company was not in fact insolvent, as it is a collateral attack on the judgment appointing the receiver.

3. Persons receiving from an insolvent insurance company, against which proceedings are pending for the revocation of its charter, with notice of its



insolvency, assets of the corporation in payment of claims due to them, are not bona fide purchasers.

4. That a note given in payment of stock subscriptions in an insurance company, which is already organized, was given with the condition that it should not be binding unless accepted by the insurance commissioner as part of the assets of the company, does not avoid the note as against the creditors of the company, though it was not accepted by the commissioner.

#### LIMIT OF TIME.—LANGUAGE OF POLICY.

The Supreme Court of Wyoming, in the case of *McFarland vs. Railway Officials and Employees' Ass'n*, Nov. 14, 1894, held that the limitation in a policy of insurance against death resulting from an accident, indicated by a clause that an action thereon must be brought, "within one year from the date of the happening of the alleged injury," begins to run at the death of the insured, and not at the time at which the right of action accrues, as stated in the contract.

#### CHANGE OF OCCUPANCY.—QUESTION FOR JURY.

Whether the carrying on of a newspaper and job printing business in a house insured as a dwelling invalidates the policy, is a question for the jury and not for the judge of the court below. So decided the Circuit Court of Hamilton Co., O., followed by affirmation by the Supreme Court of Ohio, in the case of *Ætna Ins. Co. vs. Wm. Meyer*, Mar. 17, 1891.

#### AUTHORITY OF AGENT.—CONFLICTING DUTIES.

Plaintiff employed an insurance agent to keep certain property continually insured for a certain amount, part of the insurance being taken in companies represented by the agent, and part through other companies. To avoid the frequent sending and returning of policies as some were canceled by the different companies, all of the policies were left with the agent. *Held*, That the agent had authority to receive, for the insured, notices of cancellation of policies, and that the duties of such an agent to the insured and insurer are not repugnant. *Schauer vs. Queen Ins. Co.*, in Supreme Court of Wisconsin, Nov. 13, 1894.

#### POLICY ISSUED BY AGENT TO HIMSELF IS VOID.

The case of *Wildberger vs. Hartford Fire Ins. Co.*, Supreme Court of Mississippi, Feb. 25, 1895, recites how an insurance agent, who became receiver as deputy sheriff of a stock of goods, issued to himself as such receiver a policy of insurance on the goods, and the court held the transaction to be illegal and the policy void.

#### ANTI-REBATE LAW.

An agent permitted his customer to retain one-half the first premium (the amount of the agent's commission) on his life policy, in consideration of an agreement to furnish the agent with the names of the employees of the G. Mfg. Co. so that he might canvass them for insurance, the agent paying the company its agreed half. For the other half of the premium the assured gave the agent his note and failed to pay it when due, and suit was brought thereon and defeated in the court below on the ground that the transaction was a breach of the anti-rebate statute which forbids discrimination between policyholders of a company, but it was held not to be a violation of the anti-rebate law, as the amount retained by the assured was for equivalent services to be rendered. *Quigg vs. Coffy*, Supreme Court of Rhode Island, Dec. 26, 1894.

## POLICE LIFE-INSURANCE FUND.—DISCHARGED OFFICER HAS NO RIGHTS.

The California Act of April 1, 1878, fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'Police Life and Health-Insurance Fund,' " of which \$1,000 was to be paid to the personal representative of any member of the police force on his death. *Held*, That as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no vested property right in such fund, and on his discharge from the force he was not entitled to a return of the amount contributed by him. Following *Pennie vs. Reis*, 80 Cal., 269, 22 Pac. Rep., 176; affirmed, 132 U. S., 471, 10 Sup. Ct. Rep., 149. So said the California Supreme Court, Jan. 30, 1891, in the case of *Clark vs. Reis, Treasurer*.

## PLEADING AND PROOF.—VARIANCE.—ARGUMENTS OF COUNSEL.

1. In an action on a life-insurance policy, plaintiff, beneficiary, alleged that he was the owner and holder and entitled to the proceeds thereof. The company paid the money into court, averring that the widow claimed it; and the latter, being made a party, answered, alleging that the policy was bequeathed to her by her husband; that it had been written in plaintiff's favor solely to secure payment of certain notes made to him by her husband, which had been fully paid. Plaintiff replied that the policy was also collateral security for other debts due him by decedent, and that in consideration of the surrender of the notes decedent had relinquished to him all rights in the policy. *Held*, That it was error to exclude evidence of the excess of the indebtedness over the amount of the notes, on the ground that it tended to show conditional ownership of the policy, and hence was inconsistent with plaintiff's original claim of unconditional ownership.

2. It was error to permit defendant's attorney, in his opening address to the jury, to read a portion of the will, which stated that the notes were paid; that testator owed plaintiff nothing; and that plaintiff had no right to retain the policy.

3. Where plaintiff's brief consists largely of the charge of the court, and of charges refused, which are set out in full in the "case," and of copious extracts from the testimony instead of an abstract thereof, one-half the cost of printing it will be taxed to him. See *Shove vs. Shove*, in the Supreme Court of Wisconsin, April 9, 1891.

NOTE.—We seem to have a syllabus of this case in the same court passed upon Oct. 11, 1887, in XVII Ins. Law Journal, 113.





## APPELLATE COURT OF INDIANA.

ELIZA M. SISK

vs.

CITIZENS INS. CO.\*

1. The provision in a policy that written consent for other insurance must be obtained is good. Presumption is against waiver by company. Such provision is for the benefit of the insurer, to protect the company from the hazard of overinsurance, and the law will not presume that the company waived a provision intended for its protection.
2. Substantially the same as above.
3. While the general doctrine that if one may sustain loss he has an insurable interest; and while it is admitted that knowledge of title by agent is a waiver of the question of title by company; and while a policy is not invalidated by a partial title when inquiry has not been pressed by the company; yet it is different when more exact information with regard to the title is required, as when the true title is called for or where it is provided that if the interest of the insured be any other than the entire, unconditional, and sole ownership of the property it must be so represented to the company and so expressed in the policy, otherwise the policy is void.
4. Failure on the part of insured to use the best endeavor in saving and protecting property at and after a fire, where the policy specifically calls for such care, leaves the result of such negligence resting upon the claimant.

COMSTOCK, C. J.

This action was commenced in the Knox Circuit Court on the insurance policy issued by appellee to appellant in the sum of \$1,000. To the complaint a demurrer was filed and overruled. The defendant then answered in six paragraphs. The first was a general denial. The plaintiff demurred severally to the second, third, fourth, fifth, and sixth paragraphs, which demurrer was sustained as to the sixth and overruled as to the others. The plaintiff replied to the second, third, fourth, and fifth paragraphs. There was a trial by jury, and verdict and judgment for the defendant. The errors assigned are the overruling of the demurrers of the appellant to the second, third, fourth, and fifth paragraphs of defendant's answer.

The policy is set out in the complaint, and contains the following provisions:—

If the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building stands on grounds not owned in fee simple by the assured, it must be so expressed in the written part of the policy; otherwise the policy shall be void.

This policy shall be void \* \* \* if the interest of the assured in the property, whatever that interest may be, is not truly stated in the policy.

This policy shall become void in each of the following instances, unless consent in writing of the company is indorsed hereon, viz.: If the assured or any

\* Decision rendered, Jan. 14, 1897.

VOL. XXVI.—24.

person having an insurable interest in the property, shall now have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, whether the same be valid or not.

The second paragraph of the answer alleges that after the issuance of the policy in suit plaintiff procured on the same property insurance from the German Ins. Co., of Freeport, Ill., in the sum of \$700, without the consent in writing of the defendant company indorsed upon the policy sued upon, which said policy issued by the German Ins. Co. was and still is valid. Counsel for appellant contend that this paragraph is fatally defective, because it does not aver that consent of the company for other insurance was not given in any other manner than in writing, and does not negative the waiver of the condition that such consent must be given in writing indorsed on the policy; that to avoid the policy for this reason the defendant assumed the burden, and should have pleaded avoidance. To this proposition we cannot assent. Such a provision in a policy, as has often been stated by the courts, is for the benefit of the insurer to protect the company from the hazard of overinsurance. The law will not presume that the defendant waived a provision intended for its protection. Such condition may be waived, as held in *Moffit vs. Insurance Co.* (Ind. App., 38 N. E. Rep., 835); *New vs. Insurance Co.* (5 Ind. App., 83); *Insurance Co. vs. Hart* (Ill. Sup., 36 N. E. Rep., 990), cited in appellant's brief; and in numerous other decisions of our supreme court. In the cases in which the question of waiver is passed upon, as a rule, averments of facts claimed to constitute waiver are set out either by way of reply to answer, pleading the breach of condition, or in the complaint. The matter set up in the paragraph of answer was such as in terms avoided the contract of insurance. Plaintiff, in effect, rendered it voidable, and the waiver of the forfeiture was a proper subject of reply.

The third paragraph of answer alleges prior insurance without notifying defendant company, and without procuring its consent indorsed on the policy. The objections to the second and third paragraphs are substantially alike, and the same authorities and reasons apply to both. It is further urged that the allegation "that the plaintiff procured to be issued to her a policy of insurance" is not equivalent to an allegation of delivery to and acceptance of such policy by the plaintiff. Conceding the learning of counsel, we think they are in error in this interpretation. A standard dictionary defines the word "procured," "to acquire for one's self," "to cause;" and the word "issue," "to deliver for use." An allegation that one has caused to be delivered to himself any article imports its acceptance.

The fourth paragraph of answer alleges that the plaintiff does not own the entire interest in the property insured, but that one James Sisk owned the one undivided half thereof at the time said policy was issued. The objections urged to this paragraph are that it does not aver facts showing no insurable interest in the property. In support of this proposition, counsel, in their able brief, cite *Insurance Co. vs. Dunham* (117 Pa. St., 460, 12 Atl., 668); *Knopp vs. Insurance Co.* (Mich. S. C., 59 N. W. Rep., 653); *Cross vs. Insurance Co.* (132 N. Y., 133, 30 N. E. Rep., 390); *Carpenter vs. Insurance Co.* (135 N. Y., 298); *Van Schoick vs. Insurance Co.* (68 N. Y., 434),—the policies in which cases contain provisions as to title of the insured similar to the policy issued by the defendant company. *Insurance Co. vs. Dunham*, supra, was a case in which the holder of the policy was the purchaser under articles of the land upon which stood the property insured. The court held that the policy was not void, upon the ground that he was the equitable owner in fee, and, in respect to the insurance, the entire, unconditional, and sole owner; that, when articles are entered into for the sale of land, the purchaser is considered the owner. In *Knopp vs. Insurance Co.* (Mich. S. C., 59 N. W., 653), the insured held the property under contract of purchase; and in *Carpenter vs. Insurance Co.*, supra, the court held that the provisions of the policy were waived by the insurer. In these cases the insured held the property under articles of purchase, and were, in the respective opinions given by the court, owners in fee. In *Cross vs. Insurance Co.* (132 N. Y., 130, 30 N. E., 390), and *Carpenter vs. Insurance Co.* (135 N. Y., 298, 31 N. E., 1015), and *Van Schoick vs. Insurance Co.* (68 N. Y., 434), it is held that the policies were not avoided although the insured did not own the entire and sole interest in the property, because the agents soliciting the insurance and issuing the policies had knowledge of the facts as to the titles of the insured; that their knowledge of the facts as to the titles of their principals, and that the circumstances attending the issuing of the policies amounted to a waiver of the condition, is beyond question. In *Philadelphia Tool Co. vs. British-America Ass'e Co.* (132 Pa. St., 236, 19 Atl., 77), the insured was a lessee for a term of years of a building in which he was engaged in a manufacturing business, and the court used the following language: "We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the building; that fraud is not presumed." If the court in that case was justified in holding that the policy was issued with knowledge of the interest the insured held in the real estate in which its

business was being carried on, the assumption that the insured in the case before us owned only an undivided interest in the household goods described in the policy and that the defendant had knowledge of that fact, we think would not be warranted. Counsel cite a number of authorities to the effect that, whenever loss may be sustained, an insurable interest exists. This proposition is not questioned; but it is also true that, unless a statement of interest is required either in the application or policy, the insured need make none; and, unless otherwise provided, it is sufficient that the applicant has an insurable interest. Unless more particularly inquired about, or there be a fraudulent concealment or misrepresentation, it does not invalidate the policy when the applicant states that he is the owner of the property, or that it is his, if in some substantial sense this is true, although it turns out that he has not a perfect and absolute title. But it is different when more exact information with regard to the title is required; as when the true title is called for, or where it is provided that, if the interest of the insured be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or be incumbered, it must be so represented to the company, and so expressed in the policy, otherwise the policy shall be void: 7 Am. & Eng. Enc. Law, 1020-1022; vide *Philips vs. Insurance Co.* (20 Ohio, 174); *Abbott vs. Insurance Co.* (3 Allen, 213); *Pinkham vs. Insurance Co.* (40 Me., 587); *Fuller vs. Insurance Co.* (36 Wis., 599); *Addison vs. Insurance Co.* (7 B. Mon., 470); *Murphy vs. Insurance Co.* (7 Allen, 239), and the many other cases there cited. Judged by these decisions the fourth paragraph of the answer is sufficient.

The fifth paragraph alleges that the property became very wet from the water thrown thereon to extinguish the fire in the building where the same was situate; that the plaintiff used no endeavor to dry or clean the same, but suffered it to remain in that condition; that, if it had been properly cared for, the damage thereto would not have exceeded \$100. It admits a damage occasioned by the fire of \$100, and is pleaded only as a defense to the amount claimed in excess of that sum. The policy provides that the best endeavor of the insured shall be used in saving and protecting the property from damage at and after the fire, and, in case of failure to do so, the company shall not be liable for damage caused by such failure. There can be no abandonment to the company of the property insured. This paragraph charges a failure of the insured to perform her part of the contract in case of injury of the property by fire, and states wherein she was negligent. We find no error in the rulings of the court below. Judgment affirmed.



## SUPREME COURT OF OREGON.

SCHMURR

vs.

STATE INS. CO.\*

Proofs of loss were sent to the company, minus the certificate of the nearest notary public required by the policy and a builder's estimate also required, and the company sent them back as not showing whether the conditions of the policy had been violated, and as furnishing no proof as to the value of the house except the owner's statement, and as not complying with the terms and conditions of the policy. They were returned to the company with the certificate, as notary public, of one of the plaintiff's attorneys, and a request to specify what other defects, if any, there were, when the company sent them back as "declined and objected to." *Held*, Not such an irregularity in the proofs as to make them fatally defective. The company must specify what it wants supplied and not use language calculated to mislead and confuse. *Held*, That the objections to the notary as not being the "nearest" came too late and should have been specified at the time the proofs were returned. The proofs, as made, were a sufficient compliance with the policy.

A car barn had been built within nine feet of the insured building and the owner notified the agent and asked him what the additional premium would be. The agent named three different sums, and finally wrote to the company about it and nothing further was done up to the time of the fire. *Held*, That notwithstanding the policy provisions the company had knowledge of the increased risk and allowed the policy to remain uncanceled, thereby estopping itself from claiming a forfeiture on account of the barn, although consent for its erection was not given in writing.

Action upon a policy of fire insurance, brought by John Schmurr against the State Insurance Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

W. T. SLATER and E. B. WILLIAMS, *for Appellant*.

N. D. SIMON, *for Respondent*.

BEAN, J.

This is an action upon a fire-insurance policy which provides that, as a part of the proof of loss, the assured "shall produce a certificate under the hand and seal of a magistrate, or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify," and, if the claim be for a building, "the duly-verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire;" and, also, that "any notice given to,

\* Decision rendered, Oct. 19, 1896.

representation made to or by, or knowledge of, any solicitor or agent representing this company, of any fact, change, act, or thing relating to the property, title, occupancy, incumbrances, or otherwise, insured under this policy subsequent to the issuing of the same, shall not in any wise be binding on, or be regarded as notice to, or knowledge of, this company, but, in order to be binding on the company, must be indorsed in writing hereon, as provided in the terms and conditions of this policy;" and "that in case of \* \* \* the erection of adjoining buildings \* \* \* without being immediately notified to this company, and its consent thereto obtained in writing \* \* \* this policy shall thereafter cease and be null and void."

The action is defended upon the grounds (1) that no proof of loss was made as provided in the policy; and (2) that the contract of insurance became null and void by the erection of an adjoining building within the prohibited limits without the written consent of defendant. The plaintiff claims, however, that he furnished sufficient proof of loss, and that the stipulation of the policy in reference to the effect of the erection of adjoining buildings was waived by the company. The insurance was effected through Irle, a soliciting agent of defendant, with authority to receive and forward applications to the home office, countersign and deliver policies when issued by that office, and to collect the premiums thereon. After the delivery of the policy, but before all the premiums had been paid, an electric car barn was built within eight or nine feet of the building insured; and, when plaintiff came to make the deferred payment, he notified Irle of that fact, and inquired as to the amount of additional premium required on account thereof. With this knowledge of the increase in the risk, Irle accepted the balance due on the premium, and wrote to the company to ascertain the additional amount required on account of the erection of the car barn, and, upon receipt of its answer, notified plaintiff of the amount; but it was never paid, nor the policy canceled. Within a short time after the fire, the plaintiff, through his attorney, made out and forwarded to the home office of the company proof of loss regular in all respects, except that it had neither a certificate of the magistrate or notary public nearest the fire, nor a builder's certificate as required by the policy. Upon its receipt by the company, it was promptly returned, with the objection that "it does not show whether the conditions of the policy have been violated or not, furnishes no proof as to the value of the house except the man's mere statement that it is worth so much, and in fact does not comply with the terms and conditions of the policy." Thereupon one of the attorneys of the plaintiff imme-

diately affixed his certificate as a notary public in the form and to the effect required by the policy, and again forwarded it to the company, with a letter calling attention to the certificate, and saying: "We do not know in what other respect the proof of loss is defective, as it follows strictly the proofs of loss which are used by your company. If in any other respect it is defective, will you kindly inform us?" A few days afterwards the defendant returned the proof, saying that it "is returned herewith, declined, and objected to."

Upon this record, the two questions presented are: (1) Does the proof of loss furnished by the plaintiff sustain the allegation of the complaint that proof of loss had been regularly made? And (2) did the company waive the provision of the policy in reference to the effect of the erection of adjoining buildings? Both of these questions must be answered in the affirmative.

1. The law is settled that where the assured, in attempting in good faith to comply with the provisions of a policy, furnishes to the insuring company, within the time stipulated, what purports and is intended to be proofs of loss, the company must point out particularly any defects therein if it intends to rely upon them. If it fails to do so, objection cannot thereafter be made to its sufficiency: *May, Ins.*, §§ 468, 469; *Wood, Ins.*, § 452; *Insurance Co. vs. Tucker*, 92 Ill., 64; *Insurance Co. vs. Block*, 109 Pa. St., 535; *Myers vs. Insurance Co.*, 72 Iowa, 176; *Insurance Co. vs. Holthaus*, 43 Mich., 423; *Assurance Co. vs. Samuels* (Tex. Civ. App.). Now, in this case the defendant failed to point out any particular objection to the proof as furnished, except that the value of the building was shown only by the statement of the assured. The objections that the proof did not show whether the conditions of the policy had been violated or not, and that it did not comply with the terms and conditions of the policy, are altogether too general: *Insurance Co. vs. Block*, *supra*; *Myers vs. Insurance Co.*, 72 Iowa, 176. It is the duty of an insurance company, pending the adjustment of a loss, under its policy, to act towards the claimant in good faith, and, if it is dissatisfied in any way with the proof furnished, it ought to make known to the assured the specific nature of its objections, so that he may have an opportunity to make the necessary correction before it is too late. Good faith and common honesty demand as much, and the law is not satisfied with anything less. Hence we dismiss without further comment any objections to the sufficiency of the proof as made, other than that it "furnishes no proof as to the value of the house except the man's mere statement that it is worth so much." This objection is quite indefinite in its meaning, as the policy provides that the value shall be shown both by the certificate of a magistrate

or notary public and of a builder; and whether it was intended to be understood that the proof was defective because it did not have the notary's or the builder's certificate is not made clear. The plaintiff, however, evidently in good faith, understood it to refer to the certificate of the notary, and immediately supplied what he supposed to be the defect pointed out, and so advised the company. It thereafter made no objection on that account, but returned the proof with the simple statement that it was "declined and objected to." Under these circumstances it cannot be heard to say now that the proof is defective because it did not have a builder's certificate as to the value of the property. If it desired to object on that account, it should have said so, and not used language calculated to mislead and confuse.

But it is said that the notary's certificate as actually furnished is insufficient because the facts show that the officer making it was not the notary nearest to the fire. But this objection also comes too late. It should have been made at the time the proof was returned, and plaintiff thus given an opportunity to procure the certificate of the proper officer, if that was insisted upon by the defendant company. In our opinion, the objection to the proof of loss that the certificate of the nearest notary and of a builder did not accompany it is not available to the defendant at this time, and the proof as made must be held and deemed a sufficient compliance with the policy in that respect. This being so, any error of the court either in the admission of evidence or in instructing the jury upon the matter of the waiver of a proof of loss becomes entirely immaterial, and need not be further considered.

2. Upon the other question it is admitted that, unless the stipulation in the policy in regard to the effect of the erection of adjoining buildings was waived by the defendant, the construction of the car barn rendered the policy void, and the plaintiff cannot recover. The question of waiver must be determined from the testimony of the plaintiff and the agent Irle. The plaintiff testified that, when he paid the last installment of the premium, he told Irle that the car barn had been built, and asked him how much it would add to the cost of his insurance; that Irle said \$17, but afterwards said it would be about \$22, and at another time \$35; that he told Irle he wanted to find out about it, but did not have the money to pay just at that time, and Irle replied, "All right, I will let you know," but the witness never heard of the matter again. Irle says that he saw the plaintiff in September, and had a conversation with him about the car barn, during which the plaintiff asked him if it would make any difference in his insurance; that he told him it would increase

the cost of the insurance, as well as the hazard, but he could not tell how much, but would write to the company and find out; that he did write to the company for information in regard to the matter, and, upon receiving its answer, wrote to the plaintiff to come to his office, and he would tell him what the additional cost would be. In response to this notice, plaintiff came to the office, and was informed by witness of the amount of the increased rate on account of the barn, but thought it too much, and for that reason did not pay it at the time, but said he would see about it, however. In a week or so afterwards, the witness again met the plaintiff on the street, and told him he had not paid the additional premium, and that it must be paid or he had no insurance, and plaintiff said that other agents had told him that a policy, when once written, remained in force until it expired, and that he would let it go that way. Upon cross-examination the witness said that he did not cancel the policy for failure to pay the additional premium, as he ought to have done, because he wanted to keep the insurance, and wanted plaintiff to pay the amount due. From this testimony it appears that Irle not only had notice himself of the existence of the car barn before he received and accepted the full premium on the policy in suit, but that he also notified the company at the home office of that fact, and obtained from it a statement of the amount of additional premium made necessary by such structure. When the company, with knowledge of the violation of the provisions of the policy as thus communicated by Irle, retained the premium, and allowed the policy to remain uncanceled, it estopped itself from claiming a forfeiture on account of the barn, although its consent for its erection was not given in writing. The condition of the policy in this regard could be waived or modified by the defendant, and such waiver or modification could be made by parol, although the policy itself provided that it should be in writing: *Miner vs. Insurance Co.*, 27 Wis., 693; *Webster vs. Insurance Co.*, 36 Wis., 67; *Viele vs. Insurance Co.*, 26 Iowa, 9. So that whether Irle's knowledge of the erection of the car barn would be binding upon the defendant or not is immaterial, because the company itself, after being advised of the breach, retained the premium, and took no steps whatever towards the cancellation of the policy, and therefore waived the forfeiture: *Insurance Co. vs. Malevinsky*, 6 Tex. Civ. App., 81; *Insurance Co. vs. Spiers*, 87 Ky., 285. Finding no error in the record, the judgment of the court below is affirmed.

## SUPREME COURT OF IOWA.

DES MOINES ICE CO. }

vs. }

NIAGARA FIRE INS. CO.\* }

1. The overruling of a demurrer to a paragraph of an answer in an action on an insurance policy pleading a breach of condition as a defense, and which incorrectly recites the condition in a material respect, is not conclusive as to the issue presented, though the petition sets out a copy of the policy, and the plaintiff may join issue by a reply.
2. Under the provisions of McClain's Code, § 1734, making the amount stated in an insurance policy prima facie evidence of the insurable value of the property insured, it is not necessary for the insured, in an action to recover for a loss, to introduce evidence of value beyond the policy itself; and, if the actual value at the time of loss is less than the amount named in the policy, though caused by the removal of a part of the building by the plaintiff, the burden of proving such fact rests on the defendant.
3. In an action to recover on a policy of insurance on an ice house, containing a condition that it should be void in case the building, "whether intended for occupancy by owner or tenant," should become vacant and remain unoccupied for ten days, the question of occupancy (if the condition was applicable to such building) was properly submitted to the jury.
4. The fact that the owner of an insured building started a fire for the purpose of burning rubbish, which escaped, and consumed the building, does not constitute a defense to an action to recover the insurance, in the absence of any design to burn the building.

R. W. BARGER, *for Appellant.*CUMMINS & WRIGHT, *for Appellee.*

ROTHROCK, C. J.

1. The policy of insurance upon which the action is founded was issued by the defendant to the plaintiff on the 11th day of April, 1891. The property insured was an ice house on the shore of Lost Island Lake, in Palo Alto County, in this state. The insurance was for one year, and for the sum of \$1,000. The ice house was destroyed by fire on the 15th of October, 1891. The defendant, by its answer, admitted the issuing of the policy, and the receipt of notice and proofs of loss. One defense interposed by the answer was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if a building herein described be or become vacant or unoccupied, and so remain for ten days;" and defendant avers that at the time of the alleged loss, and for more than sixty days prior thereto, said building was vacant or unoccupied, without any agreement whatever therefor by defendant. The plaintiff demurred to this division of

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\* Decision rendered, Oct. 15, 1896. From *Northwestern Reporter*.

the answer, and the demurrer was overruled. Afterwards the plaintiff filed a reply to the answer, in which the following facts were pleaded: "Plaintiff denies that the insurance policy referred to in said paragraph contains the clause set out in said paragraph, but says that said policy does contain the following provision: 'The entire policy shall, unless otherwise provided by agreement indorsed hereon, be void \* \* \* if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remains for ten days;' all of which will more fully appear by reference to a copy of said policy attached to the original petition herein, which is made a part hereof; and plaintiff says that by said policy there was insured a frame ice-house building, as will appear by reference to said policy, which said frame ice-house building was never intended for occupancy, either by owner, tenant, or any one else; that the fact that it was not so intended for occupancy was well known to said defendant and all its officers and agents, both at the time said policy was issued and at all times thereafter. And plaintiff says that because of said facts it is wholly immaterial whether said building was so vacant at any time, for that said clause in reference to vacancy never had any reference to said insured property." The defendant moved to strike out the part of the reply above set out, on the ground that the matters therein stated were merely a repetition of the ground of demurrer to the fourth division of the answer. The motion was overruled. It is contended in behalf of appellant that this ruling was error, because the question as to the occupancy or vacancy of the building was determined by the ruling on the demurrer. We have set out that part of the answer to which the demurrer was directed, and also the reply, for the reason that it is apparent therefrom that the position of counsel for appellant is not well taken. That part of the answer which was demurred to omitted the clause which related to occupancy by the owner or tenant. The same question was not presented by the demurrer and the reply. It is thought by counsel that because a copy of the policy was exhibited with the petition, and was part thereof, the issues presented were identical. If counsel desired to make the question he now presents, he should have correctly set out that part of the policy in his answer. The case is not within the rule announced in *Wing vs. District Tp.* (82 Iowa, 632, 48 N. W., 977), cited by counsel for appellant.

2. The plaintiff proved the destruction of the building by fire, except a small part of the roof, which was removed before the fire, and on the same day. It is said that the whole building did not belong to the plaintiff. This is a mistake of fact. There were two ice

houses, separated by a party wall. The policy of insurance was on one of the houses, and it was owned by the plaintiff. The fact that another building adjoined the one insured by this policy was a matter of no consequence in this controversy. It is said that when the plaintiff closed the introduction of its evidence, there was no showing of the value of the building which was insured; and it appears that the defendant presented a motion to the court to direct a verdict for the defendant. The motion was overruled, and the ruling was right. Section 1734 of McClain's Code is in these words: "In any suit or action, brought in any court in this state on any policy of insurance, against the company or association issuing the policy sued upon, in case of the loss of any building so insured the amount stated in the policy shall be received as prima facie evidence of the insurable value of the property at the date of the policy; provided, nothing herein shall be construed to prevent the insurance company or association from showing the actual value at the date of the policy, and any depreciation in the value thereof before the loss occurred; provided further, such insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy, and, in order to maintain his action on the policy, it shall only be necessary for the insured to prove the loss of the building insured, and that he has given the company or association notice, in writing, of such loss." It does not appear what evidence was introduced by the defendant under the provisos in this statute. The court instructed the jury that, if the plaintiff was entitled to recover the value of that part of the roof which had been removed, it should not be included in estimating the loss. In view of that instruction, and the further fact that the verdict of the jury was for \$431, being less than one-half of the amount of the insurance, and no question is made that the verdict was excessive, the contention that a verdict should have been directed for the defendant, and the argument in support thereof, is well answered by the plain and explicit language of the statute. It is true, a small part of the roof had been removed, and it was the right of the defendant to show the value thereof as depreciating the value of the building. And we infer from the record, the argument of counsel for appellant, and the charge of the court to the jury, that the value of the boards removed from the roof was fully established. The claim of counsel for appellant that the plaintiff should have shown by evidence the value at the time of the loss because property depreciates in value by lapse of time is founded upon an erroneous construction of the statute. Nothing can be plainer than that, under the law, the burden was on the defendant to



show that the property was not worth the amount for which it was insured.

3. At the close of the introduction of all of the evidence another motion was made by the defendant for the direction of a verdict against the plaintiff. Complaint is made because this motion was overruled. One ground of the motion was that the evidence showed as matter of fact that the building at the time of its destruction, and for more than ten days prior thereto, had been vacant or unoccupied. It will be observed that by overruling the demurrer to the petition and refusing to strike the reply from the files the court was of opinion that the question of vacancy or occupancy depended upon the evidence of the use or nonuse of the building, and that it was a fact to be determined by the jury. The plaintiff contended, on the one hand, that the building was used and occupied, and the defendant insisted that there was and could be no such use or occupancy of an ice house in the month of October as that contemplated by the policy. The evidence tended to show that the building was erected prior to the ice harvest in the year 1889-90. After it was filled with ice, the defendant sent its agent to examine the building, and it insured the same for \$1,000 for one year. After that policy expired, the insurance was renewed by the issuance of the policy in suit. No ice was stored in the building during the winter of 1890-91, for the reason that the ice in the lake was not of a good quality. Ice was sold by the plaintiff from the building in the year 1890 and in the spring of 1891. At the time of the fire there was yet a small quantity of ice in store, but it was not merchantable. All of the tools used in putting up ice were stored in the building, and remained there until it was burned. The plaintiff offered the building for sale, and did not succeed in finding a purchaser; and one or two days before the fire the conclusion was reached to tear the building down, and dispose of the lumber. We have stated some of the evidence for the purpose of showing that the court correctly overruled the motion to direct a verdict. It was a proper question to submit to the jury whether the building was vacant or unoccupied for ten days before it was burned. The defendant's counsel appears to be of opinion that the storing of the tools in the building was not sufficient to show occupancy and use. This would probably be correct if the building was one intended for physical occupancy. The form of the policy in suit was intended to be used to insure all kinds of buildings. But it is apparent that it was not understood that an ice house should be occupied by the owner or a tenant in the sense that a dwelling house, a barn, or a mill or manufactory is occupied. Courts and juries are supposed to take notice that ice is stored in

winter. The fact that there was no merchantable ice in the house in October is no evidence that the building was unoccupied or vacant. If the defendant had inserted a clause in its policy that the insurance should be binding only when the house was full of ice, there might be some plausibility in the claim it now makes. But no owner of such a building would accept such a policy. It should be presumed that the defendant understood that the ice house would probably be empty in October, and in that sense would be both vacant and unoccupied. It is earnestly contended by counsel for the plaintiff that the clause of the policy under consideration has no application whatever to the risk insured by the policy. We do not determine that question. But we think that the defendant has no just ground of complaint, because the court submitted the question to the jury with instructions as to the nature of the risk, the character of the building, the purpose for which it was used, and the time of year in which it was burned, and other facts proper to be considered in determining the question. Counsel for defendant attach importance to the fact that the defendant offered the building for sale. That in no manner affected the question of occupancy. It would be a startling doctrine for courts to promulgate that offering an insured building for sale would avoid an insurance policy. The desire to sell in no manner affected the question. The building was in the identical condition as to occupancy up to the day before it was burned that it would have been if the defendant had intended to fill it with ice the next winter. The views we have here expressed find support in the following authorities: *Wood, Ins.*, 209; *Caraher vs. Insurance Co. (Sup.)*, 17 N. Y. Supp., 858; *Williams vs. Insurance Co.*, 24 Fed., 625; *Whitney vs. Insurance Co.*, 72 N. Y., 117; *Alkan vs. Insurance Co.*, 53 Wis., 136, 10 N. W., 91; *Fritz vs. Insurance Co. (Mich.)*, 44 N. W., 139. See, also, *Limburg vs. Insurance Co. (Iowa)*, 57 N. W., 626.

4. It appears that the president of the plaintiff company commenced to take down the ice houses in the morning. He was aided by several employes. During the forenoon he started a fire in or near one of the buildings for the purpose of burning up some rubbish or débris, and while away from the building at noon the fire escaped, or spread so that it communicated with the insured building, and destroyed it. It is urged that this was an increase of the risk or hazard, which avoided the insurance. The policy provided that it should be void "if the hazard be increased by any means within the control or knowledge of the assured." It has long been well settled that the mere negligence of the assured is not a defense to an action upon a policy of insurance. In *Insurance Co. vs. Law-*

rence (10 Pet., 507), it was said: "In relation to insurance against fire on land, the doctrine seems to have prevailed for a great length of time that they cover losses occasioned by the mere faults and negligence of the assured and his servants unaffected by any fraud or design." See, also, *Mickey vs. Insurance Co.* (35 Iowa, 174), and cases there cited. It is not claimed that there was any design to burn the building by setting out the fire, and the evidence shows that care was taken to prevent its spread before leaving the building for the noon hour. It is thought by counsel that the case is within the doctrine announced in *Davis vs. Insurance Co.*, 81 Iowa, 496, 46 N. W., 1073. We do not concur in that view. That was an action to recover on a policy for the insurance of corn in a crib. There were other cribs of corn in close proximity to the insured corn. The assured caused a corn sheller, operated by steam, to be brought and operated quite near the insured crib, and the fire originated from and was caused by the use of the steam engine in dangerous proximity to the insured property. It was held that this increased the hazard. The distinction between that case and this is obvious. That was the setting up of a business in dangerous proximity to the insured property. It does not appear how long the operation of the engine was carried on before the property was destroyed. If the owners of property always used the highest degree of care to protect insured buildings from fire, insurance companies would have but little business; and, if it were permissible to set up a defense in every case where negligence could be shown in burning rubbish, failing to protect flues, and generally guarding against the possibility of the destruction of property by fire, an insurance policy would be of but little value.

There are other alleged errors discussed by counsel which we do not believe to be of sufficient importance for special consideration. This whole record impresses one with the fact that this was an honest loss, that ought to have been paid years ago, and that the defense to the action is without merit, and founded upon the merest technicalities. The judgment of the district court is affirmed.

## COURT OF APPEALS OF KENTUCKY.

GERMAN-AMERICAN INS. CO. )

vs. }

NORRIS ET AL.\*

There being no law to compel "the nearest magistrate" to give the certificate required by the policy, the provision in regard to it need not be enforced. It is not the duty of an applicant to disclose a recent attempt to burn his property unless he is asked about it. Denial of liability by the company absolves the claimant from further furnishing of proofs.

NOTE.—The court admitted that "some of the courts of last resort may have announced rules of law not exactly in accord with this decision, but this decision is in accord with former decisions of this court and is supported by reason and the fundamental principles of equity."

B. T. BUCKNER, *for Appellant.*BULLETT & SHIELDS, *for Appellees.*

GUFFY, J.

This appeal is prosecuted from a judgment of the Jefferson Circuit Court, common pleas division, rendered in the suit of M. T. Norris et al., against the appellant, German-American Insurance Company. The suit was to recover \$2,500, the amount of a policy issued by the appellant to appellee Mary V. Norris on a house then being built in Warwick Villa, Jefferson County, and which was destroyed by fire in December, 1892. The appellant resisted a recovery on five different grounds: (1) That the amount of the loss was not \$2,500. (2) That the appellees had not furnished the appellant with the proofs of loss required by the policy. (3) That it had required a certificate of the nearest magistrate to the effect that he had investigated the circumstances, and believed that the appellees had honestly sustained the loss claimed; and that the certificate had not been furnished; and made like complaint of the appellees' failure to furnish bills, items, and specifications, etc., of the building, as required by the policy and demanded by appellant. (4) That there had been an attempt by some one to burn the property insured, before the policy was issued, which fact was not communicated to appellant. Appellees' contention, in substance, is that the appellant denied their claim, hence they were not required by law to furnish anything; but that they did, in fact, give the notice, furnish the proof, bills, specifications, etc., required by the policy, and that the same were accepted as sufficient, and that they furnished the magistrate's certificate as soon as it could be obtained, and that it was

\* Decision rendered, October 14, 1896.

furnished before the institution of the suit of appellees' assignees, who were the real owners of the policy, had been instituted. They also claimed that the agent of appellant knew of the burning that had happened, and that it was not known that any one had set fire to the building, or attempted to do so. The policy contains, among other things, the following: "Within sixty days after the fire, unless such time is extended in writing by this company, the insured shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes that the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." The policy also provides that it shall be void if the insured has concealed or misrepresented any material facts or circumstances concerning the insured, or the subject thereof.

We think that it clearly appears that notice of the loss and the proofs were furnished as required by the policy, and the bills and specifications of material, etc., were also, furnished, or well known to the appellant. Appellant insists very earnestly that the failure to furnish the certificate of the magistrate when required is a bar to appellees' right to recover, but we do not think that the policy, when fairly read and construed, constitutes bar to recovery. It could not be used as evidence against the appellant, and as there is no law by which the insured could compel a magistrate to act in the matter, it is not reasonable that parties would undertake to procure the certificate of an officer when there was no law by which he could be required to certify at all. Such requirement should not be enforced. It could be of no real benefit to appellant, but only an inconvenience to appellees; but the required certificate was furnished in this case before the trial, and before the filing of the suit of the appellees' assignee, which suit was consolidated with this suit. It is also contended that the policy is void by reason of the concealment of the attempt to burn the building, known to appellees, but not communicated to appellant. We do not think that any attempt to burn the house has been sufficiently shown to authorize a forfeiture of the policy; nor are we inclined to hold that it was the duty of

the appellees to disclose such attempt unless asked about it; and, besides, it is quite reasonable to suppose, from the facts and circumstances proven in the case, that Holland was well aware of all the facts and circumstances in regard to the burning or attempted burning, and, whatever may be said as to the extent of his agency, it is clear that notice to him was in law notice to appellant. Holland was the man who really made the trade with appellees, delivered the policy and collected the premium, and was in the habit of doing such business for the company. His name was indorsed on the policy. It is in proof that Strong, a confessed agent of the appellant company, looked at the proof, and said it would do. It is true, he denied so stating. It is also in proof that Thomas, the general and supreme agent for Kentucky and Tennessee, in substance denied the debt, and refused to pay; and, if that be true, appellees were not required to furnish proofs or other papers, and it was for the jury to determine as to the truth of the conflicting statements of the witnesses.

Appellant also complains of the failure of the court to give instructions asked, including a peremptory instruction to find for the defendant, and also insists that those given by the court were erroneous. The instructions given were as follows: "No. 1. The court instructs the jury that they should find for the plaintiffs in the sum of \$2,500, with interest from the 7th day of April, 1893, unless they shall believe from the evidence that the defendant did not, within 60 days after the loss complained of in the petition, deny liability under the policy sued on, and that the plaintiffs failed, within sixty days after the loss, to furnish to the defendant or its agents sufficient proofs of said loss, or that an attempt had been made to burn the house in question before the policy sued on was issued, and that this fact was unknown to the agent of the defendant when he solicited plaintiffs to insure, and that plaintiffs, or either of them, concealed that fact from said agent for the purpose of obtaining insurance. No. 2. But if they shall believe from the evidence that within sixty days after the loss complained of the defendant denied that it was liable under the policy sued on, then it was not necessary for the plaintiffs to furnish the defendants with proofs of loss. No. 3. If the plaintiffs did not, within sixty days after said loss, furnish to the defendant sufficient proof thereof, then the law is for the defendant, and so the jury should find, unless the defendants demanded other and further proof that it was within the power of plaintiffs to furnish, and plaintiffs did furnish, the further proof demanded within a reasonable time after the same was demanded. No. 4. If the jury shall believe from the evidence that an attempt

was made to burn the house in question before the policy of insurance sued on herein was issued, and that plaintiffs knew thereof, and that the agent of the defendant who solicited the insurance (Holland) did not know of the said attempt when the policy was issued, and the plaintiffs concealed that fact from him for the purpose of obtaining insurance, then the law is for the defendant, and the jury should so find." It seems to us that the foregoing instructions are as favorable to the appellant as it was entitled to, and that those asked for by it were properly refused; nor do we think that the court erred in the admission or rejection of testimony. It may be that some courts of last resort have announced some rules of law not exactly in accord with this opinion, but this decision is in accord with the former decisions of this court, and is supported by reason and the fundamental principles of equity: *Insurance Co. vs. Owens* (Ky.), 21 S. W., 1,037; *Insurance Co. vs. Spiers*, 87 Ky., 285, 8 S. W., 453; *Insurance Co. vs. Wigginton*, 89 Ky., 330, 12 S. W., 668; *Insurance Co. vs. Downs*, 90 Ky., 236, 13 S. W., 882.

It may be remarked, in passing, that it nowhere appears that appellant was in any respect injured or damaged by any of the alleged failures of appellees to furnish any of the proofs, certificate, bills, or specifications complained of, and it was the province of the jury to weigh the testimony, and render a verdict accordingly; and, no erroneous ruling of the court to the prejudice of appellant's substantial rights having occurred, the judgment of the court below must be affirmed.

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## SUPREME COURT OF MINNESOTA.

SCHULTZ ET AL.

vs.

CITIZENS' MUT. LIFE INS. CO.\*

1. The words "legal representatives" in a life-insurance policy construed as meaning heirs or next of kin, and not executors or administrators.
2. *Held*, That the articles of association of the defendant (a corporation organized under Laws 1885, c. 184) authorize mortuary assessments on the policyholders only upon death losses that have already actually occurred.

HAYNES & CHASE, *for Appellant*.

C. R. ST. JOHN and FRED W. REED, *for Respondents*.

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\* Decision rendered, Dec. 7, 1894. Syllabus by the Court.

MITCHELL, J.

The plaintiffs are the widow and children (heirs at law) of August C. Schultz, who died in July, 1892. The defendant is a corporation organized under Laws 1885, c. 184, "for the transaction of life-insurance business on the assessment plan." This is an action to recover on a policy for \$2,000 on the life of August C. Schultz, issued in November, 1886.

1. The first question is, to whom is the policy payable,—to the heirs or to the personal representatives of the insured? By the terms of the policy, the application for the insurance is made a part of it. In this application, in response to the following interrogatories, the insured gave the following answers: Question. "Name in full of the person or persons to whom you desire the money paid in case of death?" Answer, "Legal heirs." Q. "Relationship?" Ans. "Wife, if living." Q. "Has the above person any interest in the life of the person insured?" Ans. "Yes." Then at the end of the application is found the following: "Person for whose benefit policy is taken?" "Legal representatives." The policy itself provides "that the amount shall be payable to and for the sole use of his legal representatives." Although perhaps not entitled to great weight, in view of the nature of the corporation as expressed in its articles of association, yet it is worthy of mention that its by-laws state that "the object of this company shall be to insure its members, and to secure pecuniary benefits to widows, orphans, families, or heirs of deceased members." Notwithstanding the loose, inaccurate, and apparently contradictory use of terms in the application and policy, we are satisfied that the heirs (including the widow) of the deceased are the beneficiaries of the policy, and that the words "legal representatives," as therein used, must be construed as meaning heirs or next of kin, and not executors or administrators. It is always permissible to construe these words in that way, especially in wills and policies of life insurance, wherever it is apparent from the context or subject-matter that they were used in that sense. They will be construed in that way more readily in policies of life insurance than in almost any other kind of instrument, for the reason that such insurance is very commonly intended as a provision for the family of the insured. A controlling fact in this case is that, whenever the words "personal representatives" are used, they have reference, not to the persons entitled merely to receive the money, but to those for whose "benefit" or "use" the policy is taken or the money is payable. It is not to be supposed that the insured intended his executors or administrators personally to be the beneficiaries of the policy.



2. The only other question is whether there had been a forfeiture of the policy during the lifetime of the insured, by reason of the nonpayment of "a mortuary assessment" claimed to have become due and payable April 1, 1892. The amount of this assessment (\$7.31) was on April 6th, transmitted by mail by the insured to the defendant, and received by it April 13th, but was returned on the ground that the payment was too late, and that the policy was already forfeited. The policy itself contains no provision for a forfeiture for nonpayment of such assessments, and contains no reference to the by-laws of the association; but in the application it is stipulated "that the insurance is applied for and will be accepted subject to the conditions contained in the policy which may be issued on this application, the provisions of the articles of incorporation, and the by-laws of the company"; also, that the insured "will always promptly respond to all demands made upon him according to and by virtue of the by-laws and articles of incorporation of the company." The defendant contends that by reason of these references, as well as by virtue of the membership of the insured in the company, the by-laws became a part of the contract of insurance, and that by their provisions the policy was forfeited by reason of the nonpayment of the mortuary assessment on April 1st. Much of the briefs of counsel is devoted to the discussion of these two questions, upon the latter of which they discuss at some length the construction of the various provisions of the by-laws, which are quite long, and the meaning of which is not always entirely clear; but we find no occasion to consider either of these questions, for the reason that we are satisfied that there was no valid mortuary assessment. Article 8 of the articles of association provides that "upon every death loss an assessment may be made on the policyholders in the company, in such amounts, and under such regulations, as shall be prescribed in the by-laws." In view of the further provision that 75 per cent collected on such assessment shall be held for the payment of death losses, and the other 25 per cent shall go into the reserve fund to supplement any deficiency that may arise in the payment of death losses, it must be conceded that in making an assessment the company is not limited to the amount necessary to pay the death losses that have already occurred; yet it is perfectly clear that assessments can only be made for and upon death losses that have previously occurred, and not merely on the basis of losses which may be anticipated in the future. The provisions of the by-laws are: "Each policyholder shall pay subsequent quarterly mortuary premiums on each \$1,000 of insurance carried in accordance with the rate at the actual age attained in the following table [table No. 2].

Mortuary premiums \* \* \* shall be due and payable ninety (90) days from date of policy, and every ninety (90) days thereafter." In short, the scheme of mortuary assessments (called "premiums") provided for in the by-laws is a fixed and absolute assessment every 90 days, the amount of which is determined solely by the age of the insured and the amount of his policy, without any regard to the number of death losses that have occurred, or whether any at all have actually occurred. The evidence shows conclusively that the mortuary assessment, for nonpayment of which a forfeiture is claimed, was made solely on this basis. However much more businesslike it may be to have the money on hand to pay losses before they occur, yet it is perfectly clear that no such system of assessments as adopted in this case is authorized by the articles of association. That the association had for years been demanding payment of such assessments, and that the insured had paid them, is not material. The fact that one party has been making illegal demands on another, and that the latter has heretofore complied with them, imposes no legal duty upon him to continue to comply with them. Therefore, whether the reasons given by the trial judge for his decision were right or wrong, he was correct in holding that the policy was not forfeited. In closing, we think we may be excused from digressing to say that, while we do not mean to be understood as at all characterizing the defendant association, of which we know nothing except from the record, yet we have no patience with the prolix, obscure, and involved provisions and conditions which so many so-called co-operative, life, endowment, casualty insurance, and other similar associations usually incorporate into their policies and by-laws. The patrons of such associations are largely composed of people of limited means, neither astute lawyers nor experienced business men, whose object is to make moderate provision for their families in case of death. Whether intended to have such result or not, such provisions and conditions are calculated to mislead the insured, and entrap him into some act of omission or commission that will work a forfeiture of his insurance. It would certainly be a great boon to the public if there could be devised legislative forms of contracts and rules for all such associations, couched in clear, concise, and intelligible language, and to or from which the associations could neither add nor subtract. Order affirmed.

## SUPREME COURT OF ILLINOIS.

PHENIX INS. CO. }

vs. }

HART.\*

The insured house stood on a forty-acre tract, and there were three other tracts, making in all one hundred acres. In the policy the house was described as situated on a one-hundred-acre tract of land. Insured mortgaged the house and its forty acres, and obtained written endorsement from the company consenting. He also separately mortgaged the other sixty acres and informed the local agent, who told him that it was only necessary to get consent for the forty acres on which the house stood. Two years thereafter the house burned. *Held*, Not such a lien or encumbrance as would void the policy. *Held*, That in this state (Illinois) the decisions are uniform; that notice to the agent at the time of the application for insurance of facts material to the risk is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent, and that the company is estopped from asserting a forfeiture. The agent of the company, and therefore the company, knew of the second mortgage.

JOHN A. BELLATTI (Elbert H. Gary, of counsel), *for Appellant*.

MORRISON & WHITLOCK, *for Appellee*.

SHOPE, J.

The policy sued on insured appellee against loss or damage by fire upon his brick dwelling, which was represented to the company as being situated upon a 100-acre tract of land described, and owned by assured. That the house was destroyed by fire during the continuance of the policy, and due proof of loss was made, and other provisions of the policy complied with, by the assured, is not questioned. The defense insisted upon was that there had been a forfeiture of the condition of the policy that, "if the property shall hereafter become mortgaged or incumbered" without consent of the company indorsed thereon, then the policy should be null and void. It appears that the policy was dated and in force September 30, 1886, and that on September 14, 1887, the assured, joined by his wife, executed a mortgage to one M. T. Layman, to secure \$1,500, payable in three years, at 8 per cent interest per annum, which was duly acknowledged and recorded, upon 60 acres of the 100-acre tract upon which the house was represented as being situated. The 100 acres consisted of an 80-acre tract and two adjoining 10-acre tracts. The house was situated on the north 40 of the 80, and the mortgage was on the south 40 and the two 10-acre tracts. In the condition of this record, we are not called upon to determine

\* Decision rendered, April 2, 1894.

whether the execution of such mortgage, in the absence of showing diminution or depreciation thereby in the value of the house insured, was a breach of the condition of the policy or not. The fourth plea, after setting up the condition, alleged a breach thereof by mortgaging the entire premises to Layman, etc. The fifth plea alleged as a breach of the condition the execution and delivery of the mortgage upon the 60 acres of the 100 acres upon which the house was located. Upon each of these pleas issue was taken, and, by the second and third replications, it is averred that the defendant, with due notice of said mortgage, waived the forfeiture in said pleas mentioned of said condition of the policy. The only difference in the replications is that the second pleads a waiver generally, while the third sets out the facts relied upon as constituting the waiver, and that thereby the defendant company waived the forfeiture in the pleas mentioned, etc. The case was tried upon this issue, and we need not notice the pleadings further, as the question of whether there was a waiver of the forfeiture is directly presented in the rulings of the court upon instructions. By the judgment of the trial and appellate courts every controverted question of fact material to sustain the case of the plaintiff below has been settled in his favor and adversely to appellant, and we need examine the facts only so far as necessary to determine whether the court erred in the instructions given and refused. If other errors have intervened, they have been abandoned in argument in this court, and need not be considered.

There was evidence tending to show that appellant was a foreign insurance company, with its principal office, for this state, in Chicago. That one B. R. Upham was the local agent of the defendant company at Jacksonville, and had been acting for the company continuously as its agent from 1873. This policy, however, was not written by Upham, but by another solicitor and agent of the company. About the time of the making of the mortgage to Layman, appellee, through said Upham, secured a loan upon the 40 acres upon which the house was situated of \$2,000 from one Metcalf, and executed his notes and mortgage on said 40-acre tract to secure the same; said loan being consummated about two weeks after the making of the Layman mortgage upon the other 60 acres. At that time appellee took his policy to Upham, and delivered it into his possession, for the purpose, as they both agree, of having it forwarded to the Chicago office for the consent of the company to the making of this mortgage to Metcalf. That appellee then told Upham of the mortgage to Layman upon the 60 acres, and asked him if consent of the company was necessary to that mortgage to preserve

the validity of his insurance, and Upham replied that it was only necessary on the 40 acres the house stood on. By an arrangement between Upham and appellee, the policy was assigned to Metcalf as additional security to the loan. The policy was taken by Upham, forwarded to the Chicago office by him, and consent to the Metcalf loan indorsed upon it, returned to Upham, and by him delivered to Metcalf. The jury were justified in finding that Upham was held out to the public as the local agent of the company for the transaction of its business of insurance, and that appellee acted in reliance upon his declarations and statements as such agent. Under this state of facts, which the evidence tended to establish, the court instructed the jury that if Upham was the agent of defendant in the business of insurance of such property as it insured for plaintiff, and that the policy was delivered to him by plaintiff, showing on its face that the lands named in the policy consisted of a 100-acre tract, and that plaintiff then told him of the mortgage to Layman, and that Upham then assured plaintiff that there need be no permit or consent of the company indorsed on the policy as to said mortgage, because it was not on the 40-acre tract on which the house stood, there was a waiver of forfeiture of the condition named; and refused to instruct the jury that the mortgaging of the 60 acres to Layman, without having the consent of the company thereto indorsed on the policy by the general agent at Chicago, rendered the policy void, etc. That appellee acted in good faith, and endeavored to keep the policy in force, does not admit of question. There could have been no other purpose in delivering the policy to Upham to obtain consent of the company to the making of the Metcalf mortgage. And it is equally clear that appellee relied upon his policy as indemnity against loss, and, but for the representations of Upham, would either have procured the consent of the company to the Layman mortgage or ceased to so rely upon it. It is not seriously questioned that, if the company is bound by the knowledge and conduct of Upham, it is estopped from insisting upon the forfeiture. It cannot be contended that the company, with knowledge of the execution of the mortgage to Layman, could retain the premium, treat the policy as in force, knowing that the assured was relying upon its validity, until a loss occurred, and then insist upon the execution of the mortgage as a breach of the condition of the policy. And especially would this be so where, upon full knowledge of the fact by the company, the insured was induced to rely upon the indemnity afforded by the policy by the affirmative representations of the company that no indorsement of consent to the execution of the mortgage was necessary to the continued validity of the policy: *Insurance Co. vs.*

Schettler, 38 Ill., 166; Insurance Co. vs. Maguire, 51 Ill., 342; Insurance Co. vs. Fahrenkrug, 68 Ill., 463; Insurance Co. vs. Ward, 90 Ill., 545; Wood, Ins., 1163, and cases in note 2. The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this state, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent: Insurance Co. vs. Wright, 22 Ill., 473; Insurance Co. vs. Chestnut, 50 Ill., 116; Insurance Co. vs. Ives, 56 Ill., 402; Insurance Co. vs. Fish, 71 Ill., 620; Insurance Co. vs. Wells, 89 Ill., 82; Insurance Co. vs. Luttrell, id., 314; Insurance Co. vs. Clipp, 93 Ill., 96; Insurance Co. vs. McKee, 94 Ill., 494; Insurance Co. vs. Stocks (not yet officially reported) 36 N. E., 408. Whether facts occurring subsequently to the issuance of the policy, and coming to the knowledge of the agent, will charge the principal, has been the subject of less frequent adjudication. The case of Insurance Co. vs. Stanton (57 Ill., 354), is, in many respects, similar to the case at bar. There the policy contained a clause rendering it void in case of alienation, without an assignment of the policy duly confirmed by the board of directors of the company, and indorsed on the back of the policy of the secretary thereof. A sale was made, of which the local agent was notified, and his advice asked as to the proper course to pursue. He replied that the policy would remain good until it could receive the proper indorsement at the home office. Thereupon the sale was consummated, but, before the consent was in fact given by the company, the building was destroyed by fire. The court held the company bound by the act of its agent, and that it was estopped thereby from insisting upon the forfeiture. In Insurance Co. vs. Cary (83 Ill., 453), the goods had been removed from the building in which they were at the time they were insured, and the court says that the company might well treat the removal of the goods as a breach of the warranty implied from a description of the location of the goods, and declare the policy forfeited. After the goods had been removed to the place where they were subsequently destroyed, the company's local agent was notified of the removal, and asked to consent to carry the risk in the new location, and, as it was found, consented. The notice to the agent is there treated as notice to the company, and the company retaining the premium, and not electing to cancel the policy, and thereby enable the insured to reinsure, is held liable under its policy. It is said in May on Insurance (section

143) that "the tendency of the courts generally is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy, and bind the company by such waiver, and that his promises and acts, both of omission and commission, representations, statements, and assurances, made within the scope of his agency, and after knowledge of a breach of condition or of the inaccuracy of the statement in the application, if relied upon by the assured, who is himself without fault, may be set up by the insured, either on the ground of waiver or of estoppel, in answer to a claim of forfeiture." See cases in note 2, 11 Am. & Eng. Enc. Law, pp. 339, 340. It is unnecessary to extend this opinion by the citation of authority showing that the public are authorized to deal with agents of insurance companies upon all subjects within the apparent scope of their authority, the rule being that one clothed with power to act for them at all is treated as authorized to bind as to all matters within the scope of his real or apparent authority.

It is, however, insisted that, by the terms of the policy, a waiver of its conditions could only be made by the general agent at Chicago, and that, therefore, waiver of the condition by the local agent would not be binding upon the company, and that appellee, having notice of the stipulation, could not have been misled to his prejudice by the conduct of Upham. That he was thus misled, if the company be now permitted to insist upon the nonindorsement of consent to the Layman mortgage as a cause of forfeiture, does not, under the proof in this case, admit of question. He applied to the agent, who was clothed with apparent authority to transact the business of the company, and contract for it in respect of insurance, for information as to whether such indorsement was necessary or not. The agent was about to send forward to the company the policy, then delivered to him, to obtain the indorsement of consent for the Metcalf mortgage upon the 40 acres upon which the house was situated, for the sole purpose of keeping the policy in force; and, but for the information given by the agent, that no indorsement of the Layman mortgage on the 60 acres of land was necessary, it may well be presumed that like consent would have been asked and given as to that mortgage. And, in consequence, the insured relied upon the validity of the policy, without question on the part of the company, until after the loss of the property by fire two years subsequently. The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago was inserted for the benefit of the insurer, and, like any other clause or condition of the policy, might be waived by the company. As we have seen, notice

to the agent of matters falling within the general scope of his apparent authority is notice to the principal, and the company may be estopped from asserting a forfeiture of the policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it has failed to exercise, but instead has treated the policy as in force. Here the agent of the company, and therefore the company, knew of the Layman mortgage. At the time only about one-fifth of the premium had been earned. It knew, not only by the statements of the agent, but by the application for indorsement of consent to the making of the Metcalf mortgage, that appellee was relying upon the policy. Yet it failed to claim a forfeiture of the policy, retained the premium, and permitted the policy to remain apparently in force for two years, and until the destruction of the property by fire, when for the first time it seeks to assert forfeiture. Independently of whether the local agent was authorized to waive the indorsement of consent upon the policy, the company, being chargeable with notice of the fact that the assured was relying upon the policy as valid insurance, and having failed to exercise its right of forfeiture until a cause of action accrued upon the policy, must be held to have waived the necessity of such indorsement of consent. It would be most inequitable to permit the company to insist upon the forfeiture after the fire when, by its silence and apparent acquiescence in the validity of the policy, the assured had been led to rely thereon, and prevented from obtaining insurance elsewhere. We are of opinion that the company was estopped from insisting upon the forfeiture set up in its pleas, and, while the instructions given may not have been technically correct, they stated the law applicable to the facts of the case with substantial accuracy. The judgment of the appellate court will be affirmed. Affirmed.

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## SUPREME COURT OF APPEALS OF VIRGINIA.

VIRGINIA FIRE & MARINE INS. CO. }

vs.

THOMAS.\* }

W. A. T. & Co. consisted of T. and the wife of S., who acted as his wife's agent and worked about the shop. Mrs. S. died and the insurance ran on for several months without objection on the part of the company, the business continuing the same practically as before and the policy being renewed in the meantime. *Held*, Not such a change of title, interest or ownership as to avoid the policy.

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\* Decision rendered, Mar. 29, 1894.



Insurance on a tin shop covers the making of tin cans and the soldering of strips of tin for roofing, this being the obvious daily work of a tin shop.

The oft-decided points were repeated in this case; that an insurance contract is to be considered as a whole, not literally nor severely as to either side, but accurately so as to carry into effect the real purpose and understanding of the parties; but all conditions involving forfeitures as well as all exemptions will be considered strictly and most favorably to the assured.

Also, in a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, the one is to be adopted which is most favorable to the insured, and in case of doubt as to the meaning of terms employed by an insurance company they are to be considered most strongly against the insurer.

W. W. & B. T. CRUMP, G. D. GRAY, and HILL & JEFFRIES, for Plaintiff in Error.

RIXEY & BARBOUR and J. C. GIBSON, for Defendant in Error.

LACY, J.

This is a writ of error to a judgment of the Circuit Court of Culpeper County, rendered on the 24th day of October, 1893. The action is upon a policy of insurance, trespass on the case in assumpsit for \$3,250 for a loss incurred by fire. The defense is that no such contract was made as that sued upon; fraud in the procurement of the fire by which the property was burned; no effort made to save the property by the plaintiff, and the efforts of others prevented by the false alarm of danger made by the plaintiff; increase of risk after the insurance by keeping gunpowder, and the buildings used for manufacturing purposes; the loss claimed greater than the interest of the assured; false estimates of the value of the property furnished by the assured; misrepresentations and concealment of material facts in reference to the value of the property and the interest of the assured, made in the application for insurance; no sufficient proofs furnished, as required by the policy; no proofs of loss furnished by the plaintiff; change of interest, title, possession, and occupancy, after the policy issued, without the consent of the defendant indorsed on the policy, as required thereby; want of interest of the plaintiff in the property; other contracts of insurance procured without the consent of the company indorsed on the policy, as required thereby; misrepresentation in the proofs of loss in reference to the value of, title to, interest in, and ownership of the property destroyed, and as to the origin of the fire; running the manufacturing department at night, without the consent of the defendant indorsed on the policy; plaintiff not the sole, absolute, and unconditional owner of the property insured, and destroyed by fire; failure of the plaintiff to comply with each and every one of the conditions precedent set forth in the policy of insurance sued on.

The policy was issued to W. A. Thomas & Co., a mercantile firm doing a tinning business in the town of Culpeper. This firm was

composed of the said W. A. Thomas and one Mrs. Ellen S. Stringfellow, a married woman, whose husband, George F. Stringfellow, was, by the agreement between the parties forming the copartnership, to act for her as her agent under the contract, and render services in the business as occasion might require. The insurance company was represented by local general agents stationed at Culpeper. The insurance was procured by these agents, who were familiar with the business, and well acquainted with the parties concerned. The business insured was a general tin, tinning, and stove business. The fire occurred late in the night. The defendant in error, W. A. Thomas, surviving partner, resided in the town, and was at work late at night in the place of business, and had shut up and retired to bed at his home in the town some hours before the fire occurred. When called up, he went to the store, where a large crowd was already assembled, and attempted to enter the front door, but retired before the smoke and fire. Subsequently he opened a window, and went in and got his books out of the safe, and saved them, it is said at great personal risk to himself. A cry of gunpowder being raised (it does not appear by whom), parties whose property adjoined procured axes and broke into the hardware department and brought the gunpowder out. An effort is made, on the cross-examination of Thomas, to indicate the grounds of suspicion of criminal conduct on his part in the fraudulent procurement of the fire. He was asked if he did not say "All right" when first informed of the fire; if he did not do an unusual and suspicious thing in being down there until nine or ten o'clock that night, with his furnaces running; and if that night, or that week at least, was not the beginning of such night work; and if two of his insurance policies did not expire next day at 12 m.; and if he was not greatly pressed just then to meet money-demands pressing in on him in the shape of drafts, orders, and demands for liquidation of unpaid bills. But these things were not established to the satisfaction of the court and jury, and upon the demurrer to the evidence the jury fixed the recovery subject to the judgment of the court, which was rendered for the plaintiff.

The chief defense, and most relied on, is that there was a "change of interest, title, possession, and occupancy, after the policy issued, without the consent of the defendant indorsed on the policy." It appears that the firm of W. A. Thomas & Co. had continued to run the business as before until the fire; and it is not contended that there was any sale or transfer making any change in the ownership or in the parties in possession. But the circumstance to which we are pointed to sustain this contention is that Mrs. Stringfellow died

before the fire occurred, in the month of March of that year; and by will left her property for life to Mr. George F. Stringfellow, her husband, charged with the support of her infant child, and, after his death, to the child, providing, however, that he continue the business as heretofore, as he might deem best; and he had continued to do this, as we have said, and W. A. Thomas & Co. continued the business as it was before, except additional investments in stock and merchandise, as their business views suggested; and there was no actual change in the personnel of the force at work and controlling the business, in possession and occupancy. The change in title caused by the death of Mrs. Stringfellow is what is relied on under this assignment to defeat this recovery; and to decide this we must construe the language of the policy under which this claim is set up, which is as follows:—

If there be any change in the title or interest of the assured in or to the property in any way, or by sale or mortgage or other incumbrances, or if the title or interest of the assured is less than an entire, absolute, unconditional, unincumbered, fee-simple ownership, unless, in last event, notice thereof before loss or damage be given in writing by the assured to the company, and it accepts the same in writing herein.

The policy in question must be construed according to its terms, and the evident intent of the parties is to be gathered from the language used; and the court cannot extend the risk beyond what is fairly within the terms of the policy. New conditions cannot be added by the court, but the rights of the parties must stand upon the contract as made. It is to be construed as a whole; not literally nor severely as to either side, but accurately, so as to carry into effect the real purpose and understanding of the parties. But all conditions involving forfeitures, as well as all exemptions, will be construed strictly, and most favorably to the assured; that is, most strictly against the party for whose benefit they are inserted; that is, that such contracts are to be construed as other contracts are construed, and that the exceptions contained in them as provisos shall be construed most strongly against the parties for whose benefit they are inserted. Its language is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded. Full legal effect should always be given to it, for the purpose of guarding the company against fraud and imposture. Beyond this it has been said we would be sacrificing substance to form—following words rather than ideas. And, in a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, it is now well settled that the one is to be adopted which is most favorable to the insured; and in case of

doubt as to the meaning of terms employed by an insurance company they are to be construed most strongly against the insurer.

These general principles, the result of the decided cases, and to be found in the text-books on the subject, being borne in mind, we will briefly consider the clause in question. The intention is to protect the company against unknown risks. The contract of insurance is like other contracts made between known and contracting parties. The contract being one of hazard, and largely of trust and confidence, the person contracted with is deemed of such vital importance that it is expressly provided that the same shall not be assigned without the consent of the company. The person, and all that is involved in the person, his estimated character and known habits, may affect the risk in no small degree, and a stranger is not to be brought in without the consent of all parties. The interest must remain entire and absolute, or the safeguards arising from the ownership and uninsured interest may be broken down. In this case there has been no sale or transfer, or change in the persons in possession. Mrs. Stringfellow, one of the partners, died, and the business, by operation of law, passed to one surviving partner for the settlement of the business of the concern. By the testator's direction, and the consent of all parties interested in the business, the affairs went on, buying and selling, as before. It is conceded that, if the fire had occurred the next day after the death of the deceased partner, it would not have impaired the policy; and the continuance of the business for several months does not alter the question, as there was no objection, but a positive approval, on the part of the company, by a renewal under these precise circumstances. We are not without the aid of judicial construction and decision upon this question. In the late case of *Insurance Co. vs. Vaughan* (88 Va., 835), the question arose where one partner sold out to the other; and it was held, by the weight of authority and the better reason, not to violate the provision as to changes of title or possession, and not to avoid the policy. See that case and the authorities cited, where this clause was held to mean the transfer by the insured to third persons. If, after the insurance is obtained and the risk assumed, the title to the property insured is transferred or changed without the permission of the insurer, it will avoid the policy. "But if the change be a mere succession of the widow and heirs of the assured, who resided in the house at the time of his death, this is not such a change or transfer of the title as avoids the policy:" *Insurance Co. vs. Kinnin*, 28 Grat., 99.

This is the main question in the case, but there are others which appear to be relied on also. It is claimed that the company insured

a tin shop, and the policy contained a provision against a manufacturing establishment, and that the making of tin cans and soldering strips of tin for roofing to be placed upon houses was a violation of the policies. This would be a stick in the back, indeed. The obvious daily work of the tin shop, patent to everyday observation, was the business insured. To hold that the work of this sort violated the clause in question would not be to effectuate the contract of parties, but to circumvent it. There are other questions still which have been mentioned, which appear to have been rightly decided by the trial court. The question of fraud and deceitful conduct was left to the jury, and by them decided, and we perceive no evidence in the record to sustain these charges. Upon the whole case we are of opinion to affirm the judgment complained of, rendered herein by the Circuit Court of Culpeper County.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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KEENE

vs.

NEW ENGLAND MUT. ACCIDENT ASS'N.\*

In an action on an accident policy, it appeared that assured undertook in the daytime to cross railroad tracks at a station at a place where they were commonly crossed by people with the permission of the company, and that he was struck and killed by detached freight cars which had been "kicked" along the track, the sight of which was out off by an umbrella he was carrying to protect himself from rain. *Held*, That the assured's acts were not necessarily a violation of conditions in the policy providing that no claim under it should be valid in case of death resulting from "any voluntary exposure to unnecessary danger, hazard, or perilous adventure," and requiring the assured "to use all due diligence for personal safety and protection;" and the question of such violation was for the jury.

Plaintiff's intestate was employed in Boston as a salesman in a wholesale leather house, and on the morning of June 4, 1891, went to Brockton, Mass., by cars, arriving there about 9 A. M. He left the cars on the side nearest the station, and, as it was raining, opened his umbrella, passed in front of the engine attached to the train, to the platform No. 2; and as he stepped from platform No. 2 upon the railroad track to the east, in order to cross the track to the street known as "Railroad Avenue" upon the east of the railroad tracks, was struck by the first of two freight cars, which had been kicked

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\* Decision rendered, March 28, 1894. From *Northwestern Reporter*.

VOL. XXVI.—26.

to the north from the rear of a train consisting of an engine and several freight cars, which had pulled out to the south from the station at the time of the arrival of the passenger train, and which, at the time the plaintiff was struck by the detached cars, was standing still upon the track, at some distance south. The detached cars were in charge of a brakeman, who was on the top of the car which struck plaintiff's intestate, and this brakeman called out to the plaintiff's intestate to "look out," just before he was struck, but not in time to prevent the accident. The jury viewed the premises, and the location of the trains, cars, and engines was pointed out to them before the trial. At the time of the accident the wind was southeast, the passenger engine was blowing off steam, and the plaintiff's intestate was about five feet back from the forward trucks of the passenger engine when struck first by the freight cars.

E. M. JOHNSON and JOHN W. KEITH, *for Plaintiff.*  
RANNEY & CLARK, *for Defendant.*

ALLEN, J.

The defendant insured the deceased "against personal bodily injuries effected \* \* \* through external, violent, and accidental means, within the intent and meaning of the provisos and conditions" recited in the policy. The provisos and conditions material to be considered are as follows: "No claim shall be valid under this certificate when the death or injury may have been caused by dueling, fighting, wrestling," or "may have happened in consequence \* \* \* of racing of any description, or of any voluntary exposure to unnecessary danger, hazard, or perilous adventure." "The certificate holder is required to use all due diligence for personal safety and protection." "For injuries received while \* \* \* walking or being on the roadbed or bridge of any railway, the certificate holder or his beneficiary shall be entitled only to the indemnity or death loss provided in the classification of this association for railway employees insured to cover such risks."

Death through external, violent, and accidental means having been proved, the burden of proof was on the defendant to show a voluntary exposure to unnecessary danger, or a want of due diligence: *Freeman vs. Insurance Co.*, 144 Mass., 572, 12 N. E., 372; *Badenfeld vs. Accident Ass'n*, 154 Mass., 77, 27 N. E., 769. The question is not the same as would arise in an action against the railroad company to recover damages for the accident which caused the death. In such action, the relation of the deceased to the railroad company would probably be that of a bare licensee, to whom the railroad company owed no duty except to abstain from reckless

and wanton conduct: *Redigan vs. Railroad Co.* 155 Mass., 44, 28 N. E., 1133, and cases there cited. Moreover, there may have been such a want of positive care on his part, with reference to approaching cars, as would prevent a recovery; the burden being upon the plaintiff in such action to prove due care affirmatively. In the present action the burden of proof is different, and the questions of due diligence and of voluntary exposure to unnecessary danger arise, not upon general principles of the law of negligence, but upon the construction of the contract of insurance against accidents. Clearly, a contract of indemnity against accidents should be construed with more liberality to the assured than the rules of common law if the same person seeks under them to put the responsibility for his accident upon another. Looking, then, at the policy with reference to the subject of the contract of insurance, the first provision relied on in defense is against "any voluntary exposure to unnecessary danger, hazard, or perilous adventure." A voluntary exposure to unnecessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. The policy recognizes that there are some dangers which it is necessary to encounter; as, for example, where there is a chance to rescue persons in deadly peril. See *Tucker vs. Insurance Co.*, 50 Hun, 50, 4 N. Y. Supp., 505. There are other dangers which one usually need not encounter if he knows of their existence long enough beforehand,—as, for example, the danger from a runaway horse or a coming car; and a merely inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious, intentional exposure,—something which one is consciously willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence. Great negligence will not necessarily defeat a fire policy: *Johnson vs. Insurance Co.*, 4 Allen, 388. And in the present policy against accidents, upon the evidence, although the jury might well find a voluntary exposure to danger, we cannot say that it would be bound as matter of law to do so. It did not appear that the deceased was a trespasser. The testimony tended to show that it was a common thing for persons to cross the railroad tracks all along there where the deceased was crossing. Notices were indeed posted up by the railroad company to prohibit it, but no other attempt was made to stop the practice. Two witnesses testified that from 1,000 to 2,000 persons a day crossed there, and this habit of so crossing had continued for years. This would go to show that the deceased was not a trespasser. The deceased was not

attempting to walk upon the track, or to remain upon it; but he was simply crossing at a quick pace. He was hit, not by an engine, with its noise, but by a detached car which had been kicked along there, the sight of which was cut off by his umbrella. Construing the clause in the policy against "voluntary exposure to unnecessary danger" with reference to the subject of the contract, and also in connection with the other provisions against intentional acts which are found in the same sentence, the act of the deceased, as described by the witnesses, was not necessarily to be deemed a violation of it.

The next provision is: "The certificate holder is required to use all due diligence for personal safety and protection." This phrase is very general, and certainly it does not mean that the assured must guaranty himself against accidents; nor do we think it means that he shall not recover for any accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. Due diligence or care is sometimes said to be reasonable diligence or care, and reasonable care is sometimes said to be the ordinary care of prudent persons. It is not a precise term, but a relative one. In an accident policy it would not be reasonable to hold that this clause requires of the assured a higher degree of diligence than prudent persons are accustomed habitually to use. Under such a construction, few persons would care to have an accident policy. The due diligence required is not inconsistent with inadvertence, nor with running such risks as prudent and cautious persons habitually run; and, upon the evidence, the act of the deceased was not necessarily to be deemed a violation of this provision. This conclusion is made the more clear by a reference to the later provision which allows a reduced recovery for injuries received while walking or being on the roadbed or bridge of a railway. If walking on the roadbed of a railway will not defeat a claim under the policy, it is not to be supposed that the contract means that merely crossing a railroad track should necessarily have that effect. Whether merely crossing the railroad should in the present case reduce the plaintiff's claim to the lower classification we do not determine, as this question was not presented by the ruling at the trial, and has not been argued by the defendant. See, as to this, *Duncan vs. Accident Ass'n* (Super. N. Y.), 13 N. Y. Supp., 620.

The defendant has strongly relied on *Tuttle vs. Insurance Co.*, 134 Mass., 175. In that case the deceased was, on a dark evening, running along on a railroad track, and was killed by a train which came up from behind. He made the railroad track his path for travel, and did it unnecessarily. A reference to the original papers



in the case shows that it appeared in evidence that the railroad station to which he was going was on the same side of the tracks as the hotel from which he started, and that it could be reached from the hotel by public ways, without crossing any tracks. A plan was also referred to which (speaking from present memory) showed that the convenient and natural mode of going from the hotel to the station, especially in the evening, was by the public ways. Under these circumstances it was held that the act of the deceased in going upon and along the railroad track on a dark evening, when trains were coming and going over it, was an exposure to an obvious and unnecessary danger, and was not using all due diligence for personal safety and protection. That case in its facts and circumstances was quite different from the present. For these reasons, in the opinion of a majority of the court, the plaintiff was entitled to go to the jury upon the evidence. Exceptions sustained.

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## SUPREME COURT OF NEW HAMPSHIRE.

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BARNARD

vs.

PEOPLE'S FIRE INS. CO.\* }

W. B. CLEMENT, J. F. BRIGGS, and O. E. BRANCH, *for Plaintiff.*D. CROSS and R. E. WALKER, *for Defendant.*

DOE, C. J.

"In any suit \* \* \* against an insurance company to recover for a total loss sustained by fire, \* \* \* the amount of damage shall be the amount expressed in the contract as the sum insured, and no other evidence shall be admitted on trial as to the value of the property insured. \* \* \* Nothing in this section shall be construed to prevent the admission of testimony to prove over-insurance fraudulently obtained." Laws, 1885, c. 93, § 2. The loss in this case being total, and there being no "over-insurance fraudulently obtained," the plaintiff is entitled to "the amount expressed in the contract as the sum insured," and his statement of value in his proof of loss is not a defense. Judgment on the verdict.

Blodgett, J., did not sit. The others concurred.

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\* Decision rendered, March 13, 1891.

## SUPREME COURT OF ILLINOIS.

MECHANICS' INS. CO., OF PHILADELPHIA, }

vs. }

HODGE.\*

1. A provision in a policy that differences between insurer and insured shall, at the request of either party, be submitted to arbitration, does not justify the insurer, after the property has been damaged by two different fires, in demanding that the loss caused by the first fire be submitted to arbitration, since the damage done by both fires constitutes but one loss, to be settled in one proceeding.
2. A condition avoiding a policy if the insured fail to notify the insurer of any increase in the risk does not apply to increased risks which are at the time as well known to the company's agent, then engaged in adjusting another loss, as to the insured.
3. In the printed part of a policy insuring chattels belonging to a tenant of part of a building was a provision that "mechanics will be allowed to make ordinary alterations and repairs to buildings, not exceeding fifteen days, during the term of this insurance." It appeared that the same form of policy was used in insuring realty and personalty. *Held*, That the clause in question did not apply to repairs to the building made by the owner.

Appellee brought suit on a policy of insurance issued by appellant, and recovered a judgment in the Circuit Court of Cook County for \$1,135, which was affirmed on appeal to the Appellate Court of the first district. An appeal is now prosecuted to this court.

The evidence shows that at the time of issuing this policy the appellee was a manufacturer of spur-wire machines for making fence wire, and his place of business was on the second floor of Burton's block, which was on the corner of Clinton and Van Buren Sts., in the city of Chicago, appellee being a tenant. Burton's block was a brick building, six stories high, built for manufacturing. The different parts of this building were let to different persons, each independent and separate manufacturers or business enterprises. On the same floor with appellee were two other tenants,—one, Roberts, of the spur-wire fence company. Other enterprises were conducted on the other floors. This policy was issued on the stock and machinery of appellee situated in that part of the building occupied by him in the above building. A fire occurred in that building, greatly damaging it, on June 28, 1889, and appellee sustained damage on his insured property. In July the company was furnished with an invoice of the property of appellee damaged, and on September 7,

\* Decision rendered, March 31, 1894. From *Northeastern Reporter*.

1889, proofs of loss were furnished the company. While negotiations for settlement were proceeding appellee removed certain small articles to 793 Warren St., and took from Burton's block, and sold, two spur-wire machines for \$1,600. One Marshall, an adjuster for the company, said to appellee he must not take anything from the building until the loss was settled. During the pendency of negotiations for the settlement of this loss a second fire occurred, on September 11, 1889, by which all the appellee's property remaining in the building was destroyed, except as might be its value as old iron. A short time after the fire of June 28th the owner of the building commenced to repair the same, and work in repairing continued until the time of the second fire. October 2d and October 31st, Marshall, the adjuster, in the name of the two companies that had issued policies, wrote to Mr. Hodge, asking for an arbitration to determine the loss and damage under the fire of June 28th, and named Mr. McDonald as their arbitrator, asking the assured also to name one. To these letters Mr. Hodge made no reply. On September 18th the company wrote to Mr. Hodge, saying that they had learned of the second fire, and that he had machinery in the ruins, upon which he claimed a loss; and requesting him to get the property out from the ruins, and in shape, so that his claim might be definitely arrived at and determined. September 28th the companies wrote to him that "by reason of the extraordinary work being done on the building lately known as the 'Burton Block' they denied any liability for loss by reason of the second fire." There was evidence tending to show that all the property before there was any fire was worth \$5,200.

That the three spur machines were then worth.....	\$2,400
The patterns.....	250
And the remainder of the property.....	2,550
	<u>\$5,200</u>
The total salvage was on spur machines.....	\$1,600
On machinery.....	225
	<u>\$1,825</u>

Appellant excepts to the giving, refusing, and modifying of instructions.

The policy contains, among others, these claims: That "this policy is subject to the following terms and conditions, and the assured by acceptance of this policy agrees to be bound thereby:" "(a) The assured hereby covenants and agrees: (2) To notify the company if the above-mentioned premises shall become vacant or unoccupied, and so remain more than thirty days, or any change in the nature or character of occupation, or of any increase of hazard within the

control or knowledge of the assured." "(b) This policy shall become void and of no effect: (1) By the failure or neglect of the assured to comply with its terms, conditions, and covenants." "(e) Mechanics' risk. \* \* \* (1) Mechanics will be allowed to make ordinary alterations and repairs to building, not exceeding fifteen days, during the term of this insurance. Any extension of this privilege must previously be consented to by this company, in writing, on this policy." Other clauses are referred to in the opinion, which it is not necessary to here state.

BARNUM, HUMPHREY & BARNUM, *for Appellant.*  
W. F. WIEMERS and U. P. SMITH, *for Appellee.*

PHILLIPS, J. (after stating the facts.)

Where a policy of insurance is issued, and a loss occurs within the terms of the policy that does not amount to the sum insured, the policy will still continue in force, and for a subsequent loss within its terms a recovery may be had, provided the sum recoverable may not, with that paid, exceed the amount insured by the terms of the policy: *Curry vs. Insurance Co.*, 10 Pick., 535; *Trull vs. Insurance Co.*, 3 Cush., 263; *Crombie vs. Insurance Co.*, 26 N. H., 389. And when loss results by reason of successive fires, and no part is paid, the recovery to be had on the policy by reason thereof is a single sum, constituting one loss. When such successive fires have occurred, and the loss has not been in any manner paid, the provisions of a policy providing the loss shall be determined by the agreement between the company and the assured, and, if differences arise, such differences shall, at the request in writing of either party, be submitted to arbitration, does not contemplate a submission of different items of loss to different arbitrators, nor look to the settlement of part of the loss by arbitration and another part to be determined by the adjudication of the courts. The loss to be determined by agreement, or, if differences shall arise, to be determined by arbitration, is the loss sustained by the assured under the terms of the policy. The request of the adjuster asking for an arbitration to determine the loss and damage under the fire of June 28th, made more than twenty days after the loss by the second fire, was not a request to submit to arbitration the loss or damage sustained by the assured under the policy. It was not a request that by the terms of the contract the insured was bound to accede to. The company would have as much right to insist that each article destroyed was a separate loss, and an arbitration be had before different arbitrators as to each item destroyed. The company would have no right to place the as-

sured in the position that he must split up his cause of action into several different causes of action. The second, third, and fourth instructions asked by appellant were upon the question of arbitration as to loss by the first fire, and were refused by the court, which refusal is assigned as error. Those instructions sought to state as law that the company, after the second fire, had a right to demand and have an arbitration as to the loss and damage by the first without demanding it as to the second fire. They did not state a correct rule of law, and it was not error to refuse them; and no offer in writing was made or requested until after the second fire. The appellee, therefore, was never placed in a position of declining a reference to arbitration. The proof of the loss by the first fire was made within the time required by the terms of the policy.

After the second fire, and on September 18th, the company wrote appellee, saying they had learned of the second fire, and that he had machinery in the ruins upon which he claimed a loss, and requesting him to get it from the ruins, that his claim might be determined. On September 28th the appellant was notified by the companies that "by reason of the extraordinary work being done on the building lately known as the 'Burton Block' they denied any liability for loss by reason of the second fire." The company had been notified by letter of the loss consequent on that second fire.

The policy contains provisions substantially as follows: "(a) The assured hereby covenants and agrees to notify the company if the above-mentioned premises shall become vacant and unoccupied and so remain more than thirty days, or of any change in the nature or character of occupation, or of any increase of hazard within the control or knowledge of the assured." "(b) This policy shall become void and of no effect: (1) By the failure or neglect of the assured to comply with its terms, conditions, and covenants." "(e) Mechanics' risk \* \* \* (1) Mechanics will be allowed to make ordinary alterations and repairs to building, not exceeding fifteen days, during the term of this insurance. Any extension of this privilege must previously be consented to by this company, in writing, on this policy."

It is urged first that there was a material increase of hazard within the knowledge of the assured by reason of the work in and about repairing the building, and that he failed to notify the company of that increased hazard. The object and purpose of that clause was that the company should have notice of any increased hazard, and the evidence of James F. Marshall is that he was adjuster for the company. His evidence, as abstracted by the appellant, is: "A short time after the fire, workmen were sent there to

put on a new roof and fire walls and partition and windows. I should say between twenty-five and thirty workmen, and perhaps more than that, were at work in the various parts of the building shortly after the fire, rebuilding and repairing the damage done by the fire to the building, and getting it in a tenantable condition. A large number of workmen were there. I was in and out of the building from two to three months. This work commenced three or four days after the fire, and was continued right along. The effect of a large number of workmen in a building is to increase the hazard. It was a material increase. It was safer with the walls down than with the workmen there. The increase of the risk or hazard was considerable—was greater by reason of these alterations and improvements.” The evidence shows that Marshall was at the premises with appellee. Appellee knew that Marshall had all the knowledge in that regard that he possessed. Marshall knew all that appellee was aware of. Marshall represented the appellant. The appellant knew all that was known. A notice to Marshall would have been a notice to the company in that behalf by Marshall. To say that appellee was to notify Marshall would be to require an absurdity. The object of the clause was that the company should know the circumstances surrounding, and it did know it.

By the provisions of the policy it was provided that: “Mechanics will be allowed to make ordinary alterations and repairs to building, not exceeding fifteen days, during the term of this insurance. Any extension of this privilege must previously be consented to by this company in writing on this policy.” This written clause of the contract for insurance is to be construed to determine its meaning, purpose, and intent. In determining and construing this provision of the policy, resort can only be had to the policy itself, and the meaning of the language used. It will appear from an inspection of the policy that many of its provisions have reference to insurance of buildings. For instance, the reference to “plant, survey, and description,” etc., and “buildings intended to be secured shall stand on ground owned in fee simple;” “to notify the company if the premises shall become vacant and unoccupied;” “if during this insurance the above-mentioned premises be used,” etc., “frescoed work,” etc., “not covered by insurance on the building.” These provisions all form a part of this policy of insurance, and the conclusion results that the same form of policy in its general terms is used alike for insurance of personal property or buildings constituting a part of the realty. Such being the case, the provisions as to mechanics’ risks may well be construed as applying to cases of insurance of buildings only. One of the ordinary printed covenants

of a policy, it would appear in the policy, whether in the insurance of a building, or of hay in a rick, or lumber piled away from a building, or a stock of goods. No apprehension of the terms as to mechanics' risks could be made to the case of lumber not in a building or hay in a rick. Its application, by its very terms, is only to a building insured. "Mechanics will be allowed to make ordinary alterations and repairs to building," etc. This, by its terms, does not apply to personal property, but to buildings to which ordinary alterations and repairs may be made. Where, as in the city of Chicago, immense buildings are erected, and parts of such buildings leased to different tenants, who do not in any manner have charge or control of any part of the building other than the particular room occupied by each tenant, repairs and alterations may be going on on other floors or on other parts of the building of which a tenant had no notice, and may be continued for more than fifteen days with such tenant ignorant of such work. It may well be held that the object, purpose, and intent of that clause was to only apply to the repair or alteration of a building under the control of the assured. Any other construction would be to practically render invalid insurance of personal property under a policy with such a clause, and could not have been the purpose or object of the company. At least the language used will not admit of a construction that such was the purpose. We hold the language as to mechanics' risk as used in this policy was only intended to apply to cases where buildings were insured under the control of the assured.

The first instruction asked by the appellant was refused, to which the defendant excepted. That instruction was: "If the jury believe from the evidence that the hazard to the insured property was considerably increased by work and workmen engaged in reconstructing and repairing or altering the building from shortly after the first fire to the time of the second fire, and that the plaintiff had knowledge of such facts so increasing said hazard, and that he did not notify the company thereof, and that the consent of the company to the continuance of such work beyond fifteen days was not asked nor obtained and indorsed in writing on the policy, then the policy, by reason of such considerable increase of the hazard, became and was void, even if you believe from the evidence that the witnesses Marshall or Hunter saw the progress of the said work, and knew of such increase of hazard thereby." This instruction sought to state as law that a failure to notify as to the increased hazard and the continuance of the work beyond fifteen days without the consent of the company rendered the policy void, even though agents of the company saw the progress of the work, etc. We have already held

that the agent's having knowledge as to increased hazards was notice to the company, and, the policy covering only personal property, the clause as to mechanics' risk did not apply to it; that it was not error to refuse the same. The fifth instruction asked by appellant was given as modified, as follows: "If you believe from the evidence that shortly after the first fire, and from that time forward until the second fire, there was a material and considerable increase of hazard from fire to the insured property, occasioned by reconstruction of the premises and building mentioned in the policy, and changes, alterations, and repairs of the same, and by the continuous presence during that time in said premises and building of a large number of workmen and mechanics, engaged in said work, and that the plaintiff during all of said time had knowledge of said continuous work by said workmen, and that the plaintiff did not notify the company of said facts, so known to him, and so increasing said hazard, *and that the agents of the company, at Chicago, named in the policy, did not have knowledge of such fact while such work was in progress*, then you are instructed that the policy in this case, by reason of said increased hazard, became and was wholly void, and in that case no verdict can be rendered upon it as to the loss or damage by the second fire." The modification as made by the court was by the insertion of the words in italics. This instruction proceeds on the theory that the continuous work by workmen increased the hazard, and no notice was given, etc., whereby the policy was rendered void. The modification was in accordance with what we have heretofore said, and it was not error to so modify that instruction.

It is further urged that the clause which provided that no suit for recovery of any loss under this policy shall be sustained until after an award shall have been obtained in the manner provided, barred the action. The parties had a right to waive the clause as to an award, and the plaintiff never requested it, and the defendant never made a request that required the plaintiff to ask that this clause was waived by the parties. The demand of liability under the second fire was a waiver: *Insurance Co. vs. Cary*, 83 Ill., 453.

Other questions raised are questions of fact, settled by the judgment of the circuit and appellate courts. We find no error in the record, and the judgment of the appellate court is affirmed. Affirmed.



## COURT OF CIVIL APPEALS OF TEXAS.

SUPREME LODGE KNIGHTS OF HONOR )

vs.

KEENER\* }

K., a member of the Knights of Honor, defaulted in his payment of dues and assessments and was suspended by his local lodge and stood suspended for three months, during which time there were no monthly meetings of the lodge. Then K. asked for re-instatement, offering to pay all dues and assessments, and was informed that, sixty days having elapsed, he must present a health certificate. Such certificate was furnished by the local examiner, giving him a clean bill, and this under the rules and regulations of the order was forwarded to the medical examiner of the grand lodge, but before it was returned K. was killed by a train of cars. *Held*, That the question of suspension was determined by his failure to pay assessments, which, ipso facto, worked his suspension; that his death occurred before he was reinstated; that he was not a member at the time of his death; and that his widow could not recover.

The laws of the order are intended to compel the members to comply with their obligations to pay their monthly assessments; and these laws form a part of the contract which each member makes with his brother member when he enters the order, and public policy requires that these laws be upheld and enforced by the courts.

Action by Alice B. Keener against Supreme Lodge Knights of Honor. From a judgment for plaintiff, defendant appeals. Reversed.

JOHN R. ARNOLD and FREDERICK H. BACON, *for Appellant.*

W. C. BUFORD and J. H. TURNER, *for Appellee.*

PLEASANTS, J.

This is an appeal from a judgment rendered in favor of appellee, the beneficiary of a benefit certificate issued to L. J. Keener, the husband of appellee, by the appellant, on the 25th of November, 1881, stipulating for the payment of \$2,000 to his wife upon the death of said L. J. Keener, upon the condition, among others, that he comply with the laws and rules and regulations governing the order, or that thereafter may be enacted for its government, and that he is in good standing in his lodge at the time of his death. The pleadings of both plaintiff and defendant were both lengthy and numerous, including various exceptions by each party to the pleadings of the other. Defendant, besides general and special exceptions and general denial, pleaded in bar of the suit a failure of the said L. J. Keener to perform the conditions upon which payment of the sum contracted for in the certificate was to be made to his wife; that by his failure to pay assessment due from him the

\* Decision rendered, Feb. 1, 1894.

said Keener was not a member of the Supreme Lodge Knights of Honor, or of any of its subordinate lodges, at the time of his death, but was suspended from membership by reason of his failure and neglect to pay said assessments, and that by reason thereof the said certificate became null and void. Upon trial of the cause, January 18, 1893, verdict and judgment were rendered for appellee for \$2,000, with interest thereon from February 1, 1890, and, a motion for new trial being overruled, the defendant appealed.

The appellant has made many assignments of error, but the disposition we make of the appeal relieves us from considering most of them. The plaintiff was the wife of L. J. Keener, who died on the 12th of July, 1888, and is entitled to recover, unless the certificate was forfeited. The defendant is a corporation chartered by the state of Missouri, and is a charitable fraternity, composed of a supreme lodge and subordinate lodges, and known as the "Knights of Honor." The supreme lodge alone is incorporated, and is the representative of the order. The fund from which the benefit certificates issued to members are paid is called the "Windows' and Orphans' Benefit Fund," and is raised by monthly assessments upon every member of every subordinate lodge of the order or fraternity. The evidence adduced upon the trial established the following facts: L. J. Keener became a member of the order in 1881, and paid his assessments and dues regularly, and otherwise demeaned himself as became a member of the fraternity, until April 1, 1888, and after that time he ceased to pay either his assessments made by the supreme lodge or his dues to the subordinate lodge of which he was a member. On the 5th of April, 1888, the latter lodge declared him suspended from membership by reason of his failure to pay certain assessments and dues, and from that date to the 7th of July following there was no meeting of said lodge. On the day last mentioned Keener appeared before the lodge, then in regular session, and asked to be reinstated, offering to pay all assessments and dues and fines with which he was chargeable. The application does not seem to have been in writing. The lodge, by its proper officer, in response to his application for reinstatement, informed him that, more than 60 days having expired since he was suspended, he must first present a certificate from the proper medical officers of the order, touching the state of his health, before his application could be considered, and he was furnished with a blank certificate, and the lodge then adjourned. On the 8th of the month the medical examiner made examination of Keener's condition, and found his health to be perfect, and gave him a certificate to that effect, which was, under the rules and regulations of the order, forwarded for his approval to

the medical examiner of the grand lodge; but before the certificate was returned from the latter officer Keener died from injuries received from a moving train of cars. He was wounded on the 11th and died on the 12th of July, 1888. On the 12th, before his death, he was visited by the reporter of his lodge, the officer whose duty it was to receive the assessments due from the members of the lodge, and was requested to pay the assessments which were then due from him; and, under instructions from Keener, his wife, the plaintiff, then paid the amount demanded by the reporter, and this sum, after Keener's death, was returned to the plaintiff, and subsequently a memorial was sent by the local lodge from which Keener was suspended to the supreme lodge, praying that the claim of the plaintiff be allowed and paid, which memorial was refused, and the claim rejected. It is not shown that Keener made any effort to procure a session of the lodge between April and July, 1888, except by testimony which was hearsay, and which was erroneously admitted by the court, over objection of defendant. The laws of the order required that there should be monthly sessions of each subordinate lodge, and a member suspended could only be reinstated by a vote of the lodge, taken when in regular session. Between April and July, 1888, while there was no session of the lodge, the assessments upon its members were collected by the reporter, and transmitted to the treasurer of the supreme lodge, and within that time Keener was spoken to by a member of the lodge, who advised him to resume his connection with the lodge, and in this conversation Keener admitted that he had neglected to pay his assessments. The evidence further shows that between April and July there was no change made by the supreme reporter, who was authorized to do so, if he deemed it necessary, in the number of the assessments for each month upon each member of the subordinate lodges.

It is insisted by appellee that Keener was not legally suspended by his lodge in this: that there was no vote taken upon the question of his suspension, nor was he suspended for any definite length of time, and that, therefore, the suspension could not work a forfeiture of his benefit certificate. The laws of the order seem to require that before a member can be suspended by a lodge it must vote on the question of suspension, and, if the question be decided in the affirmative, then there must be some definite time for the duration of suspension, and if it be true, as contended by appellee, that there was no vote taken, and no time fixed for the duration of the suspension, doubtless such action by the lodge would not work a forfeiture of any right of the member. But we are of the opinion

that it is immaterial whether there was or was not a suspension effected by the lodge. Keener's failure to pay his assessments *ipso facto* worked his suspension. Section 7 of article 7 of the constitution of the order provides as follows: "On or before the last day of each month each member shall pay the amount of two assessments, unless the number of assessments due and to be paid during such month shall have been determined to be greater or less than two, in which event he shall pay the amount of assessments thus determined. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widows' and orphans' benefit fund, until he has been duly reinstated in his subordinate lodge, in accordance with the laws of the order." This case is unlike that of *Supreme Lodge vs. Wickser* (72 Tex., 257), which is cited by counsel of appellee, in this: In that case there was only one assessment, and the laws of the order required that notice should be given of the assessment to each member of the lodge. Here, there being two assessments, and no change having been made by the supreme reporter, no notice was required to be given to the members of the lodge. Section 2 of article 7 of the constitution of the order is in these words: "On the 20th day of each month the supreme reporter shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered during the ensuing month, and shall immediately mail notice thereof to each lodge. If the number of assessments so determined be greater or less than two in any month, each member shall be notified thereof at once by the reporter of his lodge, by a notice bearing date of the first of said ensuing month." As we have seen, the seventh section of this same article of the constitution declares that any member failing to pay any assessment required by law shall stand suspended, and shall not be entitled to the benefits of the widows' and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order. This section is self-executing, and requires no action on the part of a subordinate lodge, or of any other judicatory of the order, to put it in operation. The words of the constitution are mandatory, not that a member may be "suspended" for not paying his assessments, but he "shall stand suspended." Vide *Borgraefe vs. Supreme Lodge*, 22 Mo. App., 127; *Rood vs. Benevolent Ass'n*, 31 Fed., 62; *Bosworth vs. Society*, 75 Iowa, 582, 39 N. W., 903; *Supreme Lodge vs. Johnson*, 78 Ind., 110; *Hogins vs. Supreme Council*, 76 Cal., 109. Section 7 is equally imperative and mandatory that a suspended member shall not be entitled to the benefits of the association until reinstated in accordance with the

laws of the order. This provision is, like the other provisions of the section, a part of the contract between the member and the supreme lodge of the order: *Vide Lyon vs. Supreme Assembly*, 153 Mass., 83.

It is insisted that the appellant is estopped from denying the claim of plaintiff by the acts and omissions of the subordinate lodge of which her husband was a member. To this proposition we cannot give our assent. The failure of the lodge to hold monthly meetings in accordance with the laws and regulations of the order did not relieve Keener from his contract with the supreme lodge to pay his monthly assessments, and, being by his own negligence suspended from the order, he cannot avoid the penalty of suspension by pleading the derelictions of his lodge. If this be permitted, then a subordinate lodge, by its unauthorized act, or by its culpable omission of duty, may override and render nugatory the express provisions of the supreme law of the order. Moreover, there was, as we have seen, no effort made by Keener to have a meeting of the lodge before the one held on the 8th of July, 1888. Nor does the receipt by the reporter of the assessments due from Keener, on the day of his death, estop the appellant. Section 15 of article 7 of the constitution declares

That the reporters of the subordinate lodges, in collecting and forwarding assessments to the supreme treasurer, shall be the agents for the members of their lodges, and shall not be agents for the supreme lodge.

Section 3 of article 7 of the constitution is in these words:—

A member of this order suspended for nonpayment of dues, fines, or assessments, desiring to be reinstated, must, within one year after his suspension, make application in writing, either by himself or agent, to the lodge, at a stated meeting thereof, which application shall be acted on at such meeting of the lodge, when the applicant may be reinstated upon the following conditions only: If less than sixty days have elapsed since the date of his suspension, his application for reinstatement shall be accompanied with the amount he is in arrears for dues, fines, and all assessments made during suspension, including the assessment or assessments on which he is suspended; but he shall not be required to furnish a certificate of good health, unless ordered by his lodge. If more than sixty days and less than one year have elapsed since the suspension, his application for reinstatement shall be accompanied with the amount of dues and fines in arrears at the time of suspension, the assessment or assessments on which he was suspended, the first assessment or assessments due from his lodge after the reinstatement, and, if a beneficiary member, a certificate of good health in the form prescribed by the supreme lodge from a lodge examiner, approved by the state medical examiner of the jurisdiction in which his lodge is situated. A ballot shall be ordered in all cases, and, if a majority of the ballots cast are favorable, the applicant shall be reinstated; but if either the medical examination or the ballot be unfavorable, the applicant shall be suspended, and can only become a member under the rules governing a new applicant. All applications for

reinstatement must be forwarded to the supreme reporter immediately after the reinstatement of the member.

From this section we see that a suspended member can only be reinstated by his making application to the lodge at a stated meeting for reinstatement, and by obtaining a majority of the ballots in favor of his application, cast at the meeting at which the application is made, and by a compliance on his part with the conditions upon which the lodge is authorized by the law to grant his application.

We think that the objections made by the defendant to all evidence of what was done by the lodge of which the plaintiff's husband was a member, after his death, and the objections to evidence of what was said or done by any member of the lodge after her husband's death, in reference to his suspension, or to his application for reinstatement, should have been sustained by the court, and the evidence excluded as irrelevant and immaterial; and we are further of the opinion that the court erred in overruling defendant's objection to the following question, propounded to the witness S. J. Hendrick, after witness had stated that he was present at the meeting of the Kilgore Lodge, held 8 or 10 months after the death of Keener: "State whether anything was said publicly in said lodge tending to show whether or not Keener had made any effort to get the lodge to meet earlier than the 7th of July, 1888;" and to this question the witness answered "that such was said." The evidence was clearly hearsay, and should have been excluded.

Several errors are assigned in the giving and refusing charges by the court. We shall notice but one of these assignments. No. 10 of the charges asked by defendant and refused by the court is in these words: "The facts in this case show that L. J. Keener failed to pay the assessments required of him on April 1, A. D. 1888, and that he failed to take steps to reinstate himself till July 7, A. D. 1888, and that he died before he became reinstated in Kilgore Lodge, Knights of Honor; and you will return a verdict for defendant." This charge should have been given. The laws of the order which we have cited were intended to compel the members to comply with their obligations to pay their monthly assessments; and these laws form a part of the contract which each member makes with his brother members when he enters the order; and public policy seems to require that these laws must be upheld and enforced by the courts, otherwise the benevolent purposes of the organization to afford assistance when needed to each member of the brotherhood during his life, and to provide a fund for the benefit of his widow and orphan after his death, cannot be effected. Without meaning to decide that under no circumstances can a recovery be had upon a

certificate like the one sued on in this case, where the member made default in the payment of his assessments, we do decide that under the facts as they are presented in the record before us the plaintiff has no claim upon the widows' and orphans' fund of the society, and that she should not recover. The judgment is reversed, and the cause remanded. Reversed and remanded.

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## APPELLATE COURT OF INDIANA.

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NYE

vs.

GRAND LODGE A.O.U.W. ET AL.\*

Nye was a member of the Ancient Order of United Workmen, and had a certificate of \$2,000. Desiring to raise money for business purposes he put said certificate in the hands of a broker for sale. The broker found one Clark, who was willing to pay the required sum, and pay all future dues and assessments. Clark applied to the officers of the local lodge, who told him the transaction would be valid, and then Nye and his wife and children all joined in the necessary assignment, and the certificate (which heretofore had been in blank, not naming any beneficiary) was surrendered to the Grand Lodge of the order, and a new one was issued, naming Clark as the beneficiary. No evidence appears as to the age of Nye, either at the issue of his first or second certificate, or at the date of his death, nor as to his expectancy of life at the time of the sale. The Grand Lodge interpleaded, paid the money into court, and withdrew from the suit.

*Held*, That the transaction was not a wager, nor a cover for a wager,—the doctrine that a life policy, valid at its inception, may be assigned to one not having an interest in the life of the insured, when not used as a cloak for a wager, being sustained by abundant authority.

Clark paid \$300, and agreed to pay the dues and assessments for the policy. In the absence of the proof of any age or expectancy of life of the insured, such sale or assignment was not tainted with the vice of gambling. Clark will take the money.

Minor rulings in regard to validity, and also burden of proof, appear in the case.

FINCH & FINCH, *for Appellant.*

S. M. SHEPARD, *for Appellees.*

Lortz, J.

The appellant, Nancy J. Nye, brought this action against the appellees. From the allegations of her complaint, it appears in brief, that she is the widow of Michael W. Nye; that the appellees, Maria Lehr, John Nye, and Benjamin F. Nye, are the children and heirs at law of Michael; that the Grand Lodge, Ancient Order of United Workmen, is a charitable and benevolent association, organized under the laws of the state of Indiana; that said order issued to each

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\* Decision rendered, Feb. 3, 1894.

member thereof a certificate of membership, granting the privileges of the order, and securing the payment of the sum of \$2,000 on the death of such member, to such person as may be designated by such member, who was eligible as a beneficiary, under the constitution and by-laws of the society and the laws of the state, to hold insurance on the life of another; that Michael became a member of said order, and secured a certificate insuring his life in the sum of \$2,000; that said certificate was not made payable to any person by designation, but remained in blank for the personal benefit of Michael; that in the year of 1885, the appellee, Joseph H. Clark, for the purpose of speculation, bought said certificate from Michael; that said Clark was not related to, nor dependent upon, Michael, and Michael was not indebted to Clark in any sum; that Clark could lose nothing, either socially or pecuniarily, by the death of Michael; that the purchase was a wager on the life of Michael; that, after the purchase of the certificate, Clark sent the same to the grand lodge, and procured a new certificate to be issued on the life of Michael, in which Clark was named as the beneficiary; that said new certificate was issued in ignorance of the facts, and contrary to the constitution and by-laws of the order; that said Michael died April 18, 1890, being at the time a member in good standing in said order; and that proof of his death was duly made. Certain sections of the constitution and by-laws of the order were set out in the complaint, and it was averred that under such provisions Clark did not come within the classes of beneficiaries named therein, and that the appellant was entitled to the whole fund. The appellee, the grand lodge, filed an interpleader, and paid the money—\$2,000—into the court, and was discharged. The appellee, Clark, answered the complaint (1) by the general denial, and (2) by a special answer, in which he claimed to be entitled to the whole of the fund. He also filed a cross complaint or counterclaim against the appellant and his codefendants, in which he averred, in brief, that in 1885, the said Michael W. Nye was a member in good standing in said order, the A.O.U.W., and the holder of a certificate of membership therein; that said Michael was desirous of raising a sum of money to enable him to go into business on his own account, and applied to him (Clark) to procure money on said certificate; that upon investigation he learned through the officers of a subordinate lodge that such purchase would be legal and valid, and thereupon he agreed with said Michael, that if he (Michael) would surrender his old certificate to him, and the said Michael, his wife and his children, sign and transfer said original certificate, he (the said Clark) would pay the said Michael the sum of \$300, and, in addition, pay all dues that might be assessed against



and required of the said Michael by the rules and regulations of said order; that, in accordance with said agreement, the said Michael and his wife (appellant) and their children did assign said certificate in writing to him, the said Clark; that said original certificate was surrendered by said Michael, and the said order issued a new one, in which the said Clark was named as the beneficiary therein; that said last-named certificate was delivered to Clark, and said Clark paid Michael the sum of \$300, and agreed thereafter to pay all dues and assessments made against said Michael; that since the issuing of said certificate, and until the death of said Michael, he (Clark) paid to said order the sum of \$135.30 on account of dues and assessments. There was a prayer that the cross-complainant be awarded the whole of the fund paid into court. The appellant replied the general denial to the second paragraph of answer, and also filed a special answer to the counterclaim. The other appellees made default on both the complaint and cross-complaint. The sufficiency of these pleadings is not discussed by counsel in this court. We have made this brief summary for the purpose of showing upon whom rested the burden of proving certain facts. The issues joined were submitted to a jury for trial.

The facts, as shown by the evidence, are substantially as follows: The Grand Lodge, Ancient Order of United Workmen, is a corporation organized under the laws of the state of Indiana, and is a charitable and benevolent organization. The business affairs of the association are managed by grand and subordinate lodges, one of the latter being located in the city of Indianapolis, and designated as "Union Lodge, No. 6." In the constitution and by-laws of the order, it is provided, among other things, that the objects of the order shall be "to create a fund for the benefit of the members during sickness or disability, and, in case of death, to pay a stipulated sum to such person or persons as may be designated by such member, thus enabling him to guaranty his family against want." "The beneficiary shall be named in the beneficiary certificate, and shall be confined to one or more members of the family of the member, or some person or persons related to him by blood, or who shall be dependent upon him." "The purpose of the beneficiary department of the Grand Lodge of Indiana, A. O. U. W., is to establish a fund, to be known as the 'beneficiary fund,' from which the heirs or legatees of a deceased member who shall have complied with the conditions hereinafter recited shall be entitled to \$2,000, and said fund shall be used for no other purpose." "If one or more of the beneficiaries shall die during the lifetime of the member, the surviving beneficiary

or beneficiaries shall be entitled to the benefit equally, unless otherwise provided in the beneficiary certificate; and, if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other direction, the benefit shall be paid to his widow, if living at the time of his death; if he leaves no widow surviving him, then said benefit shall be paid, share and share alike, to his children." "Any member desiring to change his beneficiaries may do so in the following manner: He shall fill out the blank form on the back of his beneficiary certificate authorizing the change. He shall have his signature attested by the recorder of his lodge, and the seal of his lodge attached thereto, or attested by a civil officer under his seal, when the member cannot sign in the presence of the recorder. When this is done, he shall deliver his beneficiary certificate to the recorder of his lodge, together with a fee of fifty cents. The recorder shall forward the said certificate to the grand recorder, who shall make a record of the change on the books of the grand lodge, and shall issue a new certificate in lieu thereof, payable as directed on the back of the certificate. The new certificate shall bear the same number as the old one, which shall be safely filed and preserved. The provisions hereof in special cases may be waived by the grand lodge at its option." In 1873 or 1874, Michael W. Nye became a member of Union Lodge, No. 6, and a beneficiary certificate was issued to him by the grand lodge, the certificate being numbered "38," and entitled him to participate in the beneficiary fund in the sum of \$2,000. No beneficiary was named therein, it being in blank. He continued to be a member of said order, in good standing, until the day of his death, which occurred on the 18th day of April, 1890. In the year 1885, desiring to procure money with which to purchase a bath house, and to engage in business, he employed a broker to sell his beneficiary certificate in said order. The broker found a purchaser in the appellee, Joseph H. Clark. The said Michael, in pursuance to the constitution and by-laws of the order, surrendered his certificate, and had a new one issued, in which Clark was named as the beneficiary. Clark paid the said Michael the sum of \$300 for such assignment, and at the same time, and as part of the same transaction, the said Michael, the appellant, Nancy J. Nye, and Maria Lehr, Benjamin F. Nye, and John W. Nye, children of the said Michael, executed a written assignment of all their interest in said certificate to Clark. Before Clark purchased the certificate, he consulted the officers of the subordinate lodge, and was informed by them that he could lawfully purchase the same. Michael paid the broker's commission of \$20. It was also a part of the contract of said assignment that Clark should thereafter pay the assessments

and dues that might be made against Michael, and Clark did pay the same until the death of Michael. The date of this transaction was in September, 1885. The evidence is silent as to the age of Michael at the time he sold the certificate, and it is also silent as to his age at the time of his death. Nor was there any evidence given of his expectancy of life at the time of the sale. There was no evidence given tending to show whether or not Clark was a member of the family of the said Michael, or was related to him by blood, depended upon him, or one of his heirs at law.

At the conclusion of the evidence, the court, of its own motion, instructed the jury to return a verdict for the appellee, Clark, and rendered judgment in his favor, awarding him the whole of the fund paid into court. A motion for a new trial was overruled. Several errors are assigned, but the ruling on the last motion is the only one discussed by counsel for appellant. Appellant's condition is (1) that these facts show that the assignment of the certificate was a cover for a mere wager,—a speculation on the part of Clark on the duration of the life of Michael W. Nye,—and that the assignment was therefore void: (2) that, under the constitution and by-laws of the order, Clark could not be designated as a beneficiary; and that such pretended designation was illegal, and equivalent to no designation; and that the appellant, as the widow of Michael W. Nye, is entitled to the whole of the fund, or at least so much thereof as remains after reimbursing Clark for all his legitimate charges against the same. The appellee Clark contends (1) that the tendency of the recent adjudications is to permit policies of insurance to be sold and assigned like any other choses in action; (2) that the validity of the assignment can only be questioned by the order, the A. O. U. W., and that, as it has voluntarily paid the money in discharge of its contract, the appellant cannot assail the assignment, even though it were conceded that the assignment was a cover for a wager, or that Clark did not come within the classes designated in the constitution and by-laws of the order; (3) that in any event the assignment is *prima facie* valid, and that the burden is upon the appellant to prove that it was a cover for a wager, or to prove that Clark did not come within any of the classes designated in the constitution and by-laws of the order; (4) that the appellant is estopped to question the validity of the assignment by the written instrument which she executed as a part thereof.

There is a marked conflict between the adjudicated cases bearing upon some of the propositions here involved. Owing to this conflict, the questions here presented are not free from difficulty. In considering them we may be materially aided by a brief recurrence

to the origin and growth of the business of insurance and of the principles which underlie it. Nearly every kind of property is exposed to injury or destruction. Of those causes which produce disaster, the most common are fire, shipwreck, and premature death. A person in good health, in the full possession of all his faculties, has the power to earn and accumulate property. These future earnings may be of great value to those dependent upon him, or to his creditors. These earnings may be destroyed by his premature death. Life insurance has for its object the protection of these future earnings. In the complexity of modern society, property may also be exposed to certain artificial losses, such as insolvencies, failure of title, and the like. The exposure of property to these various hazards may be very common, but loss actually occurs in comparatively few instances. It is difficult or impossible to predict or prevent the happening of the events which produce the loss, but it is frequently of the greatest moment to those most deeply concerned to guard against the loss which their occurrence entails. This end may be accomplished by means of a general fund obtained by imposing a small contribution upon the many who are exposed to the common peril, from which the few who actually suffer may be made whole. To secure this indemnity against loss gave rise to, and lies at the foundation of, the business of insurance. As a business, it is the system of distributing losses upon the many who are exposed to the common hazard. Its importance has grown with the extension of trade and commerce and the necessities of civilized life. Marine underwriting lays claim to high antiquity. Traces of its existence are found under the early Roman emperors. It came into prominence among the Lombards of northern Italy during the revival of commerce in the twelfth and thirteenth centuries. The principles and methods of marine insurance were easily and readily extended to the hazards which surrounded like property upon land. The controlling principle in a contract of fire or marine insurance has ever been that of indemnity. The insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which that insurer's liability is to arise. Under no circumstance is the assured, in theory, permitted to make a profit of his loss. If this were not so, the two parties to the contract would not have a common interest in the preservation of the thing insured, and the contract would create a desire for the happening of the event insured against. When the insured can only receive compensation for the loss which he may actually sustain, the temptation to defraud, and carelessness in exposing the property, are removed. Life insurance, according to the authorities, is of

later origin than fire and marine insurance, but the same general principles which underlie them govern life insurance. The indemnity feature in life insurance is not always apparent. Indeed, the great weight of authority is to the effect that the element of indemnity is not necessary to support a contract of life insurance: *Dalby vs. Assurance Co.*, 15 C. B., 365; *Insurance Co. vs. Bailey*, 13 Wall., 616; *Loomis vs. Insurance Co.*, 6 Gray, 396; *Lord vs. Dall*, 12 Mass., 118; *Insurance Co. vs. Johnson*, 24 N. J. Law, 576. In *Biddle on Insurance* (section 185) it is said that "it may be laid down as nearly the universal rule that at the present time, either by statute or judicial decision, an interest is necessary to support a life policy; and it may be asserted with the same universality that the courts have decided that a life policy is not a contract of indemnity." The interest which one has in his own life, or in the life of another (unless it be a debtor), is difficult to estimate in dollars and cents; hence it is said that strict indemnity finds no place in life insurance. Mr. May, in his excellent work on *Insurance* (section 7), takes issue with the current authorities, and logically shows that there is no difference between valued policies in fire and marine insurance and a policy of life insurance. In each case the value of the interest is agreed upon in advance, and the purpose of the contract is to indemnify the insured to the extent of the agreed value. Life insurance has been defined to be a contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments, by another: *Buny. Ins.*, 1; *Dalby vs. Assurance Co.*, *supra*. Life insurance and fire and marine insurance have much in common, and yet there are essential differences between it and them. In the latter, the loss may or may not occur, and, should it occur, it may be total or partial; while in the ordinary life insurance the event insured against is certain to occur, and the time of the happening is the only contingent element. The person for whose benefit the insurance is written, his heirs or assigns, is certain to realize the sum named in the contract. As the expectancy of life decreases, the value of the policy increases. The reverse of this is true in fire and marine insurance. As the time for which the policy was written grows shorter, its value decreases. Insurance is sometimes spoken of as an aleatory contract, or one involving risk or speculation; and it certainly is a contract of mutual risk, wherein the premium is risked against the chance of loss. But it is not ordinarily a wagering or gambling contract. Although risk is of the essence of the contract, it exists before the contract is executed,

and the assured is moved to effect the contract by reason of the existence of the risk, while in a purely wagering contract the risk is created by the contract itself. If the assured have no interest whatever in the thing or life insured, he sustains no risk. The thing or the life which may be the subject of insurance, it is true, is exposed to the hazard of loss; still the person who has no interest therein does not bear the risk. If one take out a policy of insurance upon the life of a person in whom he has no interest whatever, his risk is created by the contract itself, and it falls within the category of wagering or gambling contracts. It has become a fixed rule in life insurance that the assured must have an interest of some kind in the life of the person insured in order to take the policy out of the category of wagering contracts. Another reason sometimes given for this rule is that it is against public policy, and has a demoralizing influence for one person to be interested in the death, rather than the life, of another. This latter reason is based upon the supposition that the temptation on the part of the assured to destroy the life of the insured must be counterbalanced by the existence of an insurable interest in the life of the insured. This doctrine that the assured must have an interest in the life of the person insured is expressly condemned by Mr. Cook on Life Insurance. (section 58.) He characterizes it as a false, artificial, and confusing restriction as to the class of persons who may obtain the benefit; and concerning the last reason he says: "But the theory that it is contrary to public policy that one person should have an expectation of a benefit conditioned on the happening of the death of another finds little, if any, support from the rules applied to analogous cases, for it is just this expectation that exists in case of a devise or legacy, or in case of dower or other life tenancies; yet it never seems to have been seriously suggested that, on that ground, devises, legacies, or life tenancies are invalid or contrary to public policy." The view maintained by Mr. Cook is supported by the adjudication of Ireland, New Jersey, Rhode Island, and perhaps some other states. The rule adopted by the courts of England and of the United States generally, and by the supreme court of this state, is that the assured must have an insurable interest in the life of the person insured: *Insurance Co. vs. Hazzard*, 41 Ind., 116; *Insurance Co. vs. Sefton*, 53 Ind., 380; *Insurance Co. vs. Volger*, 89 Ind., 572.

As to what constitutes an insurable interest has never been satisfactorily and clearly defined, although eminent courts have undertaken it: *Loomis vs. Insurance Co.*, 6 Gray, 396; *Warnock vs. Davis*, 104 U. S., 775; *Corson's Appeal*, 113 Pa. St., 438. The

American rule upon the subject of an insurable interest is much less rigid than the English as to the nature of the interest required. The English rule is affected more or less by the statute against gambling, and "an insurable interest must be pecuniary; no ties of blood or affection are sufficient." The rule adopted by the American courts generally is that the interest need not necessarily be a pecuniary one: *Bliss, Ins.*, § 21. But the supreme court of this state, in several decisions, has intimated that the interest must be pecuniary: *Insurance Co. vs. Volger*, *supra*; *Burton vs. Insurance Co.*, 119 Ind., 207. Every person has an insurable interest in his own life, to an unlimited extent. He may insure it for the benefit of his personal representatives or for the benefit of a third person: *Bliss, Ins.*, § 26; *Insurance Co. vs. Baum*, 29 Ind., 236; *Association vs. Houghton*, 103 Ind., 286; *Milner vs. Bowman*, 119 Ind., 448, 454. If a beneficiary be named who has no interest in the life of the insured, and the premium be paid by the insured, the contract does not fall within the inhibition of being against public policy. Whatever demoralizing influence there may be in the fact that the beneficiary is interested in the early death of the insured exerts its full force under such circumstances. As the insured is permitted to choose his own beneficiary, and as the law recognizes the ties of friendship and of moral obligations, it is presumed that these conditions counterbalance the baneful influences of being interested in the early death of the insured. As long as the insured pays the premiums, it is a matter of no concern, either to the insurer or the public, that the beneficiary has no insurable interest. If, however, the beneficiary pays the premiums, then the contract may fall under the ban of the law. The contract cannot be made a cover for a mere wager. The same rule holds good with reference to the assignment of a policy. The assignment cannot be made a cover for a wager. But a policy obtained by one upon his own life for the benefit of another, or assigned to another, and such other pays the premiums, is not necessarily void. Mr. Bliss, in his work on Life Insurance, (section 26,) says: "A person undoubtedly has an insurable interest in his own life, and that interest supports a policy, whether he makes the loss payable to himself, his executors and assigns, or to a nominee or appointee named in the policy; nor is a policy obtained by one on his own life for the benefit of another necessarily void. The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederated together to procure a policy for the plaintiff's benefit when he is not, and does not expect to be, a creditor of the insured, and with a view

of having the policy assigned to him without consideration, the policy is void." This language was quoted with approval by the supreme court of this state in *Association vs. Houghton*, 103 Ind., 286, 292. A creditor has an insurable interest in the life of his debtor, for, while the debtor's life continues, the power to acquire and pay are among the probabilities and possibilities. But neither can this interest be made a cover for a wager. While it is undoubtedly true that, when a policy is taken upon the life of another, the assured must have some interest in the life of the insured in order to take it out of the class of wagering contracts, it is also true that one who has effected a valid insurance on his own life may dispose of it as he sees fit; and it is immaterial that the assignee has no interest in the life of the insured. In *Olmsted vs. Keyes* (85 N. Y., 593), Earl, J., after reviewing the authorities bearing upon the question of assignment, says: "The rule, as gathered from these authorities, is that where one takes out a policy upon his own life as an honest and bona fide transaction, and the amount insured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary in the one case, and the assignee in the other, may hold and enforce the policy if it was valid in its inception, and the policy was not procured, or the assignment made, as a contrivance to circumvent the law against betting, gaming, and wagering policies. It follows, therefore, that one may, with the consent of the insurer, deal with a valid life policy as he could with any other chose in action, selling it, assigning it, disposing of it, and bequeathing it by will; and it has been well said that, if he could not do this, life policies would be deprived of a large share of their utility and value."

There are some cases that seemingly hold that an assignment of a policy to one who has no interest in the life of the insured is void; but these cases, when carefully examined, do not bear out such conclusion. The case of *Insurance Co. vs. Hazzard*, supra, is the one upon which nearly all the others are founded. While there are expressions in that case which seemingly indicate that an assignment to one that has no interest in the life insured is void, the decision actually turned upon another point. The assignment was held void, not because the assignee had no interest, but because of the disproportion between the amount paid for it, \$20, and the amount of the policy, \$3,000; the court saying that "life assurance policies are assignable, to be sure; but in our opinion they are not assignable to one who buys them merely as a matter of speculation, without interest in the life of the assured." In *Hutson vs. Merryfield* (51 Ind., 24), it was said that "the party holding and owning such a



policy, whether on the life of another or on his own life, has a valuable interest in it which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action." In *Insurance Co. vs. Sefton* (53 Ind., 380), Chief Justice Warden, who pronounced the opinion in *Insurance Co. vs. Hazzard*, said: "It may be added that, where the policyholder dies before the death of the party whose life is insured, perhaps the administrator of the holder could, for the purpose of converting the assets into money, and settling up the estate in due course of law, sell the policy to any one who might choose to become the purchaser." The chief justice in this case expressly affirmed the doctrine of *Insurance Co. vs. Hazzard*. From this it is clear that that case turned upon the disparity between the price paid for the assignment and the amount of the insurance, and not upon the want of interest in the life of the insured. *Cammack vs. Lewis* (15 Wall., 648), and *Warnock vs. Davis* (104 U. S., 775), were cases in which the policies were procured to be taken out by the assignees in order that the policies might be assigned to them, under such circumstances as they might well be held to be a cloak for wagering policies. The statement contained in the latter case, that "the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of the policy in his name," is a mere dictum, as it was not necessary to the decision of the case. The doctrine that a life policy valid at its inception may be assigned to one not having an interest in the life of the insured, when not used as a cloak for a wager, is sustained by abundant authority: *St. John vs. Insurance Co.*, 13 N. Y., 31; *Valton vs. Fund Co.*, 20 N. Y., 32; *Mutual Co. vs. Allen*, 138 Mass., 24; *Eckel vs. Renner*, 41 Ohio St., 232; *Martin vs. Stubblings*, 126 Ill., 387; *Fitzpatrick vs. Insurance Co.*, 56 Conn., 116; *Clark vs. Allen*, 11 R. I., 439; *Rittler vs. Smith*, 70 Md., 261; *Ashley vs. Ashley*, 3 Sim., 149; *Bursinger vs. Bank*, 67 Wis., 75. "A man may have the best reason for wishing to dispose of the policy on his life. The exigencies of business or absolute necessity may require him to do so. He may have paid large sums in premiums, and afterwards become unable to pay more, and, if he is not allowed to sell or assign on the best terms he can make, the policy must be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that, if he were to sell or assign it, the assignee or purchaser should have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling, is, as a matter of law, extremely fanciful and unsatisfactory." *Murphy vs. Red*, 64 Miss., 614, 1 South, 761. It is an

exceptional case where the court may rule, as a matter of law, that a policy, or the assignment of a policy, is void as a wagering contract. In the case in hearing, the appellee Clark paid \$300, and agreed to pay the dues and assessments, for the policy. In the absence of the proof of any age or expectancy of life of the insured, we cannot say that the sale or assignment was tainted with the vice of gambling. In *Ulrich vs. Reinoehl* (Pa.), 22 Atl., 862, creditors insured their debtor, a healthy man of 42 years, in the sum of \$3,000, to protect a debt of about \$100. The expectancy of life of the insured, according to the Carlisle tables, was 26 years, and the assessment and annual dues during such time would have, together with the interest, amounted to \$4,336.31. It was held not a gambling transaction, and that a recovery for the full amount of the policy could be sustained. In *Amick vs. Butler* (111 Ind., 578, 584), Judge Mitchell said: "The policy cannot be limited to the amount of the debt. If it were otherwise, the creditor would inevitably be compelled to lose whatever sums he might be required to pay in effecting the insurance and paying premiums. The beneficiary takes the chances of all future contingencies, including the continued solvency of the company, or, if it be a company in which the fund is to be accumulated by assessments upon the members, that a sufficient number will continue therein to pay the debt, and reimburse him for his advances."

The appellant claims the money as the widow of Michael W. Nye. In her complaint she averred that the designation of Clark as the beneficiary was nugatory, because he did not come within any of the classes named in the constitution and by-laws of the order. For many purposes such associations as the appellee, the A. O. U. W., are insurance companies, and the certificate issued by them is governed by the same rules applicable to insurance policies. There are, however, essential differences between them. The most usual is the power on the part of the insured in such associations to change the beneficiary. In the ordinary life insurance the beneficiary named in the policy acquires an interest in the policy, but in such charitable associations the beneficiary acquires a vested interest until the death of the insured: *Holland vs. Taylor*, 111 Ind., 126; *Society vs. Burkhart*, 110 Ind., 189. The person whose life is insured may change the beneficiary at any time by complying with the regulations of such association: Section 3850, Rev. St., 1881. It is also well settled that persons who become members of mutual insurance companies are bound to take notice of the constitution and by-laws of the company, and such by-laws enter into and become a part of the contract of insurance, the same as if they were

written into the certificate: *Holland vs. Taylor*, *supra*; *Bauer vs. Samson Lodge*, 102 Ind., 262. The object and purposes of the benevolent association must be kept in view in construing its constitution and by-laws and the certificate of membership. If any person should be designated as a beneficiary who does not come within the classes named, the designation is invalid: *Daniels vs. Pratt*, 143 Mass., 216, 221; *Rindge vs. Society*, 146 Mass., 286. When the classes of persons to be benefited are designated, the corporation has no power or authority to create a fund for other persons than the classes named (*Legion of Honor vs. Perry*, 140 Mass., 580; *Elsey vs. Association*, 142 Mass., 224); and a member of such society is powerless to divert the fund from the appointed channel (*American Legion vs. Smith*, 45 N. J. Eq., 466). The association can only pay the fund to the persons designated in its constitution and by-laws, or the statute creating it; and, if it should promise to pay to some other person, the promise is void: *Britton vs. Supreme Council*, 46 N. J. Eq., 102; *Supreme Lodge vs. Nairn*, 60 Mich., 44; *Association vs. Rolfe*, 76 Mich., 146; *Sanger vs. Rothschild*, 123 N. Y., 577. If the first clause of the constitution and by-laws above set out be considered as standing alone, the beneficiary fund payable at the death of the member must be paid to such person or persons as the member may designate. It does not confine the beneficiary to a member of his family, for he may have no family. The words, "thus enabling him to guaranty his family against want," are simply suggestive of what may be done by the member. They are words of recommendation, or express the wish and desire of the association. The second clause set out defines what person or persons may be designated as beneficiaries. Considering it alone, the beneficiary is limited to some one of the family of the deceased member, or to one related to him by blood or dependent upon him. If we consider these words in their broadest meaning, they will include many classes of persons. The word "family," in one of its broadest meanings, includes all those who have descended from one common progenitor,—those of the same blood. In a less comprehensive sense it means a collective body of persons living together and constituting one household. In a still more limited sense it means father, mother, and children. "Blood relationship" is a term of very comprehensive meaning. It includes those persons who are of the same family, stock, or descended from a common ancestor. A "dependent" is one who relies for support on another in some way: *Ballou vs. Gile*, 50 Wis., 619. Those who may be dependent upon another for support and maintenance may not be of the family or related by blood to the

member. It is a question of fact, and not of law, to determine who are members of a family or of blood relationship or dependents: *Legion of Honor vs. Perry*, 140 Mass., 590. The third clause provides that the "heirs and legatees of the deceased member shall be entitled to two thousand dollars, and said fund shall be used for no other purpose." An heir is one upon whom the law casts an estate immediately upon the death of an ancestor,—one who succeeds to the estate of a deceased person by operation of law. A legacy is a testamentary disposition of personal property, and a legatee is a person to whom the bequest is made. These different clauses, considered separately, lead to conflicting conclusions. The first does not put any limitation upon the persons who may be beneficiaries; the second limits them to members of the family, dependents, and blood relatives; the third permits heirs and legatees to become beneficiaries. They must all be construed together, and the intention and purposes of the association ascertained, if possible. In *Lamont vs. Grand Lodge* (31 Fed., 177), by article 1 of the constitution of the order it was declared to be the business and object of the order, "to promote fraternity, and afford financial aid and benefit to the widows, orphans, and heirs or devisees of the deceased members." By article 7 it was provided that, upon the death of a member, such person or persons as the member may have directed, subject to the limitations of article 1, should be entitled to the beneficiary fund. Shiras, J., said: "It is evident that the word 'heirs' is used, not in its restricted sense, but to include any one to whom the estate of the deceased might pass by operation of law; and this would, in many cases, include persons who were but distantly related by blood to the deceased member, who had not, in fact, ever been members of the family, and with whom, perhaps, he had no personal acquaintance. But, in addition to the widows, orphans, and heirs, it is also provided that aid was to be afforded to 'devisees.' It is clear that this word cannot be intended to bear the technical meaning of one to whom real estate is given by the last will of another. \* \* \* The word 'devisee,' therefore, is used in its primary sense of one 'separated' or 'designated.'" The use of the word "legatee" in the constitution and by-laws of the A. O. U. W. is the recognition of the right of a member to dispose of the beneficiary fund by will. If Michael W. Nye might have bequeathed the beneficiary fund to a person not a member of his family, dependent upon him or related to him by blood, we know of no substantial reason why he might not do the same thing by appointment. Clark was named as the beneficiary in the certificate. It is averred in the counterclaim, and was proven on the trial, that before Clark pur-

chased the certificate he consulted the officers of the subordinate lodge as to his right to purchase the same, and was informed by them that such purchase would be valid. It was also averred and proved that the appellant consented to, and joined in, the sale or assignment. The officers of the association were certainly proper persons to construe the constitution and by-laws, and to determine what persons came within the classes therein designated. If this action were against the A. O. U. W., we think that when Clark produced his certificate, and made proof of the acts and conduct of the officers, as averred, he would have made a *prima facie* case. The appellant is in no better position than the order. The burden was upon the appellant to show that she did not come within the classes provided in the constitution and by-laws. In the absence of any evidence whatever on this subject, we think the appellant has failed to show any right to the fund.

Turning our attention to the rights of the appellee Clark on his counterclaim, we wish first to allude to certain rules of pleading and practice. If a plaintiff declare upon a policy of insurance issued on the life of another, he must aver and prove that he had an interest in the life of the person insured; but, if he be named as the beneficiary therein, he is not required to plead or prove that he had an interest in the life of the person insured: *Insurance Co. vs. Volger*, 89 Ind., 572, 575; *Insurance Co. vs. Baum*, *supra*; *Burton vs. Insurance Co.*, 119 Ind., 207; *Association vs. Houghton*, 103 Ind., 286. The certificate being made payable directly to Clark, he was not required to show affirmatively that he had come within the classes provided for in the constitution and by-laws of the order. When he made proof of the death of Michael W. Nye and produced the certificate, he had established a *prima facie* case: *Supreme Lodge vs. Johnson*, 78 Ind., 110, 113. It devolved upon those who charged that he did not come within the classes named to prove the fact. *Prima facie* the policy belongs to the person in whose name it is effected, and the onus is on those who claim it against him to show to the contrary: *Bruce vs. Garden*, 5 Ch. App., 32. Clark's counterclaim contained several unnecessary allegations, but there was nothing in it that required him to show that his purchase of the certificate did not come under the ban of wagering contracts, or that he was within the classes of beneficiaries named.

Having reached the conclusion that the judgment must be affirmed, it is unnecessary to consider the other questions discussed. We may remark, however, *en passant*, that where money has been collected upon a policy which had its origin in a wager, or where an improper beneficiary was named, or where the insurance is taken

out by a debtor as a security for the benefit of his creditor, the expense of procuring the policy being borne by the debtor, the weight of authority justifies the conclusion, in either case, that the amount collected, less the amount advanced or the debt secured, may be recovered by the personal representatives of the person insured: *Cammack vs. Lewis*, 15 Wall., 643; *Page vs. Burnstine*, 102 U. S., 664; *Warnock vs. Davis*, 104 U. S., 775; *Dutton vs. Willner*, 52 N. Y., 312; *Drysdale vs. Piggott*, 8 De Gex. M. & G., 546; *Lea vs. Hinton*, 5 De Gex. M. & G., 823; *Gilbert vs. Moose*, 104 Pa. St., 74; *Amick vs. Butler*, *supra*. In the case of a creditor insuring the life of his debtor, the law requires distinct evidence of the contract that the debtor has agreed to pay the premiums. In such a case the policy will be held in trust for the debtor or his representatives: *Amick vs. Butler*, *supra*; *Bruce vs. Garden*, *supra*; *Insurance Co. vs. Sefton*, 53 Ind., 380. There are cases, respectable in number and authority, which hold that the rules of the society or corporation are made for its benefit and protection, and that, if the association waives its rights thereunder, and pays the money to the person designated, no contestant for the money can take advantage of the rules and by-laws of the order: *Johnson vs. Supreme Lodge (Ark.)*, 13 S. W., 794; *Stoelker vs. Thornton (Ala.)*, 6 South, 680; *Martin vs. Stubbings (Ill.)*, 18 N. E., 657; *Knights of Honor vs. Watson (N. H.)*, 15 Atl., 125; *Brown vs. Mansur*, 64 N. H., 39, 5 Atl., 768.

Judgment affirmed, at costs of appellant.

Davis, C. J., and Gavin, J., dissent.

## SUPREME COURT OF ARKANSAS.

JOHNSON

*vs.*

SUPREME LODGE OF KNIGHTS OF HONOR ET AL.\*

A technical word when used in a legal instrument where there is no context to explain it should be understood in its legal and technical sense. "Heirs" are those who would under the statute of distribution be entitled to the personal estate of the decedent. Under the statutes of Arkansas the widow without issue is not an "heir," and the money goes to the brothers and sisters of the assured.

U. M. & G. B. ROSE and GEO. SIBLY, *for Appellant*.

J. E. GATEWOOD, *for Appellee*.

\* Decision rendered, May 10, 1890.

BATTLE, J.

On the 4th day of September, 1883, the Supreme Lodge of the Knights of Honor issued to James W. Johnson, a member of Devall's Bluff Lodge, No. 2,172, a local lodge of the Knights of Honor, located at Devall's Bluff, in this state, a benefit certificate for the sum of \$2,000, payable to his heirs at his death. At that time Johnson was unmarried, and the constitution of the Supreme Lodge authorized the issuing of a benefit certificate payable on the death of a member to his family, or as he might direct. In 1884 the constitution was changed so as to authorize the issuing of a certificate to a member, "payable to some member or members of his family, or person or persons dependent on him, as he may direct or designate by name, to be paid as provided by general law." After this, on the 7th of December, 1884, James W. Johnson and Laura A. Johnson, the plaintiff in this action, married; and on the 27th of February, 1886, a child was born to them, who died on the 10th of August of the same year. On the 24th of November following, James W. Johnson died without descendants, leaving Laura A., his widow, and S. W. Pate and O. T. Carr, sisters of the whole blood, and George W. Price and Salvina T. Hurt, half sister and brother, his nearest kindred, him surviving. The beneficiaries named in the certificate of the 4th of September, 1883, were never changed. The Supreme Lodge has paid the \$2,000 into court; and the sisters and half sisters and brother, defendants in this action, claiming to be the heirs of Johnson and Laura A., litigate its disposition.

The first question presented for our consideration is, who are meant by the word "heirs" in the certificate in controversy? It is a technical word. When used in any legal instrument, and there is no context to explain it, as in this case, it should be understood in its legal and technical sense: *Moody vs. Walker*, 3 Ark., 147; *Myar vs. Snow*, 49 Ark., 129, 4 S. W. Rep., 381; *Hascall vs. Cox*, 49 Mich., 440, 13 N. W. Rep., 807; *Mounsey vs. Blamire*, 4 Russ., 384; *De Beauvoir vs. De Beauvoir*, 3 H. L. Cas., 553, 557; *Doody vs. Higgins*, 2 Kay & J., 729; *Holloway vs. Holloway*, 5 Ves., 401. At law it was used to designate the persons on whom an inheritance in real estate was cast by the law on the death of the ancestor. Originally, it could not be used to designate those on whom the goods or chattel property were cast, because the law cast them upon no one. No one "was appointed by law to succeed to the deceased ancestor. On his death they became *bona vacantia*, and were seized by the king on that account, and by him, as grand almoner, applied to pious purposes, now considered superstitious, for the good of the souls of their former owner." But, since the enactment of statutes of

distribution, it has often been used in gifts and bequests of personal property to designate the donee or legatee. As to its meaning when used in this connection, courts are not in harmony, and there is much confusion and conflict in the decisions. No useful purpose can be served by a review of the cases upon the question in this opinion. Suffice it to say that the weight of authority holds that the word "heirs," when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain it, means those who would, under the statute of distributions, be entitled to the personal estate of the persons of whom they are mentioned as heirs in the event of death and insolvency: *Doody vs. Higgins*, 2 Kay & J., 729; *Gittings vs. McDermott*, 7 Eng. Ch., 69; *Wingfield vs. Wingfield*, 26 Moak, 422; *Sweet vs. Dutton*, 109 Mass., 590; *Wright vs. Trustees*, 1 Hoff. Ch., 211, 213; *McCabe vs. Spruil*, 1 Dev. Eq., 190; *Evans vs. Salt*, 6 Beav., 266; *Jacobs vs. Jacobs*, 16 Beav., 557, 560; *White vs. Stanfield (Mass.)*, 15 N. E. Rep., 924, 925; *Low vs. Smith*, 2 Jur. (N. S.), pt. 1, p. 344; *Houghton vs. Kendall*, 7 Allen, 77; 2 Jur. (N. S.), pt. 2, p. 211; *Croom vs. Herring*, 4 Hawks, 393; *Eddings vs. Long*, 10 Ala., 203; *Rawson vs. Rawson*, 52 Ill., 62; *Richards vs. Miller*, 62 Ill., 423; *Hascall vs. Cox*, 49 Mich., 440, 441, 13 N. W. Rep., 807. See *Tillman vs. Davis*, 95 N. Y., 17.

In many states where the widow is entitled to take under the statute of distribution, she is held to be an heir of her deceased husband as to his personal estate. But it is different in this state. Section 2522, Mansf. Dig., provides: "When any person shall die, having title to any real estate of inheritance or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred; male and female, subject to the payment of his debts and the widow's dower, in the following manner: First. To children or their descendants, in equal parts. Second. If there be no children, then to the father; then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts," etc. The statutes provide that relations of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate through an ancestor. In only one event does the widow take as an heir or distributee of her deceased husband, and that is when he died intestate, and leaves no children or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting. Our statutes virtually declare that she shall not take the real or personal property of her deceased husband as heir in any other



event, if then: Mansf. Dig., § 2528. It is true that section 2592, Mansf. Dig., provides: "If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which such husband died seized, and one-half of the personal estate, absolutely and in her own right." But she takes the one-half of the personal estate as dower, absolutely and independently of creditors, and not as a distributive scheme.

In *Hill's Adm'rs vs. Mitchell* (5 Ark., 618), this court said: "Distribution and dower are two separate and distinct things. One is a lien created by law on the property of the husband at the time of the marriage, which necessarily takes precedence over all other subsequent accruing rights, and attaches to the specific property, and is carved out of it. Distribution occurs after administration and the payment of debts, and the estate is then divided between the heirs and legatees. The widow is not entitled to any portion or distributive share after her dower has been allotted to her; for all that goes to the heirs or legatees after payment of debts, and the administrator is bound to distribute the residue in his hands. We have no statute giving her any portion of the personal estate as a distributive share, and that part of the common law which is in force here allows her no such interest in the personal effects of her husband."

In Illinois, a statute was enacted which provides: "When there is a widow or surviving husband, and also a child or children, or descendants of such child or children, of the intestate, the widow or surviving husband shall receive as his or her absolute personal estate one-third of all the personal estate of the intestate:" Rev. St. c. 39, par. 4. In *Gauch vs. Insurance Co.* (88 Ill., 251), the court held that this statute was not intended to, and did not, make the widow an heir of her intestate husband, but defined what shall be taken as dower, and held that a policy of life insurance payable to the "legal heirs" of the person whose life was insured was payable to his children, if he left any, and that his widow was not included in the words "legal heirs."

We do not think that Laura A. was an heir of her husband, or included in the word "heirs" in the certificate in controversy. But it is contended that the brothers and sisters of Johnson are entitled to no part of the \$2,000, because the constitution of the Supreme Lodge of 1884 limits the right of a member of any lodge of the Knights of Honor to name beneficiaries in a certificate issued to him to the members of his family, or those dependent on him, and they belong to neither of these classes. But this question can be raised by no one except the Supreme Lodge, and it does not. By paying the money into court, it has expressed its willingness to have it paid

to Johnson's heirs. The money forms no part of his estate. The widow has no interest in it. The constitution of the Supreme Lodge of 1884 provides: "In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member." The child having died before its father, Johnson left his brother and sisters his only heirs. As the Supreme Lodge by its certificate promised to pay them the \$2,000, and do not object to paying, and no other person can, lawfully, they are entitled to a judgment that it be paid to them. Judgment affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

FLYNN

vs.

MASSACHUSETTS BEN. ASS'N.\*

This action was properly brought by the administrator, but if he had declined to bring it, then the owner of the equitable interest might maintain it in his own name, with or without administrator's consent.

When doctors disagree as to whether assured, did, or did not, have a certain disease, credence will be given, as in other phases of insurance litigation, to the testimony which leans against the corporation.

"Satisfactory proof of death" need not be satisfactory to the company, provided it is satisfactory to the court.

J. E. COTTER, C. F. JENNEY, and G. A. HENLEY, *for Plaintiff.*

EDWARD AVERY and A. E. AVERY, *for Defendant.*

DEVENS, J.

This action is brought upon a certificate or contract under seal, by which Eugene Sullivan, now deceased, was made a benefit member of the defendant association, and by which the association agreed to pay to his two children, Tamzina and Maria, described as his heirs-at-law, in 60 days after satisfactory proof of his decease, a sum equal to "the amount received from a death assessment, not exceeding five thousand dollars." The defendant contends that the action is improperly brought by the administrator of Sullivan, and that it should and could only have been brought by the children named, through their guardian, or next friend, they being

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\* Decision rendered, Oct. 24, 1890.

both now in their minority. Where the promise of the insurer in a policy of insurance in the ordinary form, is to the insured, his executors, administrators, and assigns, an action cannot be maintained in the name of those for whose benefit the contract is expressed to be made: *Campbell vs. Insurance Co.*, 98 Mass., 381; *Bailey vs. Insurance Co.*, 144 Mass., 177. In *Flynn vs. Insurance Co.* (115 Mass., 449), it was held that an action on a policy of life insurance under seal, whereby the insurer covenanted with A, his heirs, executors, administrators, and assigns, to pay the sum insured to B, upon the death of A, could not be maintained by B, upon the ground, well sustained by the authorities cited, that none but a party to an agreement under seal could maintain an action at law thereon. See *New England Dredging Co. vs. Granite Co.*, 149 Mass., 381, 21 N. E. Rep. 947. The defendant urges that in a corporation of a beneficiary character doing business on the assessment plan, which the defendant is admitted to be, a different rule applies, and that to the contractual relation which exists between the insured and the insurer, there is added a statutory obligation which may be enforced by an action in the name of him to whom its benefit is due. The act of 1877, c. 204 (Pub. St., c. 115, § 8), provides that beneficiary corporations may establish, by assessment, a fund "to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund shall not be liable to attachment by trustee or other process." Similar language is used in section 2 of chapter 195 of the Acts of 1882, which largely increased the number of those for whose benefit such corporations could insure. From this language, it cannot be inferred that the legislature intended to provide that an action to enforce such a contract could be maintained by one who was not a party thereto, or that an action to enforce it could be brought both by the insurer and the beneficiary. It is intended to provide only for the mode in which the corporation shall collect and disburse its fund, leaving the remedy for any failure to perform its contract as it before existed. In *Rindge vs. Society* (146 Mass., 286, 15 N. E. Rep. 628), it was held that the administrator was the proper person to bring the action, and that, although there was in that case, an averment, it was brought for the benefit of certain persons, who, under the statute as it then existed, could not lawfully be beneficiaries, this was unimportant, as, if the administrator received the money, this receipt would discharge the defendant's liability, as it would not be responsible for the proper application of the money by him. We do not consider it necessary to consider the effect of St. 1885, c. 183, relied on by defendant as showing that the action should be

brought by the beneficiaries. The certificate in question was dated before the passage of that statute, and would be governed by the law as it then existed. If, as the defendant urges, this was intended to add to the contractual undertaking, an additional statutory obligation, it could not have been intended to apply to already existing contracts. There is no danger to the interest of the beneficiaries in holding that upon a certificate, such as that sued upon, the action should be brought by the administrator. In the case at bar, the beneficiaries have, indeed, through their guardian, fully assented that the action should be thus brought, and have consented to be bound by the result. But, in any proper case, if the administrator should decline to bring the action, the owners of the equitable interest might maintain it in the name, and without the consent, of the administrator: *Campbell vs. Insurance Co.*, 98 Mass., 381 ; or, if there was danger that he would not properly dispose of the funds collected, he could be compelled to do so by judicial proceedings to which the corporation would be a necessary party (*Rindge vs. Society*, *ubi supra*). In the opinion of a majority of the court, this action is properly brought by the administrator of Eugene Sullivan.

The application of the plaintiff's intestate is to be treated as forming a part of his contract : *Clapp vs. Association*, 146 Mass., 519, 16 N. E. Rep. 433. He warranted each of the statements made therein to be true, to the best of his knowledge and belief, agreeing that any untrue or fraudulent statements made by, or for him, should forfeit the insurance. It was contended by defendant that Sullivan's answers to certain questions were untrue, according to his best knowledge, and were made with knowledge that they were so. The burden of proving this was on the defendant association : *Clapp vs. Association*, *ubi supra*. Upon this subject, in accordance with defendant's request, the court instructed the jury that, "if any of the answers were untrue, and the said Sullivan knew, or had reason to believe, that his answers were not true, or, if his answers were not made in good faith, the plaintiff cannot recover in this action, and the verdict should be for the defendant." The defendant claims to have shown by uncontroverted evidence that the answers to the tenth, eleventh, and twelfth questions made by Sullivan were untrue, to the best of his knowledge and belief, when he made them. It contends, therefore, that the jury should have been so instructed, and that the inquiry whether the statements were thus untrue should not have been submitted, as there was no conflict on that point, and the evidence was conclusive. It is not easy to say when the burden is on one party to prove affirmatively a proposition that, even if the only witnesses examined sustain it fully, it becomes the

duty of the jury, as a matter of law, to return a verdict in accordance with the testimony as given. It does not follow that because it may properly be said, under certain circumstances, that there is no evidence to sustain a proposition, that it can be said conversely that there is evidence upon which the jury should, as matter of law, render a verdict. In the one case, it is assumed in favor of the party seeking to establish the proposition that his witnesses are believed, and, therefore, every question of fact is eliminated. That which remains is the question of the inference to be drawn from the facts, which may be one of law only. In the other case, no similar assumption can be made, and, even if it would be the duty of the jury to return a verdict in accordance with the testimony of the witnesses, should they be believed, the question of fact would still remain, whether they should be believed. We have no occasion, however, in the case at bar, to discuss this matter, as we are not prepared to say that the defendant proved the propositions it sought to establish by uncontroverted testimony. The answers upon which it principally relies, as shown to be intentionally untrue, are those made by Sullivan in his application, and are especially the following: "Interrogatory 10. Have you any disease of the urinary organs? Answer. No. Int. 11. What sickness, disease, or injury have you ever had? A. None, to my remembrance. Int. 12. How long since you were under the care of a physician, and for what cause? A. Years ago, for measles. Int. 13. Have you now any disorder, infirmity, or weakness? A. No." It was for defendant to show that answers thus recited were consciously untrue, and it claims to have done so, both by direct and circumstantial evidence. Whether they were so depended largely on the testimony of Dr. Plimpton, who stated that he saw Sullivan first on the 9th of December, 1884, and that, on his second examination, on the 10th of December, 1884, he was satisfied that Sullivan had Bright's disease of the kidneys; that he informed Sullivan of the fact, and also that his chances of getting well were very poor, indeed; that he was a doomed man; that he might live six months or three years, it could not be told which. Dr. Plimpton also described in detail the examinations made by him, although he had not preserved minutes of them, and the various tests adopted by him to ascertain the presence of albumen in the urine of Sullivan, with a view of determining the existence of Bright's disease. Dr. Plimpton also testified that the last time he saw Sullivan was at his house, on May 14, 1885, when he (Dr. Plimpton) was discharged as a physician, and also described the treatment adopted by himself. He saw the patient professionally also, as he states, several times, after his examination on

December 10th, during the months of December and January, including January 31st, the day when the application was made, as well as in February and March. On the other hand, Dr. Durgin testified that he examined Sullivan on January 31st; that he was in good health; that he was strong and robust as any man in Norwood; that he examined his urine, and that there was no indication of Bright's disease. Dr. Cragin testified also, that he treated Sullivan at various times up to the time of his death, which was January, 1888, and that he never had Bright's disease, and there was evidence from an expert (Dr. Fifield) that, from the description given by the witnesses of Sullivan's condition, he never had Bright's disease, which was supported by that of Dr. Cilley. The plaintiff claimed not only that the diagnosis by Dr. Plimpton, of Sullivan's condition, was erroneous, but also that his examination of Sullivan did not take place until after January 31st, and for this purpose introduced the testimony of Ellen Sullivan, the sister of the insured, who testified that she noticed no trouble with her brother, except a cold, until about April, 1885; that, late in March, or early in April, she called on Dr. Plimpton; that he informed her of having examined her brother two or three days before, and expressed the opinion that he had Bright's disease. The plaintiff also introduced the evidence of other witnesses as to the physical condition and appearance of Sullivan, his strength as shown by the work done, as tending to prove that he did not have this disease at the time of the alleged examination by Dr. Plimpton, nor any serious disease, until a later period, which the defendant met by evidence from other sources of Sullivan's weak physical condition. Without recapitulating even in a condensed form all the evidence on this, or the other points of the case, it sufficiently appears that a conflict existed on the important inquiry when the examination made by Dr. Plimpton took place, and as to its correctness. If these examinations took place after January 31st, they had but little relevance to the case; while, if they took place previously, were correct, and included the information to Sullivan of his almost desperate condition, they were decisive against the plaintiff. The accuracy of Dr. Plimpton in his statements was a question that could not be withdrawn from the jury, and was submitted to them under proper instructions. On examining the requests made, and the charge actually given, we do not perceive that anything was omitted necessary to aid the jury in a fair consideration of it. By their answers to the special questions submitted to them, the jury have found that the answers to the interrogatories above recited, were not, according to the knowledge and belief of Sullivan, untrue.

Nor, has the defendant any just ground of complaint as to the instructions as to the proof of death. All the information was given that was required by the terms of the policy. Its fourth clause requires that satisfactory proof of death shall be furnished by the sworn certificates of the attending physician, and other persons named. Sworn certificates from all of these persons were furnished. The defendant had no right to require a certificate from Dr. Plimton, who had not attended the deceased for several years, and thus provide itself with a statement from a witness, friendly to itself, who was not one the class named in the policy. The words "satisfactory proof of death," in the body of the policy, are explained and limited by the fourth clause, which defines the mode in which, and the persons by whom, this proof is to be furnished: *Clapp vs. Association*, 146 Mass., 519, 530, 16 N. E. Rep. 433.

Judgment on the verdict.

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## COURT OF CIVIL APPEALS OF TEXAS.

MUTUAL LIFE INS. CO., OF NEW YORK, }

vs. }

NICHOLS.\*

An examination was begun by the medical examiner of another company a year prior to the application to defendant company, but was abruptly terminated by said examiner, who, on putting his ear to the applicant's breast, found his pulse running at over one hundred beats per minute, and told him it was useless to proceed further as the rapid pulse would reject him. This examination was not written down and no written application for insurance was made at that time.

In his application for the policy sued on, the question was asked "if any proposition or negotiation or examination for life insurance has been made in this or any other company or association on which a policy has not been issued; state when and in what company;" to which the applicant answered "None other." *Held*, That the answer made by N. was warranted to be true and was in point of fact untrue in that the information of the prior examination was withheld, which might have influenced the company to decline the risk. The question referred to any and any sort of examination by any other company. A warranty was broken and the policy was void.

Local questions of state jurisdiction under the Texas law as well as venue are included in the text of the case.

R. H. WARD and JOS. SPENCE, Jr., *for Appellant*.

COCHRAN & HILL, *for Appellee*.

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\* Decision rendered, January 17, 1894.

COLLARD, J.

This action was brought by the appellee against the appellant on September 16, 1889, in the District Court of Tom Green County, Tex., upon a policy of insurance issued by defendant for \$2,500, for the benefit of plaintiff, upon the life of George D. Nichols, her husband. Verdict and judgment were for plaintiff. Defendant has appealed.

The petition alleged the residence of plaintiff at Natchez, Miss., and that defendant was a life-insurance corporation chartered in the state of New York, having its principal place of business in the city of New York, but that, at the time of the issuance of the policy and the institution of the suit, it was doing business as such insurance company in Tom Green County, in this state, under the laws of this state; A. B. Sherwood being its local agent and representative resident in Tom Green County, Tex. It is also alleged in the petition that defendant is a foreign corporation, and, as an insurance company, has made its deposit, as required by law, with the treasurer of Texas, and been licensed to do business in this state. It is also alleged that the policy was made payable at the company's office in the city of New York. Defendant filed special exceptions, and a sworn plea to the jurisdiction of the court, which were overruled, which ruling is assigned as error. The plea sets up the nonresidence of plaintiff, and the nonresidence of defendant, created by the laws of the state of New York; that it had never resided in Texas; never deposited with the treasurer of the state of Texas \$100,000, or any other sum, as alleged by the plaintiff; that it is not a foreign corporation, as alleged by plaintiff, and is not required to deposit \$100,000, or any other sum, with the state treasurer of Texas. The plea further shows that George D. Nichols died in the state of Mississippi.

There was no error in overruling the exceptions and plea to the jurisdiction. Our statute authorizes the suit in this state. It provides that "foreign, private or public corporations, joint-stock companies or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within this state, having jurisdiction over the subject-matter in any county where the cause of action, or a part thereof, accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or when the defendant corporation has no agent or representative in the state, then in the county where the plaintiffs or either of them reside:" 1 Sayles' Civil St., art. 1198, § 21b. Defendant is included, as a foreign corporation, within the meaning of the above statute: *Railway Co. vs. Whitley*, 77 Tex., 130, 131, 13 S.



W., 853. The plea does not deny the distinct averment that the defendant corporation was, at the time of the institution of the suit, doing business within this state, or that it had an agent representing it in Tom Green County. The fact that it was doing business in this state authorized the suit in this state, and the fact that it had an agent in Tom Green County fixed the venue in that county. The statute controls the question; but, without the statute, the doctrine of the case of *York vs. State* (73 Tex., 651, 11 S. W., 869), followed by several other cases, that an appearance by a nonresident for any purpose, even to object to the jurisdiction, is an appearance for all purposes—a submission to the jurisdiction—is conclusive of the question against appellant: *Railway Co. vs. Whitley*, 77 Tex., 126, 13 S. W., 853; *Railway Co. vs. Harrison*, 73 Tex., 103, 11 S. W., 168. An action, like the present, for debt, will be entertained by our state courts at the instance of a nonresident plaintiff, if jurisdiction can be had of the defendant. The plaintiff submits to the jurisdiction by instituting suit in our courts. Consent would confer jurisdiction of parties in transitory actions: *Cofrode vs. Gartner*, 79 Mich., 332, 44 N. W., 623; *Railway Co. vs. Miller*, 19 Mich., 305; *Roberts vs. Dunsmuir*, 75 Cal., 203, 16 Pac., 782; *Insurance Co. vs. Woodworth*, 111 U. S., 138, 4 Sup. Ct., 364. In this state, in a suit for debt by attachment, by a nonresident against a nonresident, after the attachment was quashed, the court refused to dismiss the case, holding that the defendant had submitted to the jurisdiction by answer: *Campbell vs. Wilson*, 6 Tex., 379. In the case before us, the statute having given jurisdiction of the defendant, the residence of the plaintiff is immaterial, she having voluntarily submitted to the jurisdiction of the court. We cannot hold, as appellant insists we should, that the statute must be construed to apply exclusively to citizens of this state, granting to them only, the right to sue, in this state, foreign corporations doing business in this state. Persons nonresident who are permitted, upon principles of comity, to sue nonresidents found within our jurisdiction, may avail themselves of the statute, and sue a foreign corporation found doing business here. The corporation doing business here by force of the statute is made amenable to our courts; and in applying the statute the question is not, who may sue? but, who may be sued? The statute declares that nonresident corporations, in a certain case, may be sued here, and provides for service upon them. The terms of the statute are fully met if they are found here doing business, and, in our judgment, they may be sued by a nonresident plaintiff, at least upon the same terms that such plaintiff could sue a nonresident person found here; that is, in the same character of action.

Indeed, we think the statute opens our courts to all persons having suits against such corporations upon the same terms as in suits against citizens of the state. Section 22 of the article referred to in our statute (article 1198) relates to venue only,—that is, to the county in which the suit may be brought, presupposing the right to sue somewhere in the state,—and it enlarges the venue. It reads: “\* \* \* And suits against life and accident insurance companies or associations may also be commenced in the county in which the persons insured or any of them resided at the time of such death or injury.” Article 2952 of the Revised Statutes also relates to venue of counties and the manner of service. It does not affect the question of jurisdiction. It assumes jurisdiction of the state courts, relates to domestic and foreign companies, and provides for service. Appellant has not raised the question of venue, and does not claim that it has been sued in the wrong county.

After stating the issues, the court instructed the jury, in part, as follows: “You are instructed that the burden is on plaintiff to establish a *prima facie* case in order to recover, and this is done by proof of the execution of the policy sued on; second, the payment of all premiums agreed upon; third, the death of said George D. Nichols; fourth, the proof of said death made to defendant; and, fifth, the failure by defendant to pay said policy. And, if you find these facts in the affirmative, you will find in plaintiff’s favor for the amount of said policy, with 12 per cent interest from the 21st day of January, 1888, also \$250 attorney’s fees, unless you find in defendant’s [favor] on the issues hereinafter submitted.” Appellant says that this instruction is erroneous “in that it authorizes the jury to find for plaintiff on less than a preponderance of evidence; the burden being upon plaintiff to make out her case, not a *prima facie* case, by a preponderance of the testimony.” It is also insisted that the charge is erroneous in that it relieves plaintiff from proving compliance with all the warranties and conditions precedent in the application; and that the charge was misleading because the jury could infer therefrom “that the plaintiff had made out her case by *prima facie* proving the propositions set out in the charge, when, in law, before plaintiff could recover, the jury must have found in her favor upon all the issues raised by the pleadings and evidence, and from a preponderance of the testimony.” It will be proper to state, under this assignment, the principal facts of the case, so that the issues arising thereon and the one under consideration may be fully understood. Plaintiff had proved the policy, as alleged, dated December 16, 1886; that it was applied for and issued while the plaintiff and the insured were residing in Texas;

that all premiums had been paid; that George D. Nichols, the insured, was dead, as alleged, and that proof of his death had been furnished the defendant as required; and that defendant had failed to pay the amount due by the policy, as stated therein. The application by Nichols for the policy of date December 8, 1886, was a part of the contract, and in the application was the following warranty: "I also agree that all the foregoing statements and answers, as well as those that I make, or shall make, to the company's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract." The fifteenth question propounded in the application was as follows: "If any proposition or negotiation or examination for life insurance has been made in this or any other company or association, on which a policy has not been issued, state when and in what company,"—to which the applicant answered, "None other." Defendant, in its answer, set up the foregoing warranty, question, and answer, and that the answer was false, in that Nichols had, on the 1st day of December, 1885, made application to defendant for insurance on his life, upon which he had been examined by its medical examiner, John Rodman, and that no policy was issued on the same; and that he (Nichols) had also, on or about the 15th day of January, 1885, made application for life insurance upon his life to the New York Life Ins. Co., in pursuance of which he was, on the 15th day of January, 1885, examined by John Rodman, medical examiner for said company, when he was found unfit for insurance by reason of disease; that his application was rejected, and no policy issued thereon. Defendant set up these facts as constituting a breach of the warranty, and that they rendered the policy null and void. It was in proof that Nichols had made application in writing to defendant on the 1st of December, 1885, for a policy on his life, had been examined by defendant's medical examiner, Rodman, and that his application had been rejected, the medical examiner having reported his pulse rate at 108 beats to the minute. The medical examiner, in his report on the application, made the following explanation as to the rapid pulse: "Mr. George Nichols is very excitable and nervous, and the idea of a physical examination has given the rapid pulse. An examination of pulse by your agent, Mr. Howland, and Mayor H. M. Stockings, gives the rate at 74 and 76 under less exciting circumstances. Mr. Nichols controls a large fenced ranch, and his vocation is entirely free from accidents incidental to the ordinary ranch life. I think him a first-class risk. I examined his pulse in a slight dysentery not long since, and his

pulse rate was not unusually rapid." The application and examination (December, 1885) were sent by defendant's district agent, W. P. Howland, who solicited it, to Bryan Sherman, defendant's general agent at St. Louis, Mo., whose name is, in such capacity, indorsed on the same, and is also indorsed on the policy sued on. The reported pulse rate, as stated by the medical examiner in application for policy sued on, is 84 to the minute, and full. Howland knew and testified that the application of December 5, 1885, was not accepted by the company. Dr. T. Fitzhugh conducted the medical examination of Nichols at the time the application was made upon which the policy sued on was issued. He testified that, when he examined Nichols, "he had been examined once before for life insurance. He had been examined by a physician in Abilene, Tex., for a life policy, and a favorable report had been made, but that he neglected to take the policy out." He stated that the examination had been made about a year previous. The witness Rodman testified that he examined Nichols in December, 1885, for defendant, and at another time after the examination for defendant,—thinks within three months. In relation to this last examination made, he testified: "I have been local medical examiner at Abilene, Tex., for the New York Life Ins. Co. ever since 1882, up to this time; have also been local medical examiner for defendant's company ever since 1885, to this time. I knew George D. Nichols during his lifetime, at Abilene, Tex. I examined him for life insurance in the New York Life Ins. Co. at Abilene in the latter part of 1885 or early in 1886. There was no written examination or written report made of the result of the examination, and I do not think Nichols made a written application for this examination. Mr. Nichols came to my office with the soliciting agent of the New York Life Ins. Co., and requested me to make the examination. I made a casual examination of him by putting my ear to his breast for the purpose of testing his heart beats. I found his pulse running at over 100 beats to the minute, and I at once told him it was useless to proceed further with the examination, as the rapid pulse would reject him. A pulse of 90 beats to the minute is the highest limit at which subjects for life insurance are accepted. Nichols was greatly annoyed at the result of the examination, and said: 'I am so foolish. I cannot control myself.' I also examined Mr. Nichols for life insurance in the Mutual Life Ins. Co. [defendant.] This examination was made before my examination for insurance in the New York Life Ins. Co.," etc. "It is a rule of defendant that applications for insurance shall be in writing, and examiners' reports are also required to be in writing; I mean such is the practice.

I do not know whether or not there is any by-law of the company to that effect. \* \* \* Nichols, before the examinations on both occasions, stipulated and requested that the result of the examination, if unfavorable, should not go on record or be reported to the companies, as it might prevent him from getting insurance in other companies." No report was made of the examination for insurance in the New York Life Ins. Co. There was no error in the court's charge. Plaintiff had made a *prima facie* case when she proved affirmatively the five propositions stated by the court. Had the evidence stopped with such proof, there would have been nothing to prevent plaintiff's recovery. She was not called on to prove that the warranties had not been broken. Defendant set up breach of warranty affirmatively, and took the burden of proving it. Without proof of it, there could be no finding in favor of it, and of course plaintiff must have recovered. The proposition made by the court's charge that, if plaintiff established the five facts stated (the burden of proof being upon her to do this), the jury should find for plaintiff, unless they should find for defendant on the issue of breach of warranty, was correct. The court instructed the jury substantially that, if Nichols' answer to question 15 was false, the policy would be void, and defendant should recover, unless defendant was estopped upon other grounds stated.

On the question of estoppel the court instructed the jury that "if, at the time said application was made by said Nichols, or at the time any of the premiums on said policy were paid, the defendant, or its agents intrusted with the management of its business, had knowledge that any of the answers of said Nichols to any of the questions asked him by the agent or the medical examiner were false, the defendant is estopped from urging said false answers in avoidance of said policy." Defendant objects to this charge, upon the ground that it authorizes the jury to find estoppel if defendant had notice that any part of the answer was false, though another false part of it were unknown to it; as, that it knew application had been previously made to defendant itself, but not to the New York Life Ins. Co. We do not think the charge should be so construed, or that the jury so understood it. It allows estoppel only for such false answers—"said false answers" as were known by defendant to be false.

In explanation of notice to defendant by knowledge of its agents, the court, at the request of defendant, instructed the jury that defendant would not be chargeable with knowledge of any fact acquired by Dr. Rodman when acting as medical examiner for the New York Life Insurance Company, although he may have been at

that time also the medical examiner for defendant. At the plaintiff's request, the court charged the jury as follows: "If you believe from the testimony that at the time the application for insurance policy sued on was made, and at the time of the medical examination of George D. Nichols for such insurance, it was the meaning and intention of the parties at said time that by the expression in said medical examination, 'Have you ever made any proposition or negotiation or examination in this or any other company for insurance on which a policy has not been issued?' it was intended and meant thereby, by the parties thereto to mean and refer to written application, proposition, and negation and examination, as used and prescribed by the rules of the insurance company (if you believe from the evidence there were any such rules); and you further believe from the evidence that there was no written proposition, negotiation, or examination previously made by the said Nichols in the New York Life Insurance Company, and that the rules of said company required a written proposition, negotiation, or examination,—then you will find that he correctly answered said question in so far as said answer relates to any proposition, negotiation, or examination in the New York Life Insurance Company." The appellant assigns error in this charge upon the grounds: "First, it is upon the weight of evidence; second, there is no evidence in the case to which it can apply; third, it is upon an assumed or feigned issue; fourth, the court authorized the jury to construe the effect of an unambiguous written contract when the court should have declared the legal effect of the same; fifth, the jury were empowered to vary or alter the legal effect of the written contract by parol." We have found great difficulty in coming to a conclusion upon this assignment, but have decided that the charge must be held to be erroneous. Fitzhugh was the medical examiner of defendant propounding the question No. 15, December 8, 1886. Dr. Rodman was the local medical examiner for defendant at Abilene at the time Nichols was previously examined for insurance in this company about one year before, in December, 1885, which application was rejected by the company, and has been such examiner ever since. After the former examination for insurance in the company of defendant, but before the last examination, on which the policy sued on issued, about one year before, Dr. Rodman made the casual examination, mentioned in his testimony, for insurance in the New York Life, which was not in writing, and on which no report was made, he informing Nichols that it was useless to proceed, as his rapid pulse would reject him. The court below instructed the jury that this company would not be estopped by the knowledge of Dr. Rodman

acquired when acting for the New York Life. Had Dr. Fitzhugh made the examination for the New York Life Insurance Company, the company would be estopped from claiming a breach of warranty by the failure of Nichols to give information as to such examination in answer to question 15, as in such case his knowledge, possessed while acting for defendant company as examiner for it for the policy sued on, would be held to be the knowledge of his principals: *Insurance Co. vs. Ende*, 65 Tex. 122, and authorities cited; *Morrison vs. Insurance Co.*, 69 Tex., 362, 363, 6 S. W., 605; *Insurance Co. vs. Malevinsky*, 24 S. W., 804 (decided by this court at the present term), and authorities cited. Dr. Rodman, however, did not make the examination for the policy sued on. He was merely the local examiner for defendant at the time he examined Nichols for the New York Life, and we do not think this fact would affect the defendant with knowledge of that examination. We are clearly of opinion that the company was affected with knowledge of the policy that had been rejected by it, but we cannot hold that it had knowledge by construction of the examination in the New York Life. The charge of the court permitting the jury to find that question 15 meant a written examination was important, and it doubtless controlled the verdict, as they were told by the court that the knowledge of Rodman acquired while acting for the other company would not affect this company. By the terms of the policy the answer to the question was warranted to be true. It was as follows: "If any proposition or negotiation or examination for life insurance has been made in this or any other company on which a policy has not been issued, state when and in what company." The answer as written was, "None other." It cannot be said that the company would not have been influenced by the answer if it had stated the fact of the former examination in the other company on which no policy issued, whether it was in writing or not. It may have declined to issue the policy because of that fact. The question required an answer as to any examination on which a policy had not been issued, not on which a policy had been rejected. It was not, in our opinion, ambiguous, or of doubtful import, but referred to any examination in any company, whether in writing or not. Many authorities are cited by appellee to the effect that if the question be ambiguous, or capable of two constructions, it may be explained, and that that construction should be given most favorable to the insured: 11 *Amer. & Eng. Enc. Law*, 295, 296, 304, 331; *Moulou vs. Insurance Co.*, 111 U. S., 335, 4 Sup. Ct., 406; *Langdon vs. Insurance Co.*, 14 Fed., 275; *Rogers vs. Insurance Co.*, 121 Ind., 570, 23 N. E., 498; *Insurance Co. vs. Spiers* (Ky.), 8 S. W., 456; *Mallory vs.*

Insurance Co., 47 N. Y., 54; Insurance Co. vs. Rogers, 119 Ill., 474, 10 N. E., 242; Insurance Co. vs. Hazlewood, 75 Tex., 342, 12 S. W., 621; Goddard vs. Insurance Co., 67 Tex., 71, 1 S. W., 906. We confess there is great difficulty in the question, but, after careful consideration, we are constrained to say that there is no room for construction or uncertainty as to the question and answer in this case. It seems to us that Nichols could not have understood that a written examination only was referred to. The court should have instructed the jury that if any examination had been made in any other company upon which a policy had not been issued, and the answer written was the one made, it constituted a breach of the warranty. The judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

Fisher, C. J., did not sit in this case.

On rehearing in the same court, January 31, 1894, the following record appears:—

COLLARD, J.

The motion for a rehearing by the appellee is overruled. Appellant, in its reply to the motion, insists that this court is in error in holding that knowledge on the part of the agent that an answer is false is notice to the company, and to support the doctrine cites the case of Fitzmaurice vs. Insurance Co., 84 Tex., 62, 19 S. W., 301. This case is not like the one cited. The facts stated in our original opinion show that defendant's general agent, Shearman, must have known of the first application by Nichols for insurance in this company. The company rejected the application, and in doing so acted in its corporate capacity, and is certainly chargeable with notice of the facts. It is not necessary at this time to further discuss the doctrine in the Fitzmaurice Case. The motion for a rehearing is overruled.

KEY, J. (dissenting.)

Not being able to concur with the majority of the court in the disposition made of appellee's motion for a rehearing, the writer will briefly state the grounds of his dissent. After further consideration, my conclusion is that question 15 in the application for insurance, and set out in this court's original opinion, is not so definite and certain as to render the charge submitting its meaning to the jury reversible error. Dr. Rodman testified that prior to the issuance of the policy in suit Nichols came to his office with a soliciting agent of the New York Life Insurance Company, and requested the witness to examine him for life insurance; that a casual examination was made by the witness putting his ear to Nichol's breast



for the purpose of testing his heart beats; that his pulse was found to exceed 100 beats per minute; that the witness at once told Nichols it was useless to proceed further with the examination, as his rapid pulse would cause his rejection, and there the examination terminated; and, so far as the record shows, nothing further was said or done by Nichols, or any one else, concerning insurance in the New York Life Insurance Company. Rodman further stated that said examination was not in writing, that he made no report thereon, and that Nichols made no written application. The witness also testified that it was appellant's rule or practice to require applications for insurance and examiners' reports to be in writing. Considering this evidence, I think it was proper to submit to the jury, whether or not the facts testified to by Dr. Rodman in reference to his partial examination of Nichols constituted a proposition, negotiation, or examination, as those terms are used in question 15. It is a matter of general information that applications and medical examinations for insurance are usually made in writing, and upon forms prepared and furnished by insurance companies; and whether or not the question was intended to apply only to those and other written proceedings, or to every character of transaction, whether verbal or written, is, to my mind, uncertain. Does not the expression, "on which a policy has not been issued," carry with it the idea that the "proposition, negotiation, or examination" referred to was one which had reached the company itself,—been sent to headquarters, and submitted to the judgment and action of corporate officers of the company? If so, then, in the nature of things, the proposition, negotiation, or examination must have been in writing. When the case was formerly decided by this court, I fully concurred in its disposition, and in the opinion then delivered. Further consideration has induced me to change my views on the question upon which the case was reversed, but on all other questions I concur with the other members of the court.

## LOWER COURT DECISIONS.

### BENEFICIARY'S INTEREST—SUBSEQUENT DECLARATIONS ADMISSIBLE.

*Supreme Court of New York, General Term, Fourth Department.*

LAURA A. STEINHAUSEN, *Respondent*,

*vs.*

THE PREFERRED MUTUAL ACCIDENT ASS'N, *Appellant*.\*

A beneficiary in a certificate of insurance in the defendant company has no vested interest until the death of the insured; and, therefore, the declarations of the insured made subsequent to the issuing of the certificate are admissible against the beneficiary in an action on such certificate.

Action upon a certificate of membership, issued by defendant to Frank J. Steinhausen, July 27, 1886. This provided that: "The principal sum represented by the payment of three dollars by each member of the association, as provided in the by-laws (which sum however, is not to exceed \$5,000), is to be paid to Laura A. Steinhausen (his wife), if surviving (in the event of the prior death of said beneficiaries, or any of them, said sum shall be paid as provided in the by-laws), within sixty days after sufficient proof that said member at any time within the continuance of membership shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof."

The certificate also provided for the payment of certain sums to the member in case of bodily injuries, disabling him from the prosecution of his business. It also provided that the benefits under the certificate should not extend to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease at any time.

On the 25th January, 1889, Steinhausen met with an accident, and on 27th January, 1889, he died. The plaintiff claims that the accident was the sole, direct, and immediate cause. He was by profession a physician, and it was so stated in the certificate.

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\* Opinion filed, February 20, 1891

S. M. LINDSLEY, *for Appellant.*VAN AUKEN & PITCHER, *for Respondent.*

MERWIN, J.

We are of the opinion that the proofs in this case are sufficient to justify the submission to the jury of the questions whether the injury was the sole, direct, and immediate cause of the death, and whether there was any violation of that clause of the certificate giving the defendant the right to examine the person of the member in respect to an injury or cause of death when and so often as may be reasonably required. There are, however, some rulings upon evidence that call for more particular consideration.

Upon the trial, the defendant called as a witness F. W. Klages, who, having testified that within a year of the death of Steinhausen, he (Klages) spoke to him about his physical ailments, about his kidneys, was asked this question: "What did he tell you, if anything, as to his condition?" This was objected to by the plaintiff as incompetent, and objection sustained, the court ruling that "what the deceased said subsequent to the issuing of the policy was inadmissible; that, after the policy was issued, the rights of the beneficiary were settled, and the assured had no authority to make any statement or declaration of any kind calculated to impair the contract." The defendant duly excepted. The defendant offered to show by another witness that upon the morning before the accident the deceased said he was suffering from rheumatism and from kidney difficulty. To this there was the same objection, ruling, and exception. Another witness, called by the defendant, having testified that upon a certain occasion he noticed that deceased had a difficulty in breathing, and placed his hand on his breast, was asked the question: "Did he say anything at the time of his difficult breathing, and at the time he placed his hand on his breast; that is, at the same time, and as he put his hand on his breast, did he make any statement as to his condition?" This was objected to as a declaration of the assured after the policy was issued, and the objection was sustained, and the defendant excepted.

There seems to be no doubt as to the materiality of the declarations. They were not objected to on the ground that they were immaterial. The question then is whether the declarations of the member, after the issuing of the certificate, are admissible against the beneficiary.

The defendant is a domestic corporation and within the provision of § 18, of chap. 175, of the Laws of 1883, which provides that: "Membership in any corporation, association or society transacting

the business of life or casualty insurance, or both, upon the co-operative or assessment plan, shall give to any member thereof the right at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries."

The case of *Smith vs. Nat. Benefit Society of N. Y.* (51 Hun., 575; 22 N. Y. State Rep., 852) is claimed by the appellant to be in point. There the plaintiff was a creditor of one Tyler who procured from defendant an insurance on his life, and subsequently under a rule of the defendant the plaintiff was substituted as beneficiary under the policy. The defense was that Tyler obtained the policy with intent to commit suicide. His declarations after the substitution and up to his death were held to be competent; it being said that under § 18, above referred to, the deceased had the right, with the consent of the company, to change his beneficiary from time to time without the consent of such payee or beneficiary; that "the plaintiff got no separate standing by the designation under the policy before the date of the death; before that the sole right was in Tyler. The deceased by his designation of plaintiff as beneficiary did not make a case to exclude evidence of his declarations. He stood as owner till he died, and the plaintiff was in no better condition in respect to the policy than if the decedent's representative had brought the action."

This case was affirmed by the court of appeals (33 N. Y. State Rep., 67), but upon another basis. It was, however, said with reference to § 18, aboved referred to: "That section attaches the beneficial interest to the membership and permits the member to change the payee or beneficiary of the insurance without the latter's consent. Where the right of the payee has no other foundation than the bare intent of the member, revocable at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect."

There are many other cases to the effect that a beneficiary in a certificate like the present has no vested interest: *Hellenberg vs. Dist. No. 1, etc.*, 94 N. Y., 585; *Luhrs vs. Sup. Lodge, etc.*, 27 N. Y. State Rep., 88; *Sabin vs. Grand Lodge, etc.*, 6 id., 151; 28 id., 45; *Luhrs vs. Luhrs*, 33 id., 688; *Mutual Ben. Soc. vs. Burkhart*, 110 Ind., 189; *Bagley vs. Grand Lodge, etc.*, 131 Ill., 498; *Richmond vs. Johnson*, 28 Minn., 447. In this respect the certificate is different from the ordinary policy of life insurance, where a vested interest passes to the beneficiary and the assured ceases to be a party in interest.

Upon this ground, it was held in *Rawls vs. Am. Mut. Life Ins. Co.* (27 N. Y., 290), that the admissions of the assured after the issuing

of the policy were not admissible, and many similar cases are cited by the respondent where this rule has been followed. The reason is said to be (*Swift vs. Mass. Life Ins. Co.*, 63 N. Y., 192) that after the contract of insurance is effected, the subject of insurance has no such relation to the holder of the policy as gives him the power to destroy or affect it by unsworn statements. This rule does not reach this case.

In *Grossman vs. Supreme Lodge, etc.* (25 N. Y. State Rep., 844), the same rule of inadmissibility is asserted with reference to the claim of the plaintiff as the beneficiary in a certificate of membership in the defendant which entitled the member to participate in its relief fund to a certain amount which, at her death, should be paid to the plaintiff, her husband, and the case of *Fitch vs. Am. Pop. Ins. Co.* (59 N. Y., 557) is cited. The *Fitch* case was upon an ordinary policy. It does not appear whether the statute of 1883 was applicable to the *Grossman* case. Apparently the plaintiff had no vested right up to the time of the death of the member. This, however, was not considered.

It is, however, claimed by the plaintiff that under chap. 80 of the Laws of 1840, she had a right to insure the life of her husband and have a vested interest in the policy, and that this applies to the present case. A contrary doctrine was held in *Durian vs. The Central Verein, etc.*, 7 Daly, 168. Besides, the act of 1883 does not except the case of wives. We think that the act of 1840 does not help the plaintiff on this question. The insurance there referred to was not intended to cover a case like the present.

We see no escape from the conclusion that the plaintiff had no vested interest until the death of her husband, and that therefore his declarations were admissible the same as if the action was by his representatives. It follows that the judgment must be reversed.

Judgment and order reversed upon the exceptions and a new trial ordered, cost to abide the event.

Hardin, P. J. and Martin J., concur.

## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### SPECIFIC COMPLAINT.

On page 369 we print in full the case of *Sisk vs. Citizens Ins. Co.* which grew out of the same fire as *American Fire Ins. Co. vs. Sisk*, Appellate Court of Indiana, Feb. 20, 1894, three years before. The Citizens' policy was on building and the American on contents. The court decided in favor of the Citizens and against the American. Both cases were on points of error with but little reference to their insurance merits, which in each case were held to be correctly decided in the court below, but in the case of American company it was held that when a motion to make a complaint more specific and definite in some material respect is overruled, such ruling is erroneous; but, notwithstanding it may appear that it would have been proper to sustain such motion, a wrong ruling thereon does not constitute prejudicial error if no substantial injury arises from overruling it. Whether the overruling of a motion to make certain items more specific constitutes prejudicial error, must depend on the facts and circumstances of each particular case.

The waiver of the proofs of loss by the company within sixty days after a fire, as alleged in the complaint, was a sufficient legal excuse for not furnishing such proofs. Even though this condition was not complied with, the alleged waiver of it constitutes a good legal excuse for such failure, and in this respect the complaint is sufficient.

It is only where error is shown to have occurred in the trial court which it appears was probably prejudicial to appellant that an appellate court will reverse the judgment.

### ATTORNEY'S FEES.

In the case of *Cobbey vs. Dorland et al.*, in the Supreme Court of Nebraska, Jan. 19, 1897, it was held that an indorsement by the clerk of the court that attorney's fees should be included in the judgment was not sufficient notice either to the company or of the attorney's claim, the suit having been dismissed by plaintiff. Further, that, the action having been dismissed prior to attorney's notice, no claim for fees could be entertained.

### RETURN PREMIUMS BY AN EX-AGENT.

After an agency has ended and a receiver has been applied for, the agent, being aware of the facts, can no longer cancel policies and return premiums, although he was formerly empowered to do so while an agent in the ordinary course of business; and credits for such return premiums will not be allowed

him in settlement of his account. He must pay over the amount of return premiums so illegally disbursed. *American Casualty Ins. & Sec. Co. vs. Arrott*, in the Supreme Court of Pennsylvania, Jan. 4, 1897.

#### CHANGE OF VENUE.

In *Palatine Ins. Co. vs. Evans*, judge, Supreme Court of Arkansas, Nov. 28, 1896, it was held that under the statute providing for change of venue in civil cases to a court "to which there is no valid objection," a judge of the circuit court may change the venue to a court outside his judicial circuit.

#### PROOFS OF LOSS.—BURDEN OF PROOF.

In the case of *Flanagan vs. Phenix Ins. Co.*, Supreme Court of Appeals of West Virginia, Nov. 25, 1896, it was held that the burden of proving compliance with the necessary requirements of an insurance policy as to proofs of loss, or the waiver of such compliance on the part of the company, is on the insured; and, if he fails to establish the same by a preponderance of evidence, his action must fail.

#### ANSWERS TO APPLICATION.

In the case of *Mutual Life Ins. Co., of New York, vs. Simpson*, decided by the Court of Civil Appeals of Texas, Nov. 15, 1894, it was held that the fact that insured was subject to headaches when overworked, does not render false a statement in the application that he does not have headache; also that an occasional drinking to excess does not render false an answer "not at all" to the question whether he ever drank wine.

#### BREACH OF WARRANTY AS TO INTemperance.

In the case of *Mengel vs. Northwestern Mutual Life Ins. Co.*, decided by the Supreme Court of Pennsylvania, July 15, 1896, the application stated that the insured had always been temperate and had last consulted a physician for a slight illness about one year before, while the uncontradicted evidence of the physician showed that he had attended the insured for about five years preceding the time of application, for disorders consequent upon excessive drinking. It was held as a matter of law that this was a breach of warranty.

#### RIGHTS OF MORTGAGEE.

In the case of *Hare vs. Headley et al.*, decided by the Supreme Court of Chancery of New Jersey, it was held that where the company has paid insurance to the mortgagee, the claim of such company under the subrogation clause is assignable; also, that the insured is an unconditional owner of the property notwithstanding the mortgage. It was further held that the insured has not forfeited his rights under the policy because suit on the same had not been begun within one year from the time of the loss where the entire amount of loss had been paid to the mortgagee.

#### ACTION ON CERTIFICATE OF BENEVOLENT ASSOCIATION.

In the case of *Wheeler vs. Supreme Sitting of Order of Iron Hall*, the Supreme Court of Michigan, in a decision rendered July 28, 1896, held that in an action on a matured benefit certificate the defense that the suit was premature because the treasurer was not permitted under the by-laws to pay until certain preliminaries had been complied with, and if there was no money in the treasury an assessment would be required, was not available where it was

not shown that nonpayment was due to such lack of funds. It was further held that the by-laws of the society giving ninety days for the payment of such certificates and forbidding their transfer do not affect certificates issued prior to such by-laws.

#### BY-LAW AS TO SUICIDE.

In the case of *Daugherty vs. Knights of Pythias*, decided by the Supreme Court of Louisiana, June 15, 1896, the following syllabus was furnished by the court:—

Under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-law thereafter to be enacted, the insured is bound by a subsequent by-law, forfeiting such policies when the insured should die by his own hands.

#### EVIDENCE OF SUICIDE.

In the case of *Travelers Ins. Co. vs. Nitterhouse*, decided by the Appellate Court of Indiana, Nov. 23, 1894, it appeared according to the evidence that there was nothing in the financial or commercial relations of the insured which would induce suicide; that he was industrious and sober, but that he had been prevented temporarily from working through an accident which might have rendered him despondent, and it further appeared that the position of the insured and of the pistol by which he had apparently been shot was such as would justify the theory of suicide. It was held that the burden was on the party alleging suicide to prove self-destruction to the exclusion of all other reasonable hypotheses, and that the finding of accidental shooting was justified.

#### CONSTRUCTIVE TOTAL LOSS.

In the case of *Commercial Union Ass'e Co., of London, vs. Meyer*, decided by the Court of Civil Appeals of Texas, Nov. 21, 1894, it was held that proofs of loss were waived by an inspection on the part of the adjuster and an admission of a partial liability together with an offer of settlement. It was further held that the fact that repairs could be made for 50 per cent of the original cost of the building was no evidence against a constructive total loss, since a building entirely destroyed might be replaced for 50 per cent of its cost, and that the policy under the valued-policy law of Texas was a liquidated demand, which justified a refusal to charge with reference to an offer by the company to replace, notwithstanding a provision authorizing such replacement was in the policy itself; that where there was evidence that the building was so injured as to lose its specific character as a building, the loss was total although the property was not absolutely extinguished.

#### WAIVER OF PAYMENT OF ASSESSMENT.

In the case of *Beatty vs. Mutual Reserve Fund Life Ass'n*, decided by the U. S. Circuit Court of Appeals, Ninth Circuit, June 1, 1896, there was evidence that the insured was unable to obtain money to meet the call for an assessment when due, by reason of the bank being closed on a holiday, and that on the day following he was unable to find the agent; that he had previously been informed by the secretary of the company that, being in a distant part of the country, prompt payment was not essential; that the agent refused on the second day after such assessment was due to receive the same, but that he subsequently received notice of another assessment. It further appeared that the policy provided that it should be void in case of nonpayment of an assessment when due, and that the notice of assessment provided that the sending



of the same was not to be held as a waiver of forfeiture. It was held that the question was for the jury whether prompt payment had been waived by the company's course of dealing and the levy of the subsequent assessment.

#### INCOMPLETE CANCELLATION.

In the case of *Etna Ins. Co. et al. vs. Rosenberg et al.*, decided by the Supreme Court of Arkansas, July 8, 1896, the policy provided that it might be cancelled upon five days' notice and a tender of the unearned premiums. The agent requested the insured to return the policy for cancellation, promising to replace it in another company. The policy was accordingly returned but was not cancelled nor another policy substituted nor was the return premium tendered. It was held that the policy had not been cancelled.

#### RECOVERY BY MORTGAGEE.

In the case of *Phoenix Ass'e Co. vs. Allison et al.*, decided by the Court of Civil Appeals of Texas, Oct. 17, 1894, the mortgagor procured at his own expense a policy for the protection of the mortgagee. It was held that the grantee of such policy could not recover if the mortgage debt had been paid, although such payment was not made until after the loss had occurred. The mortgagor in such case would become the beneficiary of the policy and entitled to the insurance.

#### WAIVER OF OTHER INSURANCE.

In the case of *Labell et al. vs. Georgia Home Ins. Co.*, decided by the Court of Civil Appeals of Texas, Oct. 31, 1894, the policy contained the usual clause forbidding other insurance without consent. It was held that the fact that the printed clause "total insurance permitted \$—" was not filled in, did not waive a prohibition against other insurance, nor was a suggestion made by the adjuster that the unburned and burned stock should be separated after investigating the loss such waiver.

#### EMPLOYERS' LIABILITY CONTRACT CONSTRUED.

In the case of *American Employers' Liability Ins. Co. et al. vs. Fordyce et al.*, decided by the Supreme Court of Arkansas, July 8, 1896, the undertaking was to pay all damages with which the insured may be legally charged, or which the insured may be required to pay, or for which the insured may be legally liable. It was held that this was not simply a contract of indemnity but an undertaking to pay all such liabilities, and that it was not necessary that the insured should have first settled claims for damages before recovering the amount of same from the insurer. It was further held that where the policy had been issued by an agent who had authority to waive a condition requiring prepayment of premium and a loss had occurred before the demand for such payment was made, and the policy was afterwards cancelled for non-payment of premium, any liability accruing prior to the cancellation, less the earned premium, could be recovered.

#### UNCONDITIONAL OWNERSHIP.

In the case of *Boulden vs. Phoenix Ins. Co.*, decided by the Supreme Court of Alabama, June 16, 1896, it appeared that the premises were held under a contract of sale on which a certain amount still remained due and no deed had passed. It was held that this was not inconsistent with a statement that the insured was the unconditional and sole owner.

**WIFE'S POLICY IN CASE OF BENEVOLENT SOCIETY.**

In the case of *Handwerker vs. Diermeyer et al.*, decided by the Supreme Court of Tennessee, July 22, 1896, it was held that in case of a certificate payable to a wife, a paper which had none of the indicia of a will except that it was signed by the insured and addressed "to the officers and members" which recited that "it is my will that the benefit named in this certificate be paid to F., my wife," such paper gave the wife no vested interest.

In case of such certificate, where the member survives the wife, it remained his property where the by-laws provided that a member might surrender the certificate with directions to whom a new one was to be made payable, and that the old one should thereupon be cancelled and a new one issued according to such directions. The wife in such case acquires no vested interest in the certificate.

**VACANCY IN CASE OF DISTILLERY.**

In the case of *Louck vs. Orient Ins. Co.*, of Hartford, decided by the Supreme Court of Pennsylvania, July 15, 1896, the policy covered four buildings described as a half-story building occupied by assured as a distillery, a building occupied as a bonded warehouse, a hog pen between the distillery and warehouse, and a building occupied as an ice house, with the provision that it should be void if a manufactory which ceased to be operated for more than ten consecutive days. It was held that the policy insured the distillery as occupied, but not operated, where it appeared that the distillery was not operated after the issuing of the policy, nor had it been for some time previously, and that there was no present intention to so operate it, but that insured had an office on the premises in which he slept and which he occupied.

**PROOFS OF LOSS.—ARBITRATION.**

In the case of *Moyer vs. Sun Insurance Office*, of London, decided by the Supreme Court of Pennsylvania, July 15, 1896, it appeared that the insured immediately notified the company through the agent and, within three months thereafter, communicated direct to the company, stating the amount insured, the description of the property, the amount of loss, and the sum necessary to replace, and requested information of anything additional that might be required in order to fully comply with the terms of the policy. It was held that in the absence of any demand for additional proof, that which was furnished was sufficient compliance; also that a magistrate's certificate according to the terms of the policy must be provided if required, but such certificate was not necessary unless the insured was specially notified to furnish it; also that in the absence of any failure to agree as to the amount of loss or request for submission to appraisalment, no such submission is necessary where the policy stipulated that such estimate shall be made by the insured and the company, and in the case of disagreement by appraisers.

**FIDELITY POLICY CONSTRUED.**

In the case of *Dorsey vs. Fidelity & Casualty Co.*, of New York, decided in the Supreme Court of Georgia, May 19, 1896, the following syllabus is furnished by the court:—

Where a fidelity insurance company, by its bond, covenants with a receiver engaged in operating a railroad that, during the continuance in force of such bond, certain specified employes of the receiver shall "faithfully and honestly discharge their duties in their several capacities, and shall also faith-

fully and truly account for all moneys and property and other things which may come into their possession in their respective employments, whenever thereto required by the employer, or a duly-authorized officer in that behalf; and, at the termination of their said employments, shall surrender and deliver up to the employer, or a duly-authorized representative, all moneys, books, vouchers, papers, tickets, and all other property belonging to the employer, or for which the employer shall be liable to another, or other party or parties, which shall then be, or which ought to be, in the hands, possession, or custody of the employee, or either of them; and the company hereby indemnifies the employer against all loss which the employer shall sustain by reason of the default of any or either of the employees in the premises, not exceeding in the whole the sum or sums as hereinafter provided,"—held, that the insurance company was not liable to the insured in damages for a loss resulting from a wrongful delivery of freight by one of these employees, in consequence of which the receiver was compelled to pay the value of such freight to its true owner, the wrongful delivery having occurred before the bond was executed. This is so notwithstanding that the employee, at the termination of his employment, though liable so to do, failed and refused to pay the receiver the damages which the latter had sustained because of such wrongful delivery.

#### RESCISSION OF CONTRACT IN CASE OF PREMIUM NOTE.

In the case of *Crutchfield vs. Bailey*, decided by the Supreme Court of Georgia, May 19, 1896, the following syllabus was prepared by the court:—

No consideration is essential to the rescission of a simple executory contract (that is, one which has not been acted upon), other than a mutual agreement of the parties that it shall no longer bind either of them. The consideration on the part of each is the other's renunciation.

Hence, if a written application for a life-insurance policy, and a promissory note for the first premium thereon, were delivered to an agent of the insurance company, and by him forwarded to the company, but before the latter had acted upon the application it was mutually agreed between the applicant and the agent that the note should be recalled and returned to the applicant, and that "the affair will stop just where it is at; there will be nothing more of it,"—this of itself would be sufficient to constitute a lawful rescission; and it was error to charge, in effect, that a rescission could not be had under these circumstances, unless based upon a valuable consideration.

In the trial of an action upon such note, a policy of insurance alleged to have been issued in pursuance of the application above mentioned was not admissible in evidence, without proof of its execution; and it was not sufficient for this purpose merely to prove by a subagent of the company that he had received such a policy from another subagent, or from the company's general agent, the witness being unable to remember from which of these persons it came into his hands.

#### SUSPENSION AND RE-INSTATEMENT IN CASE OF BENEVOLENT SOCIETY.

In the case of *Grand Lodge, A. O. U. W., of Indiana, vs. King*, decided by the Appellate Court of Indiana, October 11, 1894, the policy was issued by a grand lodge and provided that in case of non-payment of assessments the insured should be suspended and could be re-instated only by a majority vote of the subordinate lodge after payment to it of all assessments due. It was held that the refusal of such subordinate lodge to accept unpaid assessments after suspension did not waive the provision requiring a vote of the lodge as to re-instatement, where the constitution provided that the officers of such subordinate lodge were not agents of the grand lodge in collecting the assessments.

#### WAIVER OF PROOFS OF LOSS AND VACANCY.

In the case of *Phenix Ins. Co., of Brooklyn, vs. Rogers et al.*, decided by the Appellate Court of Indiana, November 16, 1894, the allegation that the

company was at once notified of the loss and denied liability on account of vacancy and for this reason the insured did not furnish proofs of loss, shows a waiver of such proofs according to the court. It was also held that an allegation that a general rule existed with the company allowing vacancies for thirty days, and that the application was made upon the faith of such rule, but that through a mutual mistake a condition forbidding vacancy for any period was allowed to remain in the contract, is not sufficient to justify a reformation.

#### SALVAGE SETTLEMENT IN CASE OF MARINE POLICY.

In the case of *La Fonciere Companie, etc., vs. Koons et al.*, decided by the U. S. Circuit Court of Appeals, Ninth Circuit, June 1, 1896, the insurance was on cases of salmon, and provided that a partial loss should be settled on the principles of salvage loss. The insurer agreed among other things to pay the insured for any partial loss in the event of such loss amounting to 50 per cent or more of the sound value of the shipment at the port of delivery, and a part of the cases amounting to more than 50 per cent in value as admitted were sold as damaged goods at an intermediate port. It was held that this provision applied to the method of ascertaining the loss as well as to its payment. In such case the method of determining the loss is not to be governed by the ordinary principles of marine insurance.

#### WAIVER OF PREMIUM.

In the case of the *Continental Ins. Co., of New York, vs. Chew*, decided by the Appellate Court of Indiana, October 19, 1894, it was held that a policy provision exempting from liability for losses occurring while any part of the premium was overdue was valid, but the acceptance of premium which was in default, after the knowledge of a loss, would waive the forfeiture.

## SUPREME COURT OF LOUISIANA.

JAMES A. CHALARON

vs.

INSURANCE CO. OF NORTH AMERICA.\*

1. Reinsurance is ordinarily of such portion of the amount the insurer deems proper to insure.
2. When the original insurer does not insure for the full amount of the risk in the event of total loss he pays that part, but when the loss is not total his claim on the reinsurer is for all the reinsurance.
3. The reinsurer must pay the entire sum reinsured up to the amount of his reinsurance, and has no concern with any arrangement between the first insurer and his creditors.
4. Certificates of reinsurance must stand as expressing the obligations of the parties against statements and expressions of agents and other officers of the insurance companies.

O. B. SANSUM and R. DEGRAY, *for Plaintiff and Appellant.*SAUNDERS & MILLER, *for Defendant and Appellee.*

NICHOLLS, C. J.

The plaintiff, suing as representing several of the New Orleans insurance companies, seeks to recover money claimed to have been paid in error by them on their contracts reinsuring maritime risks of the defendant, the Insurance Company of North America.

The defendant insured the cargo of the Bark Yorkshire for \$60,000, reinsuring with three of the plaintiff companies for \$17,500, and for \$27,500 in other companies, making the total reinsurance \$45,000. On this risk there was a loss of \$51,601 collected by defendant from the reinsuring companies—the New Orleans companies paying the \$17,500 for which they reinsured—other reinsuring companies paying their portion, and the residue amounting to \$12,500 was paid by the defendant as part of the risk they carried, that is, without reinsuring. In the same year the defendant insured the cargo of the Bark Budstiken, the proposed risk being \$35,000, but only a part of the cargo was laden on board. The reinsurances on that cargo were \$10,000 with four of the plaintiff companies, and like amount with other companies, making the total reinsurances \$20,000 on that risk. On that risk there was a loss nearly equal to the amount of the reinsurances, and defendant collected the \$10,000 from the plaintiff companies, and a like amount from the other reinsurers.

In 1883 defendant took a risk on the cargo of the Bark Adele of \$114,000. There were reinsurances in five of the plaintiff companies

\* Decision rendered, Dec. 14, 1896. Reported by W. O. Hart, of the New Orleans Bar.

VOL. XXVI.—30.

for \$15,000—in other companies for \$46,500, making \$61,500 reinsurances. There was a loss on the cargo put on board of \$19,309; all of which was collected by defendant of the reinsurers.

Plaintiff claims that the understanding in effecting these reinsurances was that the defendant was to carry its line and reinsure excess, by which we understand that defendants were to retain part of the risks and to reinsure to the extent of that portion of the risk it did not propose to bear. Under bills of exception reserved, they introduced evidence for the purpose of establishing this understanding, and to establish that it was a custom in the city of New Orleans for the reinsurer to carry part of the risk.

Following the negotiation between the parties the plaintiff companies issued certificates, which, on their face, are certificates of unconditional insurance, to cover loss on the cargoes of the *Yorkshire*, for \$17,500, on that of the *Budstiken* for \$10,000, and on that of the *Adele* for \$15,000. Defendant maintains that the obligation of the plaintiff companies was precisely that expressed in the certificates, to pay the losses sustained up to the amounts distinctly stated. Plaintiff, on the contrary, insists that the contracts are to be deduced from the testimony, and that the testimony shows contracts of an entirely different character.

On his theory the companies he represents with the other reinsurers were liable for only \$16,600 on the loss of \$51,601 on the cargo of the *Yorkshire*; that is for the excess of \$51,601 over \$35,000, the asserted line of defendant—that they were bound for no part of the loss of \$19,000 on the cargo of the *Budstiken*, as the loss was under defendant's line—that on the general average loss of \$47,000 on the cargo of the *Adele*, the plaintiff companies, with the other reinsurers, were only liable for \$12,000, the excess of loss over defendant's assumed line of \$35,000—the defendant being liable also, it is insisted, for a general average contribution. The issue of fraud made by the petition that defendant intended reinsuring the entire risk and failed to disclose it, declaring they retained a line, when it is averred they retained none, is not formally waived, but the contention in this court is mainly that plaintiff's liability was only for the loss over defendant's asserted lines.

The case is before us on the certificates. We must accept them as the written contracts of the parties. We first direct our attention to the preliminary question raised by defendant to the introduction of testimony to establish any custom or any understanding to contradict or vary the contracts of unqualified insurance expressed in the certificates. In view of the allegations of the petition we will consider the evidence, giving due weight to the certificates. When

the written contract is assailed as not embodying the intentions of the parties, testimony to that end should carry conviction of the error.

The petition imputes fraud in the defendant in effecting the reinsurances. It charges concealment of the reinsurance of the entire risk and misrepresentation implied by the alleged custom and by the statement of defendant's agent, "we carry our line."

We have been referred to the decision in 13th Annual (Louisiana Mutual Ins. Co. vs. New Orleans Ins. Co., 13th Ann., 246). The case was one of reinsurance of sugar, in which the insurer stated in his application that he had a risk on the building, when, in fact, he carried none. The court held that the representation was material and its falsity avoided. The syllabus in the case declares that, in regard to reinsurance the custom among underwriters in the city of New Orleans is to divide the risk and not take the whole of it—that when the application is silent this was always understood.

We do not think that an argument seeking to maintain that any custom determines the amount of the risk the original retains in effecting reinsurance is sustainable. Reinsurances necessarily vary in amount according to the nature of the risk, the judgment of the insurer as to the extent it is judicious to reinsure, and the amount the reinsurer is willing to accept. Reinsurances depend entirely on the stipulation of the parties—a reinsurance without specification of the amount reinsured is not one on which it can be supposed business men would enter. Reinsurance is, as one of the witnesses expresses it, "fluctuating." Each company determines its own line. We cannot accept as correct the proposition that in New Orleans custom divides reinsurances between the insurer and the reinsurer. We must take judicial cognizance of reinsurances for any and all amounts according to the views of the parties; there is no division of risks sought here—that kind of an apportionment would not benefit plaintiff and it has no relation to the issues. Witnesses often mistake for custom their impressions, individual experiences or methods of business and not infrequently deem that to be custom in its legal sense which is merely the course of business the law itself enforces.

Reinsurances, while they may be of the entire risk, are ordinarily of such portion of the amount the insurer deems proper to reinsure: 1st Kent S. P., 278. Whence it may be said, in reinsurances the general rule is, the original insurer retains part of the risk and in the event of the total loss to that extent of the amount retained shares the loss with the reinsurers.

If this is not the reinsurance desired but the reinsurance of the entire risk, for obvious reasons good faith exacts that that purpose

should be stated to the reinsurer. All that any custom would enforce was implied by the expression of defendant's agent. He announced, as was customary, that the entire risk was not to be reinsured, but the insurer bore part. All that can be said of any usage bearing on this controversy is that in reinsurances the original insurer, without express statement to the contrary, retains part of the risk and that amount no custom fixes. We are not dealing here with reinsurances of the entire risk, as the petition alleges and the argument in some of its aspects seems to maintain. The testimony shows that on each of these risks the insurer proposed to bear part. On the Yorkshire risk of \$60,000, the reinsurances were only \$45,000 and defendant paid its part of the loss of \$51,000. On the Adele risk of \$114,000 the property actually put on board being \$91,000, the reinsurances were \$61,000, and a total loss would have been borne partially by the defendant. As neither the negotiation, nor any custom fixed the amount of the risk on those cargoes to be retained by the defendants, and as it did bear a part of the risks, we do not see, in any aspect of custom or fact, any basis for plaintiff's allegation of concealment and misrepresentation.

There was no reinsurance of the entire risk, hence there was no concealment; there was in each case a part of the risk borne by the defendant, hence there was no misrepresentation in the use of the expression "we carry our line." There is no more basis for avoiding the reinsurance in the case of the Budstiken than in that of those we have just considered. Avoiding an insurance for alleged concealment or misrepresentation is a question not for any custom to solve, but one of law for judicial determination. The custom, if any, bearing on the subject may be an incident in the investigation, but the law alone is to ascertain the influence and effect of the supposed misrepresentation. The obligation of a faithful disclosure of all facts material to the risk resting on the reinsurer the same as on the original insurer is to be understood in a reasonable sense. The rule exacts the communication of facts not contingencies. If the information is stated as opinion, expectation, or belief, it does not affect the policy if given in good faith—in such case the insured takes the risk of the statement—if made in bad faith it will avoid the policy: 3d Kent S. P., 284. When reinsurance on the Budstiken was effected, the risk accepted was \$35,000. Of that risk, defendant proposed to bear \$15,000, hence the reinsurance was \$20,000; \$10,000 of which was with the plaintiff companies. But the assured failed to get the expected cargo of \$35,000, but placed on board goods to the extent only of \$20,000, on which the loss was sustained and the reinsurers paid. We cannot hold that this reinsurance of



\$10,000 was made void by the unforeseen failure of the insurer to put on board cargo of equal value to the amount of the risk sought and accepted. The authorities cited in this connection relate to statements of facts that had no existence, made to induce the acceptance of the risk by the insurer. Thus the representation that the insurer was a man of pecuniary responsibility when he was not; that other insurances had been obtained, a fact tending to show that other insurers deemed the risk good, when there was no such other insurances, and the case from our own court, of reinsurance of sugar obtained on the false representation that the insurer itself carried a risk on the building when it did not do so, are all instances of false representations as to facts claimed to exist, but which had no reality. These decisions and the principles on which they rest have no application here. The representation in this case that defendant carried its line on the cargo the insurer was to put on board had the prospective significance that the unforeseen against which none can guard might prevent the complete loading. The subsequent event that the cargo to the full amount was not put on board cannot stamp, as fraudulent, representations made in all sincerity and truthfulness at the time. Another test might be applied. Suppose the defendant, with a prescience not of men, had foreseen the contingency of the failure to deliver the expected cargo and indicated that possibility to the plaintiffs, is it to be supposed the reinsurance of \$10 000 on a much larger risk, part of which the insurer expected to bear, would have been declined, because of the possibility of the failure to deliver a full cargo, which would leave no part of the risk for the original insurer. That bare possibility, in our opinion, would have exerted no influence on the reinsurer, otherwise fully content to re-insure. We think the reinsurance on the cargo of the *Budstiken*, as on that of the *Yorkshire* and the *Adele* must stand: 3d Kent., 284; Wood on Insurance, S. 290, et seq.

We now turn to an examination of the extent of the liability of the companies.

We are asked to substitute for the contracts of unconditional reinsurance expressed in the certificates the contract of different character claimed to be established by the testimony of the officers of the companies. If these insurances were of the special character to cover losses only above the amounts placed before us in plaintiff's argument, it is strange there should have been no specification of these amounts in the negotiation or application. In insurances of that character the minds of the parties are necessarily directed to the fixed amount above which the assured seek indemnity and below which the insurer is resolved to incur no liability. Plaintiff insists

the companies insured only the amount of loss over defendant's line. We find a general statement from some that defendant's line was understood to be \$40,000 or \$50,000. How does that statement fix defendant's line on these risks of \$35,000, \$60,000, and \$114,000. One witness states that the "line" is proportioned to the capital of the company; another that the "line" of a company is the amount not reinsured; another that the "line" fluctuates to be determined by the company. If, in these cases, the line was to be fixed by the reinsurances, whatever the amount, then the risk of these companies was dependent entirely on the disposition or ability of the original insurer to effect reinsurances. If the reinsurer proposes to restrict his liability as contended for by plaintiffs, it is inconsistent he should leave his responsibility entirely uncertain or contingent. In a litigation between an insurance company suing defendant on grounds similar to those urged here, the insurance policies had the indorsement to apply to excess over \$50,000. The litigation failed because the limitation was held not to affect the defendant: *North America Ins. Co. vs. Hibernia Ins. Co.*, 140 U. S., 572. But the explicit statement of the policies of no liability except for losses over the specific amount is suggestive of the character of the reinsurances in this case, on which no definite amount above which loss is to occur is found either in the negotiations or the applications. On the contrary the written contracts are unqualified reinsurances up to \$17,500, \$10,000 and \$15,000. If that sort of indemnity contended for by plaintiff had been intended, it would seem it would have been explicitly stated in the negotiations and applications. There is no such testimony and the written contracts are of an entirely different character.

We have examined the testimony relied on to show that these reinsurances were not "flat" but "excess" reinsurances accepted with reference to a "line" of original insurance taken out by the company seeking reinsurance. We find no evidence in the record which would justify us, in our opinion, in adopting plaintiff's contentions. We find no evidence which would warrant us in holding that these reinsurances were to cover losses on one of the risks only above \$35,000; on another above \$20,000; on the other above \$35,000. On what part of the testimony as to the negotiations or applications could contracts of that character be sustained? The testimony is indefinite; is based in part on impressions, and in some respect manifestly consists of deductions of the witnesses. The conclusions drawn from the testimony, in support of plaintiff's case, are directly opposed to the written contracts in which all discussion and negotiation usually end. The expression attributed to defendant's agent, with slight

variations, are "we carry our line;" "we offer the excess of our line," or other equivalent thereto. In every reinsurance not of the entire risk the original insurer carries part of the risk and insures to the extent of the residue which may be expressed as the excess of his line. The expressions attributed to defendant's agent, and from which plaintiff deduces special contracts, simply announce, in our view, that which is implied in every reinsurance except the rare instance of reinsurance of the entire risk. When the original insurer does not reinsure for the full amount of the risk in the event of a total loss, he pays that part, but when the loss is not total, he goes on the reinsurer the object of all reinsurance: American and English Encyclopædia, verbo Insurance.

The effect the plaintiff's argument gives to the expressions of defendant is a reinsurance operative only on loss over a fixed amount, i. e., defendant's line. No such limitation is expressed and none is implied. It seems to us the expressions are perfectly consistent with the usual import of reinsurance, which is, that the insurer seeks indemnity not for loss over a certain amount, but for any and all loss up to a certain amount. The plaintiff now excludes the insurer from indemnity except for loss over certain amounts. That is not usually the purpose of reinsurance. Of course, the contract may be modified, but it is difficult to supply the modification from the fact the reinsurance uses language which might well be employed by any one seeking the ordinary benefit of reinsurance. Reinsurance is indemnity to the insured for the loss up to the amount whether for the whole or part of the risk stipulated, and for which the premium is paid. It is a contract as put by the books by which the original insurer procures another to insure him against loss by reason of the original insurance. Again, it is a contract where the insurer, to lessen his own liability reinsures or transfers the insurance he has agreed to carry in whole or in part to a new insurer, who thereupon occupies the same position as the original insurer does to the original insured, or still again, when the loss has happened the reinsurer must pay to the first insurer the amount of the loss within the policy. He must pay the entire sum reinsured and has no concern with any arrangement between the first insurer and his creditors: 3d Kent, § 278, foot note; Elliot on Insurance, § 3; Biddle on Insurance, § 7, 378. We think it clear from the record that the satisfaction now insisted on by plaintiff under the contracts was not the indemnity the defendant sought. When defendant insured to cover loss over fixed amounts, as it seems was done in some of the companies, that kind of indemnity was stipulated in the policies. This answers, we think, the suggestion in the briefs, why a

different form of indemnity was required from those companies. The contracts differed—the measure of indemnity accorded with the contracts. With these plaintiff companies the certificates were for unconditional reinsurances. With that appreciation, when the losses occurred the demands were for payment of the entire amount reinsured, as the contracts, in our opinion, required. Prompt compliance without question followed. The light thrown backward years after disclosed to plaintiff (the petition alleges) that the companies paid in error, and this suit was brought to revoke the payments. With all possible allowance for the alleged ignorance of the facts connected with these losses, the payments carry a significance the mind cannot easily resist. A demand of payment on insurance intended only to cover loss up to a fixed amount would naturally suggest to the reinsurer, called on for payment, the inquiry of the amount of the total loss. If under these contracts the plaintiff was bound for no loss under a certain amount, it is difficult to conceive that payments would have been made without the rendition of an account or some investigation, or, at least, an inquiry of the total loss. But we fail to find that any account was rendered or asked, or that there was any investigation or inquiry on the subject. The amounts of the reinsurance were paid in full, as we infer, on the simple notification of the losses. In the confidence of commercial intercourse, such payments might well be made under unqualified contracts of indemnity, but, in our view, would be entirely out of the ordinary course of the reinsurances as now contended for, which called for no payment whatever, unless the loss exceeded the amount stipulated and to be deemed prominent in the mind of the reinsurer. The claim of a payment in error, naturally suggests how the error occurred. No false representations are suggested unless a call for payment is to be deemed fraudulent. The call affirmed the liability for the amount of the reinsurances. If there was only a qualified liability, as now contended for, an inquiry would have disclosed no obligation in one case, and in the other two, only for amounts below these claimed. But we are confronted with the fact that with no such inquiry or the faintest suggestion from plaintiff companies, they paid the full amounts of the reinsurance, perfectly consistent with the idea of liability for loss up to the amount reinsured, and repugnant, we think, to any other appreciation of their obligations.

In this case we are asked by the plaintiff to displace the clearly-defined liability arising from the ordinary contract of reinsurance. Instead of unqualified reinsurances of \$17,500, \$10,000 and \$15,000, the plaintiff's argument is the substitution of special contracts only to cover losses over certain amounts which his argument adopts as

those intended. On the reinsurance of \$10,000 the defendant is to have no indemnity for a loss of \$19,000. On another reinsurance of \$17,500 the plaintiff is only to contribute to make good \$16,000 of a loss of over \$50,000, and in another case, with \$61,000 of reinsurance, defendant is to bear the whole loss of \$47,000 except \$12,000. This construction strips defendant of all benefit in a reinsurance of \$10,000 and sensibly reduces the advantage proposed by premiums paid by defendant for reinsurances of \$61,000 and \$15,000. This construction we are to adopt on the significance plaintiff attaches to expressions of defendant's agents and conversations from which plaintiff deduces his appreciation of the contracts. Our examination leads us to the conclusion that the expressions of defendant's agents were consistent with the indemnity of the ordinary contract of reinsurance. We think the conduct of the parties accords with that contract. With statements and expressions relied on by plaintiff with a significance to which we cannot assent, and opposed by plain written unqualified flat reinsurances, in our opinion, the certificates must stand, as expressing the obligations of the plaintiff companies, and in fulfilment of those obligations the plaintiff companies made the payments now sought to be revoked.

For the reasons herein assigned, the judgment appealed from is hereby affirmed.

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## SUPREME COURT OF CALIFORNIA.

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FARNUM ET AL.

vs.

PHENIX INS. CO.\*

1. An express provision in an insurance policy, that the company shall not be liable thereon until the premium is actually paid, is waived by the unconditional delivery of the policy to the insured under an agreement that a credit shall be given for the premium
2. An agent who has power to countersign and deliver policies, and who is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, though he is expressly authorized to give such credit only for a shorter time.
3. An insurance company cannot cancel a policy for failure of insured to fulfill certain conditions, without giving notice to the insured; and a notice sent by mail is ineffectual unless received.
4. A tender of the full amount of the premium within the term of the credit allowed is a sufficient compliance with the condition of payment to sustain an action on the policy.
5. A provision in the policy that "the use of general terms, or anything else less than a distinct specific agreement, clearly expressed and indorsed on

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\* Decision rendered, Feb. 27, 1890. From *Pacific Reporter*.

this policy, shall not be construed as a waiver" of any condition, did not have the effect to render the waiver invalid, as not indorsed on the policy, since the agent had ostensible authority to waive the indorsement.

6. A provision in the policy that the damage "may be determined by mutual agreement, \* \* \* or, failing to agree, the same shall be submitted to \* \* \* arbitration," does not require arbitration unless the parties fail to agree; and the fact that the company, when proofs of loss to a certain amount were furnished, made no objections to the amount, but denied its liability on other grounds, and denied the existence of the policy, is sufficient proof that the company acquiesced in the amount of the loss, and waived submission to arbitration.

LOUTTIT, WOODS & LEVINSKY, *for Appellants.*

J. C. CAMPBELL and P. W. BENNETT, *for Respondent.*

VANCLIEF, C.

The action is upon a policy of insurance, and the appeal is from a judgment of nonsuit. The grounds of defendant's motion for nonsuit, and upon which the motion was granted, are presented by a bill of exceptions, and the record discloses the following facts: The defendant is a foreign fire-insurance corporation doing business as such in this state, having general agents for the state, located in San Francisco, and a duly-appointed local agent for the county of San Joaquin, located at Stockton. On May 2, 1887, plaintiffs verbally applied to the Stockton agent for a policy of insurance upon their frame barn, windmill, tank, and tankhouse, situated about two miles southeast of Banta, in San Joaquin County. The land upon which these buildings stood was the property of G. W. Trahern, the father of one of the plaintiffs, who had permitted plaintiffs to erect the buildings thereon, but the buildings were the property of plaintiffs, who resided upon the land, and used and occupied the buildings. At the time the insurance was applied for the local agent was informed that the land belonged to Trahern. The policy, as applied for, was issued insuring the buildings for the term of five years from May 1, 1887; the insurance on the barn being for \$1,000, and upon the other structures for \$200. The policy does not refer to the ownership of the land on which the buildings stood. On September 5, 1887, the barn was totally destroyed by fire, and it was admitted that when destroyed it was of the value of \$1,000. Notice and proof of the loss were duly given and made by plaintiffs, upon receipt of which the defendant, without questioning the amount of the loss, denied all liability on the policy. No offer or request was made by either party to submit the question, as to amount of the loss, to arbitration. At the time of the fire and loss no part of the premium had been actually paid, but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a

credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding, and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent, and delivered to plaintiffs, on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term 60 days; and it was proved that the local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him. On June 25, 1887, the local agent mailed to plaintiffs, at Banta, a written notice stating that "the premium on policy No. 73,143, on barn, tank, etc., \$1,200, amounting to \$73.50 on five-years policy, falls due on the 1st of July, and our instructions from the home office are imperative to collect in sixty days;" and inclosed in the same envelope was a notice that, "unless the premium thereon shall be paid on or before 12 o'clock noon of July 1, 1887, we shall cancel the insurance under said policy on our books, for non-payment of premium, without further notice, and terminate our liability thereunder from that date." It was proved that there was a regular daily communication by mail between Stockton and Banta; but neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled, but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full amount of the premium, which he refused to receive. The pleadings admit that the amount of the premium was thereupon immediately deposited by plaintiffs, subject to the order of defendant, and that defendant was notified in writing of such deposit, and payment of the amount to defendant is offered in the complaint. The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies as to the use and occupancy of the premises. The following clauses are the only ones relevant to the points to be considered:—

The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid. The use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein. The insurance may be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy. The amount of solid value and of damage to the property \* \* \*

may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall be submitted to competent and impartial arbitrators. \* \* \* It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable by any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided. In witness whereof the Phenix Insurance Company has caused these presents to be signed by its president, and attested by its secretary, in the city of Brooklyn, county of Kings, N. Y.; but the same shall not be binding until countersigned by Henry C. Keyes, agent for the company at Stockton. Stephen Crowell, President. Philander Shaw, Secretary. Countersigned at Stockton this 24th day of May, 1887. Henry C. Keyes, Agent.

1. The defendant contends that there is no liability upon the policy, because the premium was not actually paid before the loss, and because the agreement for credit was not indorsed in writing upon the policy. It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit: *Boehen vs. Insurance Co.*, 35 N. Y., 131; *Wood vs. Insurance Co.*, 32 N. Y., 619; *Goit vs. Insurance Co.*, 25 Barb., 190; *Trustees vs. Insurance Co.*, 18 Barb., 69; *Sheldon vs. Insurance Co.*, 26 N. Y., 460; *Bodine vs. Insurance Co.*, 51 N. Y., 117; *Bowman vs. Insurance Co.*, 59 N. Y., 521; *Church vs. Insurance Co.*, 66 N. Y., 222; *Manufacturing Co. vs. Insurance Co.*, id., 613; *Latiox vs. Insurance Co.*, 27 La. Ann., 113; *Pino vs. Insurance Co.*, 19 La. Ann., 233; *Insurance Co. vs. Neyland*, 9 Bush, 430; *Heaton vs. Insurance Co.*, 7 R. L., 506; *Eagan vs. Insurance Co.*, 10 W. Va., 583; *Hodge vs. Insurance Co.*, 33 Hun., 584; *O'Brien vs. Insurance Co.*, 22 Fed. Rep., 586; *Tennant vs. Insurance Co.*, 31 Fed. Rep., 322; *Insurance Co. vs. Norton*, 96 U. S., 234; *Young vs. Insurance Co.*, 45 Iowa, 378; *Wagon Co. vs. Insurance Co.*, 20 Fed. Rep., 232; *Post vs. Insurance Co.*, 43 Barb., 351; *Van Schoick vs. Insurance Co.*, 68 N. Y., 440. The reason for this rule is well expressed in the case last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium, as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer, or supposed by either party, that it was intended to make



that condition a potent part of the contract. \* \* \* It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe." In *Insurance Co. vs. McCrea* (8 Lea, 520), it was said: "It seems to be well settled that, when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud."

In *Tennant vs. Insurance Co.*, supra, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium, and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company, which extends the time for the payment of the premium upon an executed and delivered policy, to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that period if no loss occurred meanwhile, and yet to deny the validity of the policy, and its liability upon it during the period of credit, in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured:" *Rivara vs.*

Insurance Co., 62 Miss., 728. In *Insurance Co. vs. Block* (109 Pa. St., 538), it was held that the counter-signature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, requires such countersigning to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy, upon the ground that the premium was not actually received by the officers of the company. The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consideration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid (Civil Code, § 2598; *Basch vs. Insurance Co.*, 35 N. J. Law, 429; *Insurance Co. vs. Fennell*, 49 Ill., 180), and upon principle the same result should follow where the policy is delivered as a valid and completed contract, upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case,—from May 2 to October 1, 1887,—but was limited to a credit of 60 days; for it is sufficient that he had authority to give a credit of 60 days. The credit given was a valid credit for 60 days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the 60 days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company it has no right to cancel the policy for non-payment of premium, except after putting the insured in default (*Latiox vs. Insurance Co.*, 27 La. Ann., 113), and

personal notice of intended cancellation must be given to the insured (*Insurance Co. vs. Turnbull*, 86 Ky., 230).

If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective: *Mullen vs. Insurance Co.*, 121 Mass., 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured (*Grace vs. Insurance Co.*, 109 U. S., 278, 3 Sup. Ct. Rep., 207; *Assurance Society vs. Insurance Co.*, 84 Va., 116, 4 S. E. Rep., 178; *Insurance Co. vs. Turnbull*, 5 S. W. Rep., 542), nor to any other person than the one obligated to pay the premium (*Chadbourn vs. Insurance Co.*, 31 Fed. Rep., 533).

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance and to countersign and deliver policies in San Joaquin County, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit: *Wagon Co. vs. Insurance Co.*, 20 Fed. Rep., 232; *Post vs. Insurance Co.*, 43 Barb., 351. Whether an agent has general or only particular powers is not determined by simply calling him a local agent: *Murphy vs. Insurance Co.*, 3 Baxt., 448. An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payment: *Insurance Co. vs. Booker*, 9 Heisk., 606. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals: *Baubie vs. Insurance Co.*, 2 Dill., 156. Where, by the terms of a policy, a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of limitation of his power, though he may have exceeded his authority, and violated his duty to his principal: *Insurance Co. vs. Earle*, 33 Mich., 151, 153; *Viele vs. Insurance Co.*, 26 Iowa, 58; *Murphy vs. Insurance Co.*, 3 Baxt., 440; *Whited vs. Insurance Co.*, 76 N. Y., 415.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority: *Insurance Co. vs. Wilkinson*, 13 Wall., 234; *Insurance Co. vs. Neyland*, 9 Bush, 436; *Rivara vs. Insurance Co.*, 62 Miss., 721; *Insurance Co. vs. McLanathan*, 11 Kan., 533; *Insurance*

Co. vs. Kasey, 25 Grat., 271; Wheaton vs. Insurance Co., 76 Cal., 415, 18 Pac. Rep., 758; Insurance Co. vs. Barnes (Kan.), 21 Pac. Rep., 165; Insurance Co. vs. Hogue, id., 641. By the authorities above cited it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted, through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given must be assumed as a fact for the purposes of the motion for a nonsuit, it appearing from the bill of exceptions that evidence to that effect was given on behalf of the plaintiffs, without any counter-evidence whatever, unless the contents of the letter addressed to the plaintiffs by the defendant's agent at Stockton may be so construed. That letter only purports to notify them that "instructions from the home office are imperative to collect in sixty days," and that the premium "falls due on the 1st of July,"—two months after the policy was delivered,—thus clearly indicating that a credit of 60 days had been given with the sanction of the company; but, as the letter was not received by the plaintiffs, it can have no effect as evidence against them for any purpose. It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of 60 days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of prepayment of the premium: *Elkins vs. Insurance Co.*, 113 Pa. St., 386-394, 6 Atl. Rep., 224; *Insurance Co. vs. Hoover*, 113 Pa. St., 591, 8 Atl. Rep., 163; *Insurance Co. vs. Elkins*, 124 Pa. St., 484, 17 Atl. Rep., 24.

It is urged by respondent's counsel that actual payment of the premium is a condition precedent to a recovery upon the policy, notwithstanding an agreement for credit, and that it was so decided in *Bergson vs. Insurance Co.*, 38 Cal., 546. But it appeared in that case that issue was taken on the fact of payment, and that there never was any actual payment or tender of the whole premium, and that the policy was canceled for non-payment of a part of the premium, within the period of the credit given by the company, and after due notice. The case also holds that an acknowledgment of the receipt of the premium in a delivered policy may be contradicted so as to defeat a recovery upon the policy; but this rule has been changed by section 2598 of the Civil Code. The decision in that case is no authority against the position that a tender of pay-

ment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy. The company cannot refuse such a tender, and then successfully insist upon a nonsuit, because the premium was not actually paid: *Eagan vs. Insurance Co.*, 10 W. Va., 588; *Boehan vs. Insurance Co.*, 35 N. Y., 132; *Bodine vs. Insurance Co.*, 51 N. Y., 119; Civil Code, § 1485.

The next important question relates to the effect of the provision in the policy that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk, or to occupancy of the insured premises: *Shuggart vs. Insurance Co.*, 55 Cal., 408; *Gladding vs. Association*, 66 Cal., 6, 4 Pac. Rep., 764; *Enos vs. Insurance Co.*, 67 Cal., 621, 8 Pac. Rep., 379; *Walsh vs. Insurance Co.*, 73 N. Y., 5. In the last case cited, it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises, known to the insured, "does not interfere with that class of cases which have established that conditions for pre-payment of premiums and the like, which enter into the validity of the contract of insurance at its inception, may be waived by agents, and are waived, if so intended."

It has been expressly adjudged by the Supreme Court of Iowa, in a well-considered case, that the insured is not bound to take notice of the conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract, by an agent having authority to countersign it, and who before or at the time of the delivery of it has given the insured a credit upon the premium by parol; and that, if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy: *Young vs. Insurance Co.*, 45 Iowa, 378. And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate

the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and completed contract, is an exercise of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy: *Van Schoick vs. Insurance Co.*, 68 N. Y., 434; *Whited vs. Insurance Co.*, 76 N. Y., 418-421; *Insurance Co. vs. McCrea*, 8 Lea, 513-520; *Insurance Co. vs. Jones*, 62 Ill., 458; *Insurance Co. vs. Earle*, 33 Mich., 151-153; *Viele vs. Insurance Co.*, 26 Iowa, 58; *Murphy vs. Insurance Co.*, 3 Baxt., 440; *Geib vs. Insurance Co.*, 1 Dill., 449; *Devine vs. Insurance Co.*, 32 Wis., 471; *Pelkington vs. Insurance Co.*, 55 Mo., 172; *Insurance Co. vs. Lyons*, 38 Tex., 253; *Insurance Co. vs. Hall*, 12 Mich., 202; *Carroll vs. Insurance Co.*, 38 Barb., 402; *Manufacturing Co. vs. Insurance Co.*, 2 Paine, 501; *Insurance Co. vs. Schettler*, 38 Ill., 166. It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds: *Trustees vs. Insurance Co.*, 19 N. Y., 305; *Insurance Co. vs. Norton*, 96 U. S., 234; *Carrugi vs. Insurance Co.*, 40 Ga., 141; *Lamberton vs. Insurance Co.*, 39 Minn., 129, 39 N. W. Rep., 76; *Insurance Co. vs. Earle*, 33 Mich., 153; *Reiner vs. Insurance Co.*, 42 N. W. Rep., 208; *Steen vs. Insurance Co.*, 89 N. Y., 326. Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact: *Insurance Co. vs. Norton*, 96 U. S., 234; *Steen vs. Insurance Co.*, 89 N. Y., 326.

The authorities before cited show that a local agent, who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the "home office," in the state of New York, and who signed himself as the direct agent

of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it: *Geib vs. Insurance Co.*, 1 Dill., 449; *Insurance Co. vs. Earle*, 33 Mich., 151-153; *Whited vs. Insurance Co.*, 70 N. Y., 418; *Viele vs. Insurance Co.*, 26 Iowa, 58; *Murphy vs. Insurance Co.*, 3 Baxt., 440; *Insurance Co. vs. McCrea*, 8 Lea, 513-520.

3. It is contended by counsel for respondent that the judgment of nonsuit should be sustained because the plaintiffs did not demand nor obtain an award of arbitrators as to the amount of loss. This, it is said, was a condition precedent to a right to maintain this action. No arbitration is contemplated or required by the terms of the policy, except in case of a failure of the parties to agree upon the amount of the loss. After the fire, and within the time prescribed by the policy, the plaintiffs furnished to defendant the requisite proofs of loss to the extent of \$1,000,—the amount alleged in the complaint,—and thereupon, without questioning or making any objection to the amount of the loss claimed or to the proofs thereof, the company, for other reasons, not only denied its liability, but denied the existence of the policy, claiming that it had been canceled two months before the loss. This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration: *Lasher vs. Insurance Co.*, 18 Hun., 98, 55 How. Pr., 218; *Insurance Co. vs. Putnam*, 20 Neb., 321, 39 N. W. Rep., 246; *Mentz vs. Insurance Co.*, 79 Pa. St., 478; *Insurance Co. vs. Badger*, 53 Wis., 284, 10 N. W. Rep., 504; *Wallace vs. Insurance Co.*, 4 McCrary, 123, 41 Fed. Rep., 742; *Nurney vs. Insurance Co.*, 30 N. W. Rep., 350. Then, it is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring proofs of loss: *Insurance Co. vs. Ruckman*, 127 Ill., 364, 20 N. E. Rep., 77; *Insurance Co. vs. Spiers*, 8 S. W. Rep., 453; *Transportation Co. vs. Insurance Co.*, 34 Conn., 561; *McBride vs. Insurance Co.*, 30 Wis., 562; *Donahue vs. Insurance Co.*, 56 Vt., 382; *Insurance Co. vs. Erb.*, 112 Pa. St., 149, 4 Atl. Rep., 8; *Zielke vs. Assurance Corp.*, 64 Wis., 442, 25 N. W. Rep., 436; *O'Brien vs. Insurance Co.*, 52 Mich., 131, 17 N. W. Rep., 726; *Wagon Co. vs. Insurance Co.*, 20 Fed. Rep., 232; *Carroll vs. Insurance Co.*, 72 Cal., 297, 13 Pac. Rep., 863. Under the circumstances, an offer

by the plaintiffs to arbitrate would have been an idle act, which "the law neither does nor requires:" Civil Code, § 3532.

None of the California cases cited to this point by respondent's counsel are opposed to the position here assumed. In *Old Saucelito L. & D. D. Co. vs. Commercial Co.* (66 Cal., 253), there was an actual dispute as to the amount of the loss, and plaintiff alleged that it had offered to submit to arbitration; but the court found to the contrary: 5 Pac. Rep., 232. So, in the case of *Adams vs. Insurance Co.* (70 Cal., 198, 11 Pac. Rep., 627), it appears that the only dispute between the parties was an express dispute as to the amount of the loss. In *Carroll vs. Insurance Co.* (72 Cal., 297, 13 Pac. Rep., 863), the difference as to the amount of loss had been submitted to arbitration, and an award had been made. The defendant pleaded this award as a limitation upon the amount to be recovered, and the plea was held good. As it appears from the bill of exceptions that the evidence on the part of the plaintiffs, substantially, and even strongly, tended to prove all the facts necessary to entitle the plaintiffs to recover, I think the judgment of nonsuit was erroneous, and should be reversed, and that the cause should be remanded for a new trial.

We concur: Belcher, C. C.; Hayne, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is reversed, and the cause remanded for a new trial.

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## APPELLATE COURT OF INDIANA.

PEOPLE'S MUT. BEN. SOCIETY

vs.

TEMPLETON\*

1. Where there are two paragraphs of answer, one in confession and the other in denial, plaintiff cannot treat the answer in confession as dispensing with proof of the facts put in issue by the paragraph in denial.
2. A complaint to recover on a policy issued to plaintiff on the life of his mother alleged that plaintiff was liable for the support of the assured under the laws of Illinois, where they lived when the insurance was effected; that plaintiff supported and maintained the assured until her death; that under the same law the assured was liable for the maintenance of plaintiff; and that thereby plaintiff had a valuable pecuniary interest in her life. The statute of Illinois, a copy of which was filed with the complaint, gives no right of action by the son against the mother, or vice versa, for nonsupport, but creates a legal liability in

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\* Decision rendered, Oct. 1, 1896. From *Northeastern Reporter*.



behalf of the town or county. The exhibits filed with the complaint showed that the assured was 76 years old when the policy was issued, and there was nothing to show that plaintiff expected any benefit from her in the way of service or maintenance. *Held*, That the complaint failed to show that plaintiff had an insurable interest in the life of the assured.

3. A certificate of life insurance was indorsed, "Incontestable after one year from date, as provided in the by-laws," and the by-laws provided that "all deaths which shall occur within three years from the date of the approval of the application, . . . or from date of last revival of said certificate, shall be incontestable." *Held*, That a claim for a death occurring over three years from the approval of the application, or revival of the certificate, is contestable.

J. M. VANFLEET, V. W. VANFLEET, J. S. DODGE, and O. J. HUBBELL,  
*for Appellant.*

R. M. JOHNSON, J. D. OSBORNE, and J. L. HARMON, *for Appellee.*

DAVIS, C. J.

The appellee sued appellant upon a certificate of life insurance. It is alleged in the first paragraph of the complaint that appellant issued to appellee a policy on the life of his mother for \$2,000; alleges the death of the assured, the payment of all assessments, and performance by plaintiff of all conditions and stipulations of the contract on his part; asserts the liability for support of assured by plaintiff under the laws of Illinois, where both the beneficiary and the insured lived at the date of effecting the insurance; makes so much of the statute of Illinois as sustains this allegation a part of the complaint by filing a copy of the same as an exhibit to the complaint; alleges the full compliance of that law by appellee to the date of the death of the assured, and also alleges the liability, under that law, of the assured, for the support and maintenance of the appellee to the date of her death, and that thereby the appellee, from the date of the acceptance of the assured into defendant company as a member, until her death, had and continued to have a valuable pecuniary interest in the life of the assured; that under the laws of the defendant company the claim of appellee was entitled to be placed in and paid from the fund secured from the pool forming at the date of the death, and accepted proofs of the same of said assured, in the months of March and April, 1894, but that appellant refused to place the same in that pool, or in any other pool, and also refused to pay said loss from that pool or any other pool, although sufficient sums of money were realized by appellant from such March and April pool to pay appellee's claim in full, which it wrongfully applied to other purposes; and that appellant has wrongfully accumulated a fund of \$50,000 out of the assessments made against its policyholders, out of which it might and ought to pay appellee's claim, but likewise refuses to apply the same to that

purpose; makes a copy of the certificate or policy a part of the complaint as an Exhibit A, containing, among other conditions, the following: "That this certificate shall be incontestable after one year from date, as provided in the by-laws;" makes a copy of the by-laws of appellant a part of the complaint by filing the same as an Exhibit C, alleges that appellee is the owner of the certificate sued on, and that there is due him thereon the sum of \$3,000, for which he demands judgment, and all other proper relief. The policy is for a sum "not to exceed two thousand dollars," being dependent upon the amount realized on certain assessments. A demurrer was sustained to the first paragraph of the complaint. To the second paragraph of the complaint appellant filed an answer in two paragraphs. The first paragraph purports to be but a partial answer to the complaint, and admits all its material allegations except the amount. The second paragraph of the answer is a general denial. The appellee moved for judgment against the appellant for \$2,000 on the partial answer. This motion was sustained. Appellant appeals, and assigns this ruling as error. Appellee assigns cross error on the ruling sustaining demurrer to the first paragraph of the complaint.

The rule is that, where there are two paragraphs of answer, one in confession and the other in denial, the plaintiff cannot treat the answer in confession as dispensing with the proof of the facts put in issue by the paragraph in denial: *Palmer vs. Poor*, 121 Ind., 135, 22 N. E., 984; *Smelser vs. Turnpike Co.*, 82 Ind., 417; *Weston vs. Lumley*, 33 Ind., 487. Therefore, for this reason, if for no other, the court erred in sustaining appellee's motion for judgment against appellant on the first paragraph of answer.

We will next consider the cross error assigned by appellee. Counsel for appellant insists that the first paragraph of complaint is bad, "because it shows on its face that appellee had no insurable interest." The first contention of counsel for appellee is that under the poor laws of Illinois there is a legal liability resting upon the son for the maintenance of the mother, and upon the mother for the maintenance of the son, in the event the one is unable to earn a livelihood and the other be of sufficient ability to provide such support. The Illinois statute has not been fully recited or set forth in the first paragraph of the complaint, but a copy of the statute has been filed therewith: *Wilson vs. Clark*, 11 Ind., 384; *Tyler vs. Kent*, 52 Ind., 583; *Swank vs. Hufnagle*, 111 Ind., 453, 12 N. E., 303. Assuming, without deciding, that the statute has been properly pleaded, we have examined it, and find that the statute is "An act to revise the law in relation to paupers" (Rev. St. Ill., 1893, c. 107),

and the legal liability is created in behalf of the county or town. The only provision for enforcing it is by an action instituted either by the state's attorney or overseer of the poor. No right of action is created by the son against the mother or by the mother against the son. The exhibits filed with the first paragraph of the complaint show that the mother was 76 years of age when the policy was issued, and that she was more than 80 years of age when she died. It is averred in this paragraph that at the time the policy was issued appellee "then was, and up to the date of her death was, supporting, caring, and providing for her maintenance." There are no averments in the complaint tending to show any reasonable ground for an expectation of appellee of pecuniary or material benefit or advantage to him from the continuance of the life of his mother. There is nothing justifying an inference or expectation that she had or would have, in any event, sufficient ability to support him. It does not appear that appellee expected any benefit from her in the way of service, maintenance, or the like. In other words, it does not appear that appellee had any insurable interest in the life of his mother: *Burton vs. Insurance Co.*, 119 Ind., 207, 21 N. E., 746. The rule recognized in *Insurance Co. vs. Kane* (81 Pa. St., 154), does not prevail in Indiana: *Insurance Co. vs. Vogler*, 89 Ind., 572.

It is next contended by counsel for appellee that the incontestable clause dispenses with allegation of insurable interest. On the back of the certificate is found the following: "That this certificate shall be incontestable after one year from date, as provided in the by-laws." In section 2 of the by-laws occurs the following provision: "Sec. 2. All deaths which shall occur within three years from the date of the approval of the application upon which the certificate is issued, or from date of last revival of said certificate, shall be incontestable, provided all payments have been made as required by the by-laws of the society that no misrepresentation was made in said application, and that the death of the insured person was in no way caused by lack of proper medical attendance, or by or with the connivance of any person in any way interested in the payment of the claim." It is alleged that all payments have been made as required by the by-laws of the society. The position of counsel for appellee is that under the provision in the by-laws above set out appellant is "precluded from the right to make any defense whatever to the payment of the full amount of the certificate." There is no express provision in the by-laws that the certificate shall be incontestable. Construing the clause on the back of the certificate and the provision in the by-laws together, we assume, without deciding, that the certificate, after one year, and within three years, from date of issue, is incontestable.

The complaint shows that the policy was issued on the 29th of December, 1886, and that the assured died on the 2d day of January, 1894. The approval of the application upon which the certificate was issued was therefore not later than the 29th of December, 1886. It does not appear that there ever was a revival of the certificate; in other words, the certificate sued on was issued and delivered on the 29th of December, 1886, and was never thereafter, as it appears, forfeited or revived. The stipulation in the by-law is that "all deaths which occur within three years from the date of approval of the application upon which the certificate is issued, or from the date of the last revival of said certificate, shall be incontestable." It is not claimed that the death in this case occurred within three years from the date of the approval of the application upon which the certificate was issued, or within three years from the date of the last revival of said certificate. The clause on the back of the certificate is to the effect only that it shall be incontestable after one year, "as provided in the by-laws." The provision in the by-law applies only to cases where death occurs "within three years." There is no provision that, where death occurs after three years, the certificate shall be incontestable. What the effect of the stipulation may be in cases where death occurs after one year and within three years from the approval of the application or revival of the certificate, we need not further consider. In this case the death occurred more than seven years after the date of the approval of the application. In our opinion, the court did not err in sustaining the demurrer to the first paragraph of the complaint. Judgment reversed, with instructions to overrule appellee's motion for judgment against appellant for \$2,000 on the partial answer.

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## SUPREME COURT OF MINNESOTA.

HANSON

vs.

MINNESOTA SCANDINAVIAN RELIEF ASS'N ET AL.\* }

The by-laws of a mutual benefit society, whose expressed object was "to aid and assist the widows and orphans of deceased members," provided that every applicant for membership should designate in his application the person or persons to whom, in the event of his death, the benefit should be paid; also, that any member might change his beneficiary by sending to the secretary a written application acknowledged before a

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\* Decision rendered, Nov. 16, 1894. Syllabus by the Court.

notary, and surrendering his certificate; that, if such change was approved by the board of managers, the secretary should issue him a new certificate; and that no change of beneficiaries should be made in any other way. The by-laws also provided that the benefit should be paid to such person or persons as the deceased member may have designated, as the same shall appear on the books of the association, and, if no designation had been made, then to his legal heirs or devisees. A certificate of membership was issued to the deceased without his having designated any beneficiary. Subsequently, he went to the office of the association, and verbally designated to the secretary four of his children as beneficiaries, and requested the secretary to make or enter such designation. Thereupon the secretary, in his presence, entered or recorded, in the book of the association kept for that purpose, the names of the four children as the beneficiaries, and assured the member that this was all that was necessary to be done. This entry remained in the records of the association, without objection, until the death of the member, six years afterwards. In a controversy between the four children and the other heirs of the deceased as to who were entitled to the benefit, *held*:

1. That a widow is an "heir," within the meaning of the by-laws.
2. That the act of the member was an "original designation," as distinguished from a "change," of beneficiaries, within the meaning of the by-laws.
3. That the requirement of the by-laws that the designation of beneficiaries shall be made in the application for membership is a mere formality, designed for the protection of the association, and may be waived by it; and if it has done so, and accepted something else as a sufficient designation, the heirs, who have no vested right in the benefit during the life of the member, cannot be heard to object.
4. That, if any approval of the designation by the board of managers was necessary, their approval must be presumed from the fact that the designation remained so long in the records of the association without objection. No formal vote was necessary.

WELCH & WELCH, *for Plaintiff.*

F. M. WILSON, *for Defendant Minnesota Scandinavian Relief Ass'n.*

J. N. TRUE and S. J. NELSON, *for Defendant Violet Hanson.*

C. A. FOSNES and TRUE & NEAL, *for other Defendants.*

MITCHELL, J.

The respondent association is a corporation of a class, now very common, by means of which persons of moderate means may, by payment of small stated assessments, make provision for their families in case of death. While possessing some of the features of ordinary life insurance, it is in fact a mutual aid society. Its expressed object is "aiding and assisting the widows and orphans of deceased members." Its by-laws provide that: "Every applicant for membership shall designate in his or her application the person or persons to whom, in the event of his or her death, the benefit shall be paid. Any member in good standing may change his or her beneficiary or beneficiaries by sending a written application, duly acknowledged before a notary public, to the secretary, and by surrendering his or her certificate, and paying a fee of one dollar. In case such change is approved by the board of managers, the secretary shall issue a new certificate to such members, and no change

of beneficiary shall be made in any other way than herein provided." "Benefits shall be payable at the city of Red Wing, Minn., and shall be paid as follows: (1) To such person or persons as the deceased may have designated to receive the same, as shall appear upon the books of the association. (2) If such beneficiary or beneficiaries shall die prior to the death of such deceased member, or if no designation has been made, then the benefit shall be paid to the legal heirs or devisees of such deceased member."

The facts found by the court, and amply supported by the evidence, are as follows: In March, 1882, the association accepted one Olaf Hanson as a member, and issued to him a certificate of membership. Neither in his application nor at the time of the issuance of the certificate did Hanson designate the beneficiary or beneficiaries to whom the benefit should be paid. Some time in 1883 or 1884, he appeared in person at the general office of the association, and verbally notified its secretary, one Werner (whom the association in its answer also designates and recognizes as its general manager), that he desired to designate his children Axel, Esther, Gertie, and Christine, as the beneficiaries to whom the benefit should be paid, and requested Werner to make such designation. In pursuance of such request, Werner made an entry to that effect in the association's book or record of membership, in the column headed "Certificate in Favor of," and then and there read the entry to Hanson, who then inquired "if there was anything more to do," to which Werner replied, "That is all you need do; that is solid." The validity of this designation was never questioned by either Hanson or the association. The foregoing is the only designation of beneficiaries which Hanson ever made. The certificate issued by the association to Hanson was merely one of membership, and in no way referred to the payment of the benefit, or to whom it was payable; and it does not appear that there was any by-law requiring such certificates to state the name of the beneficiary in case one is designated. Hanson continued to pay his assessments until 1890, when he died intestate, leaving surviving him, as his heirs or distributees, in addition to the four children named in the foregoing designation, a widow and one other daughter. A controversy having arisen between them as to who were entitled to the money under the certificate, the association, in its answer, merely alleged the facts, and expressed its readiness and willingness to pay the money to the persons entitled to it.

The point is made that even if the designation of beneficiaries was void, yet the widow has no interest in the money, because she is not a "legal heir" of her husband. In view of the expressed

purpose of the association, we are of the opinion that the word "heir" as used in the by-laws, is to be construed, not in its technical, common-law sense, but as including all those who succeed to personal property under the statute of distribution, including, of course, the widow. The main question, however, in the case, is whether there was a valid designation of the four children as beneficiaries; the contention of appellants being that it was void because not made in accordance with the requirements of the by-laws as to changing beneficiaries. Appellants' counsel argue that this was not an original designation, but a change of beneficiaries. We have no occasion to consider whether it would make any difference which of the two it was, but we are clearly of the opinion that, within the contemplation of the by-laws, it was the former. By the "designation" of a beneficiary, the by-laws evidently refer to the express act of the member specifying and naming some particular person, and by "changing" beneficiaries they refer to the act of naming and specifying some other person or persons in place of those previously designated. According to this construction of the by-laws the act of Hanson was an original designation, and not a change, of beneficiaries, and hence the only departure from the strict requirement of the by-laws was Hanson's designating the beneficiaries verbally after the certificate of membership was issued, instead of doing so in his written application for membership. The requirement of the by-laws in this regard was designed for the protection of the association, the object being that it might have on file authenticated written evidence as to who were the designated beneficiaries, to whom the benefit should be paid in case of the death of the member. It is a formality which neither goes to the substance of the contract of membership nor affects the expressed object of the association. Therefore, the association might waive it, and, if it did so, those who might prove to be the heirs or legatees of the member at his death cannot be heard to object. The matter was one wholly between the association and the member. This logically follows from the fact that such possible heirs or legatees had no vested right whatever in the benefit during the life of the member: See *Supreme Conclave vs. Cappella*, 41 Fed., 1. There is nothing inconsistent with this view in *Hall vs. Merrill*, 47 Minn., 260. Not only was that a case of an attempted change of beneficiary, but the association never had waived the requirement of the by-laws, and hence no change was in fact ever effected. Moreover, in that very case the power of the association to waive matters of form was expressly recognized. In the present case the association did waive a written designation in the application for membership, and accepted in place of it a verbal

designation, and made the appropriate entry of it in its records,—a thing which the by-laws clearly contemplate being done.

It is urged that it does not appear that the board of managers ever approved this designation. Viewing it as an original designation, and not a change of beneficiaries, within the meaning of the by-laws, we find nothing in them expressly requiring such approval. But, conceding that this is implied, the fact that such designation stood of record in the book of the association, kept for that express purpose, for so long a time without objection on part of the managers, amounted to an approval. They either knew of it or ought to have known of it, and hence must be presumed to have known of it; and by not objecting they approved. A formal vote was not necessary. See *Durar vs. Insurance Co.*, 24 N. J. Law, 171; *Phillips vs. Insurance Co.*, 10 Cush., 350; *Topping vs. Bickford*, 4 Allen, 120. Order affirmed.

## SUPREME COURT OF GEORGIA.

LIVERPOOL & LONDON & GLOBE INS. CO. }

vs.

ELLINGTON.\*

1. It is no cause for dismissing, on motion, an action founded upon a policy of insurance which has been assigned in writing, that the assignor sues for the use of the assignee, both these parties being before the court as such by virtue of the petition thus brought, and the petition being amendable by striking out the assignor. A recovery may be had without amendment, the defect not being one which could prejudice the defendant on the merits of the litigation. The pleading, being bad in form, was open to special demurrer to enforce correction by amendment.
2. One of numerous conditions in the policy of insurance declared upon being that the assured was to furnish the company with proofs of loss, and the plaintiff's petition alleging in general terms that he "has complied with all the conditions precedent to a recovery, the petition, on being amended by setting out that the proofs furnished were not satisfactory, and were returned as objectionable and insufficient, that the company's adjuster absolutely refused to pay the loss, saying that it would have to be adjusted in the courts, and alleging that this refusal constituted a waiver by the company to insist upon or require the plaintiff to furnish the preliminary proofs of loss required by the policy, and consequently he did not furnish them," is consistent with itself, and contains no duplicity, inasmuch as the amendment qualified and virtually canceled pro tanto the general allegation of compliance with all conditions.
3. The legal evidence of agency for the company by the person who was called and recognized as an adjuster, and who, as such, examined somewhat into the loss, being wholly uncontradicted and unanswered, was sufficient; and the absolute refusal of that person to pay, at the same time referring the assured to the courts for redress, was, prima facie and unexplained, a waiver on the part of the company of the preliminary proofs of loss. And although some illegal evidence was admitted and

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\* Decision rendered, Oct. 22, 1894. Syllabus by the Court.



some error committed by the court in charging the jury, both as to agency and waiver, the verdict, save as to damages and attorney's fees, was obviously correct, and for this reason no new trial is awarded.

4. One of the stipulations in the policy being that the assured should "keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit," it was not indispensable that the set of books kept should embrace what is usually termed a "cash book," or that the books should be kept on any particular system or in a manner to render it easy, rather than slow or difficult, to ascertain the amount of purchases and sales, and distinguish cash transactions from those on credit. It was enough that these matters would be ascertainable from the books with the assistance of those who kept them or who understood the system on which they were kept. But the obscurity or complication of the books, and the probability of their not being understood by reason of not being kept on some clear and regular system, would furnish good cause for unwillingness on the part of the company to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed; and in such case bad faith in refusing to pay the whole should be treated as negatived by an offer to pay a sum approximating the whole, but falling short thereof about 20 per cent.
5. There was no abuse of discretion in denying the motion for a continuance.

ATKINSON, DUNWODY & ATKINSON and L. A. WILSON, *for Plaintiff in Error.*

W. G. BRANTLEY and JOHN C. McDONALD, *for Defendant in Error.*

SIMMONS, J.

It appears from the record that on November 1, 1892, the London & Liverpool & Globe Ins. Co. issued to Ellington a policy of insurance for the term of one year upon a certain stock of goods and storehouse in the town of Saussy, Ga. On December 29, 1892, the property insured was destroyed by fire. On December 30, 1892, Ellington made a written assignment of the policy to the Savannah Grocery Company. Subsequently this action was brought by Ellington, for the use of the assignee. When the case came on for trial, the defendant moved to dismiss the same, on the ground that it appeared from the allegations in the declaration that Ellington had no legal title nor any equitable interest in the policy, and hence no action could be maintained by him either for himself or for the use of the Savannah Grocery Company. This motion was overruled, and the defendant excepted.

It is undoubtedly true that sound principles of pleading require that an action shall be brought by the person having the legal interest therein, and this action should have been brought by the assignee without Ellington as a party. If the defendant had demurred specially upon the ground that Ellington was not entitled to institute the action, the court should have dismissed it, unless the declaration was amended by striking therefrom the name of Ellington as plaintiff. One of the objects of special demurrer to a declaration is to require the plaintiff to amend the declaration in matters

of form, and, if he refuses to amend, the court may dismiss the action. But a motion to dismiss an action for improper joinder of parties is a different thing from a special demurrer, which, as above indicated, is predicated on the theory that the declaration needs amendment in matter of form, while the motion to dismiss is upon the theory that the action cannot proceed at all, because there is no cause of action. While it would have been better pleading to have brought this action in the name of assignee, yet, as against a motion to dismiss, the court did not err in allowing the action to stand. The fact that the names of the assignor and the assignees were both in the declaration, one suing for the use of the other, did not make it void, so that no recovery could be had thereon. It could have been amended at any time by striking the name of the assignor, and the rights of the defendant were not prejudiced by having both parties before the court. Any defense the defendant may have had could have been set up as well with the declaration in this form as it could have been if the assignee had sued alone; and a judgment in the case would bind both the assignor and the assignee. What substantial difference, then, could the bringing of the suit in this form make to the defendant if none of its rights were prejudiced thereby? See *Gilmore vs. Bangs*, 55 Ga., 403; *Cheese Co. vs. Smith* (March term, 1894).

2. One of the conditions of the policy declared upon was that, if the property should be destroyed by fire, the insured should furnish the insurance company with proofs of loss within a specified time. The original declaration alleged that the plaintiff had "complied with all the conditions precedent to a recovery." On the trial of the case the plaintiff was allowed to amend his declaration by alleging that the proofs furnished were not satisfactory, and were returned as objectionable and insufficient; that the company's adjuster absolutely refused to pay the loss, saying that it would have to be adjusted in the courts; and that this refusal constituted a waiver by the company of its right to insist upon or require the plaintiff to furnish the preliminary proofs of loss required by the policy, and consequently he did not furnish them. The defendant demurred to the amendment, and to the entire declaration, upon the ground that the declaration as amended was double, and that, because of duplicity, the plaintiff should be put to his election thereon. The court overruled the demurrer, and refused to compel the plaintiff to elect, and to these rulings the plaintiff excepted. This amendment did not change the cause of action, as was insisted upon by counsel for the plaintiff in error. The cause of action was a breach of the contract. The amendment related to the manner of proof. In the original declaration the plaintiff alleged that he had com-

plied with all the conditions of the policy. In the amendment he averred that he had not complied with certain of those conditions, because the defendant had waived compliance. This, in our opinion, meant that he abandoned that part of the original declaration which alleged compliance with the conditions referred to, and would not rely upon it, but would rely upon the waiver. Where a plaintiff, having averred in his original declaration his ability to prove a certain state of facts, subsequently amends it by alleging another state of facts inconsistent with the first, he abandons or cancels the first averment, and it is virtually stricken by the allowance of the amendment. The better practice would be to take an order striking the first allegation from the declaration, or else enlarge the amendment so as expressly to expunge that allegation or substitute the new matter for it.

3. There was evidence to the effect that, after the fire, one O'Connor visited the place where it occurred, and that the agent who had issued the policy recognized him as an adjuster of the company, and as such he examined somewhat into the loss. This evidence was wholly uncontradicted and unanswered, although O'Connor and this agent were present at the trial, and, in our opinion, was sufficient proof of O'Connor's agency for the company. The record further discloses that he negotiated with the insured in regard to the payment of the loss, instructed him how to make proofs of loss, and the proofs were sent to him, and returned by him as insufficient, and finally he refused absolutely to pay the loss, and referred the insured to the courts for redress. These facts, unexplained, constituted *prima facie* a waiver on the part of the company of the preliminary proofs of loss. Although some illegal evidence was admitted, and some error committed by the court in charging the jury, both as to agency and waiver, we are satisfied, after a careful examination of the evidence in the record, that the verdict was correct, save as to damages and attorney's fees; and as the case, under the evidence, could have no other legal result than a verdict for the plaintiff, we decline to award a new trial, but direct that the damages and attorney's fees be written off from the judgment.

4. At the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit. One of the grounds of this motion has already been dealt with as a ground of the motion to dismiss the action; namely, that, prior to the institution of the action, Ellington had parted with his entire interest in the policy. Of course, if this was not sufficient as a ground for the motion to dismiss the action, which is in the nature of a general demurrer, it is not sufficient as a

ground for nonsuit. The second ground of the motion for nonsuit was that the plaintiff had covenanted to "keep a set of books showing a complete record of business transacted, including all purchases and sales both for cash and credit," as stated in the policy, and, in the event of a failure to produce the same, the policy to be void; and that he had failed to keep a set of books or to produce the same showing his cash sales, and therefore the action could not be maintained. The record discloses that the plaintiff did keep a set of books, in which were entered his purchases and sales, both for cash and on credit, and that he kept a cash account, though he did not keep what is usually termed a "cash book," showing daily cash sales or a distant record of merchandise sold for cash. The plaintiff and his bookkeeper testified, however, that they could ascertain and did ascertain from these books the amount of cash and credit sales. Under the clause referred to, it was not indispensable that the books kept should embrace what is usually termed a "cash book," or that the books should be kept on any particular system. It was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit, although it might be slow and difficult to do this. The plaintiff and his bookkeeper having testified as above stated, and the books themselves being before the jury, the court did not err in refusing a nonsuit on this ground. The fact, however, that the books were complicated and difficult to be understood, by reason of their not being kept on some clear and regular system, afforded a good reason on the part of the company for being unwilling to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed by the plaintiff. The evidence shows that it took the person who kept the books a long time to show how much of the goods were sold for credit and how much for cash, and that to do this he had to resort to complicated calculations. Under this state of facts, we think it was not bad faith for the agent to refuse to pay the whole of the loss claimed. The fact that, under these circumstances, he offered to pay four-fifths of the amount claimed, should itself negative bad faith on the part of the company. The verdict was wrong, therefore, in so far as it awarded damages and attorney's fees against the defendant.

5. Under the facts there was no abuse of discretion in denying the motion for a continuance. Judgment affirmed, with direction.

# SUPREME COURT OF LOUISIANA.

LEWIS BAILLE & CO., LTD., IN LIQUIDATION, )

vs. }

WESTERN ASSURANCE CO., OF TORONTO.\*

The plaintiff sued for amount due on property insured, destroyed by fire.

Having in the answer denied all liability, the defendant was without right to sustain the plea of want of appraisalment as a condition precedent to filing suit, although the policy contained a stipulation relating to appraisalment.

If the defendant was not liable there was nothing to appraise. Moreover, there was no such demand made to at once proceed with an appraisalment as the law contemplates should be made by the one claiming an appraisalment under the terms of a policy.

Acts do not give rise to a presumption of fraud, if they could be accounted for on the basis of good faith and honesty.

The right of parties to represent a corporation, not contested in the court of first instance, cannot be examined on appeal.

From necessity, the opinion of ordinary witnesses, acquainted with the value of property, is admitted, although they are not experts in matter of value

WISE & HERNDON, BELL & RANDOLPH and ALEXANDER & BLANCHARD,  
*for Plaintiffs and Appellees.*

MORGAN & THOMPSON, *for Defendant and Appellant.*

BREAUX, J.

The defendant insured fixtures of the plaintiff, of a drug store, occupied by the latter. The amount of the policy was \$2,500 less the three-fourth value clause. The premises were destroyed by fire. Plaintiff brought this suit for the amount of the policy. The plaintiff alleges that the required notice has been given and proof of loss prepared and forwarded to the defendant within sixty days from the date of the fire, and that more than sixty days have elapsed since the proof of loss was delivered. Further, the plaintiff alleges that it has complied with all obligations imposed by the contract and policy of insurance.

The defendant relies upon two grounds. The first is: That no appraisalment had been made in the manner specified in the policy. The second is: Incorrect and untrue statement of the assured.

It is also alleged in the answer that the loss did not amount to or exceed \$2,000. The fact is, that appraisers in case of difference, were to determine the amount of loss by fire.

The policy stipulates the loss shall not "become payable until sixty days after the notice, ascertainment, estimate and satisfactory

\* Decision rendered, Feb. 1, 1897. Reported by W. O. Hart, of the New Orleans Bar.

proof of loss herein required have been received by this company, including an award by appraisers, when appraisal has been required, and that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after a full compliance by the insured with all the foregoing requirements."

As bearing upon the necessity of appointing appraisers, as a condition precedent to the suit, we note the facts that the adjuster on the ground offered \$1,900, and some time after, again when present at Shreveport, he offered \$2,000, which the plaintiff declined to accept. The defendant, by the appraiser, made the offer without admitting that it was indebted for that much.

The plaintiff in due time forwarded the proof of loss. The defendant acknowledged the receipt only a few days before the sixty days had elapsed from the date it had been received, and in its answer it objected to the proof of loss as incorrect and unsatisfactory; it required a schedule of articles covered by the policy. The defendant further demanded full compliance with the contract and exacted an appraisement. The letter expressly reserved in conclusion "all the rights under our policy and without waiver or admission of any description."

The schedule was forwarded in compliance with defendant's demand. The defendant in its pleadings does not admit the validity of the policy or its liability in any amount. In other words, the issue was not limited to a question of amount of defendant's indebtedness. On the contrary, in its answer, the defendant denies all and singular the allegations contained in plaintiff's petition.

The facts as relate to the alleged untruthful statement are in the schedule furnished by the plaintiff to the defendant. There were included "one cash register \$125, three trunks \$48, and five show cases estimated at \$200." We are informed that the fire destroyed all the books of the assured save the cash book and ledger of date subsequent to July, 1893. In making the inventory of goods purchased originally, the data were, it appears, not entirely exact owing to the loss of plaintiff's books. The facts needful in the premises, as we are led to infer, were all submitted to the adjuster before the plaintiff furnished its proof of loss. From a judgment condemning it to pay the amount of \$2,000, the defendant prosecutes this appeal.

The question of appraisement as a condition precedent vel non to filing a suit for recovery on the policy is the first before us for our determination. The policy issued by the defendant contains the stipulation that notice of proof shall be furnished to it, preceded by an award of appraisers "when appraisal has been required." Some time after the loss, and after its agents were at some consid-

erable distance from the place of loss, the insurer by letter, demanded an appraisement. There was no offer made by it to name one of the appraisers and to proceed to the appraisement. The clause of the policy appears to have been considered by the defendant company as a condition precedent, the performance of which was left entirely with the assured, who were to be left to themselves, without suggestion or offer of any kind from the assurer. In a similar case upon this point, it was said: "But it cannot be contended in such a case as this, an appraisal of the loss is an absolute sine qua non to the bringing of a suit. If it were all, that an insurance company would have to do in order to avoid payment of a loss against which it had insured its patron would be to refuse to name an appraiser, or otherwise arbitrarily prevent an appraisement." 62 Rep., 257.

A stipulation for an appraisement should have for its sole object the ascertainment of the amount of the loss. The stipulation ceases to have force where the insurer disputes to the insured the right to recover anything at all under the policy. We think the conclusion reasonable, in the presence of an absolute refusal to pay anything, the assured should have the right to file a suit and maintain an action for the loss; that a denial of all account ability leaves nothing to arbitrate. On the refusal of the defendant to pay, and in the presence of defendant's neglect actively to avail itself of the stipulation in regard to the appraisal, the plaintiff might well infer that nothing was left for him to do save to sell and have any right he had passed upon by the courts: *Millaudon vs. Insurance Co.*, 8 La., 562, 557. See also upon this point *Hamilton vs. Liverpool & London & Globe Ins. Co.*, 136 U. S., 243; *Hamilton vs. Home Ins. Co.*, 137 U. S., 370; *Wood on Insurance*, 2d vol., 1013; *Beach on Insurance*, 1st vol., sec. 200, 2d vol., 1247.

The defendant insisted that an untrue proof of loss had been furnished and that the untruthful statement had the effect of invalidating the policy.

The proposition that wilful swearing with the view of deceiving the assured will defeat the right of recovery does not admit of any question. It must be made evident, however, that the alleged false swearing was intentionally committed.

The burden of proving the truth of the allegations of fraud rests on the defendant. Fraud is never to be presumed from acts which may be accounted for on the basis of honesty and good faith. To avoid the policy it must appear that the intention was to defraud: *National Bank vs. Insurance Co.*, 95 U. S., 673; *May on Insurance*, Secs. 443-447; *Wood on Insurance*, Secs. 441-445; *Balestracci vs.*

Insurance Co., 34 Ann., 844; Baul vs. Insurance Co., 35 Ann.; 2 Beach, B Sec., 808.

With reference to the cash register, one of the articles not destroyed, the bookkeeper testified that it was not in the building, and it was not destroyed by fire, as it was being repaired at some distance from the store; it was brought back some time after the fire, which accounted for the oversight in his charging it on the schedule of articles of property destroyed by fire. As to the show cases and two empty trunks we agree with the district judge that the omission may have been the result of inadvertence, and is not gross enough to justify a presumption of fraud. After having considered all the evidence upon this point we have not found that there was wilful intention to gain an advantage by false swearing.

The defendant in the brief complains of the judgment, because no proof was made, it is insisted, of any right in W. A. Baille to bring suit, either as liquidator or assignee, the policy having been issued to Lewis Baille & Co. The facts are that the suit was brought by Baille, Ledbetter and Craney, who alleged that they had been appointed and had qualified as liquidators of Lewis Baille & Co., Ltd., as corporation. The pleadings did not deny that there was such a corporation. The general denial or the special demurrers did not put at issue the capacity of liquidators. The rights of parties to represent a corporation, not contested below, cannot be examined on appeal: *Player vs. Tarkington*, 4 Ann., 396.

Lastly the objection of defendant was to the evidence of a witness, admitted over objection, to testify as to the value of property; the objection was that his examination disclosed his unfamiliarity with values such as were involved in the case. The witness was not examined as an expert. It has been held on authority and reason that the opinions of ordinary witnesses acquainted with the value of property are often admitted from necessity, even though their knowledge is not the result of peculiar skill in any particular branch of business or department of science. Under this rule the evidence was properly admitted. The judgment appealed from is affirmed.



## SUPREME COURT OF CALIFORNIA.

McLAUGHLIN

vs.

McLAUGHLIN ET AL.\*

L. joined the Order of Chosen Friends and received a certificate for \$2,000. He named his nephews and nieces as beneficiaries. He subsequently married and spoke of changing his certificate so as to make his wife the beneficiary. He was taken ill and before he died supposed he had made arrangements to have the certificate changed, but the status was actually unchanged; and it was held that the beneficiaries named were entitled to the money.

Where the laws of a benefit society prescribe a mode of changing the beneficiary, that mode must be followed, and no change can be made in any other manner. The councils have no power, by stipulation or otherwise, to change or effect the right of beneficiaries after the insured's death. The insured himself could not make any change except by compliance with the rules of the order; and oral declarations are of no effect.

MARCUS ROSENTHAL, *for Appellants.*

JONES & O'DONNELL, *for Respondent.*

BELCHER, C.

In July, 1886, Alexander McLaughlin became a member of Mission Council of the Order of Chosen Friends, a corporation organized and existing under the laws of the state of Indiana, and received a relief-fund certificate, stating that he had become a member of the order, "and entitled to all the rights and privileges of membership, and a benefit of not exceeding \$2,000 from the relief fund of said order, which sum shall in case of death be paid to the nephews and nieces, John, Robert, Jennie, and Lottie McLaughlin, children of Armor McLaughlin, in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership." Afterwards Mission Council was dissolved, and he became a member of Home Council of the same order, and continued to be a member thereof, in good standing, until he died, on March 28, 1890. On February 18, 1890, he and the plaintiff intermarried, and thereafter were husband and wife up to the time of his death. In August, 1890, the plaintiff commenced this action against the four beneficiaries named in the relief-fund certificate, their father, Armor McLaughlin, and the Supreme and Home Councils of the Order of Chosen Friends, alleging in her complaint facts

\* Decision rendered, Sept. 24, 1894.

which it was claimed entitled her to the \$2,000 to be paid on the death of her husband. Before the trial of the action all the parties thereto entered into a written stipulation whereby the said councils disclaimed any and all interest or right in or to the \$2,000 in controversy, and whereby it was agreed that the said sum of money should be deposited in a certain savings bank, in the names of the attorneys of the parties, in trust for the person or persons who should be found entitled thereto by the final judgment to be rendered in the action; and, in pursuance of this stipulation, the money was deposited as agreed, and the action was then dismissed as to the defendant councils. After trial the court found the facts to be substantially as alleged in the complaint, and, as conclusions of law, that the plaintiff was entitled to the said money. Judgment was accordingly entered in her favor, from which and from an order denying a new trial the defendants, the McLaughlins, appeal.

Appellants contend that the decision was not justified by the evidence, and was against law, and also that several errors of law were committed by the court in its rulings upon the admission of evidence.

The constitution and laws of the order contain the following provisions:—

Section 111. There shall be connected with this order a relief fund, from which each beneficiary member, the person or persons designated by said member related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw a sum not exceeding the amount named in his or her certificate, as hereinafter specified. During his or her life each member shall have full control of his or her interest in this fund, etc.

Sec. 162. Each member shall enter upon his application the name or names of the person or persons related to him or her to whom he or she desires the benefit to be paid in case of death, subject, however, to such future disposal of the benefit as the member may thereafter direct, not in conflict with § 111, and the same shall be entered in the relief-fund certificate according to such direction.

Sec. 172. A member in good standing may at any time surrender his or her relief-fund certificate, and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her as the member may direct, upon payment of the certificate fee (\$1).

To establish the plaintiff's right to the money as against the beneficiaries named in the certificate, evidence was introduced on her behalf showing the following facts: C. L. Stone was the secretary of Mission Council when Alexander McLaughlin became a member thereof, and continued to be its secretary until it ceased to exist, and as such secretary he issued to McLaughlin his relief-fund certificate. They were intimate friends, and in 1888 both became members of Home Council at the same time. McLaughlin never attended any

of the meetings of either council after his initiation. Stone was never secretary of the new council, but he paid all of McLaughlin's dues, and from time to time furnished him with receipts therefor, signed by its secretary, who was a Mrs. Carroll. About a week after plaintiff and McLaughlin were married, he gave her his certificate, and she put it away, and thereafter retained possession of it until after his death. At the time of handing the certificate to her, he told her he was going out that day to see Mr. Stone, and have it changed to her name. He returned in the evening, and told her he had not been able to find Mr. Stone. On March 7th he saw Stone, and told him he desired to have the certificate changed, and made payable to his wife, and thereupon they agreed to meet at the next regular meeting of the Home Council, to be held on March 11th, and have the change made. Stone then told him that it would be necessary to write out an application to the secretary and to surrender the certificate. He told his wife of the appointment made with Stone, and together they went to the meeting agreed upon, but Stone was not there, and nothing was done. Three days later he was taken sick with pneumonia, from which sickness he never recovered. On March 23d plaintiff sent word to Armor McLaughlin, telling him of her husband's condition. Armor called that evening, and, finding his brother very sick, advised him to transfer all his property to his wife. Alexander then asked Armor to have the certificate changed and made payable to his wife, and asked her to get the certificate, which she did. Armor read it over, and then handed it back, saying, "I will attend to it to-morrow." As Armor was leaving the house that evening, he said to one Webster, a brother-in-law of the plaintiff, that he would go the first thing the next morning and have the certificate changed, and that, in case he could not get it changed, or his brother should die, he would draw the money in the children's names, and turn it over to the plaintiff. Armor called again the next day, and in his presence Alexander then transferred to his wife all his property, consisting of a lot in Seattle and \$2,500, money on deposit in a bank, and during that day Armor stated to said Webster that he had sent one Hansen with \$25 to see the secretary and have it all straightened out; and in the afternoon of the same day Alexander called Webster to his bedside, and asked him if everything had been straightened, and mentioned the certificate, and Webster, relying on what Armor had told him, said it had; and he said it was all right. Plaintiff first learned that she had not been substituted as beneficiary about a month after her husband's death. Meantime, plaintiff had frequently asked Armor about the certificate, but he gave no definite answer, and said he did

not know anything about the laws of the society, but, anyway, she would not hear anything for sixty or ninety days.

It is urged on behalf of respondent that the laws of mutual benefit associations, providing how a change of beneficiaries may be made, are for the protection and benefit of the association alone, and that when in this case the councils entered into the stipulation above referred to, and thereby disclaimed any right to the money in controversy, they in effect waived, as they might do, a compliance with their laws by McLaughlin, and hence that appellants cannot invoke them for their benefit. It is further urged that since McLaughlin expressed a desire to have the certificate changed by substituting respondent as beneficiary therein, and took the steps indicated to accomplish that end, it should be regarded, under the rule that equity will consider that done which ought to be done, as in fact changed, so as to entitle respondent to the money. We do not regard the stipulation as in any way material to a determination of the case. It shows only that the councils made no claim to the money, and were willing to pay it into court, and let it go to the party or parties who might be adjudged entitled to it. It is true that during his life McLaughlin had full control over his interest in the fund, and had a right at any time to have his certificate changed by substituting a new beneficiary; and, while he lived, the beneficiaries named in the certificate had no vested interest in the money to be paid on his death; but, when he died, the right to the money did vest either in the respondent or appellants, and the councils had thereafter no power, by stipulation or otherwise, to change or affect that right. The question, then, is, did the expressed desire of McLaughlin to have the respondent substituted as beneficiary, and the steps taken to that end, have the effect to make the change, when the certificate was not surrendered, but remained all the time in respondent's possession, and no application was made to the secretary or other officer to have it changed? This is the first time that a question of this character has ever been presented to this court for decision, but there have been numerous decisions in other states directly bearing upon it. The general and prevailing rule, as shown by these decisions, is that, when the laws of a benefit society prescribe a mode of changing the beneficiary, the mode prescribed must be followed, and no change can be made in any other manner. See *Nibl. Mut. Ben. Soc.*, § 221 et seq., and cases cited; also, *Bac. Ben. Soc.*, § 307, and cases cited. In *Wendt vs. Legion of Honor* (72 Iowa, 682), it was held that, as the provisions of the constitution pertaining to the subject were a part of the contract of insurance, the insured could not make any change of beneficiaries, except by

compliance therewith, and also that expressed intentions and oral declarations can have no effect to change beneficiaries; and in that case, as in this, it was claimed that, as the order was willing to pay the money into court to be disposed of as should be directed by the final judgment, it had waived a compliance with its laws. The court said: "But it is said this is a matter to which the defendant can only object. We think differently. While the heirs, during the life of the assured, had no right in the policy, their interest being nothing more than in expectancy, upon his death they acquired rights which cannot be cut off except in the manner prescribed by the contract. If that was not done, the defendant could not, even by positive consent after their rights had attached, by act or word do anything to defeat these rights. It is controlled by the contract as it was at the death of the assured." In *Supreme Conclave vs. Cappella* (41 Fed., 1), the general rule is declared as follows: "In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer." It is said in that case, however, that the general rule is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued. The same exceptions are recognized in some of the other cases, but it is evident that this case does not come within either of them. Here the council did not waive a compliance with its laws, and issue a new certificate, and it was not beyond the power of the insured to comply literally therewith. Nor did the insured pursue the course pointed out by the laws, and do all in his power to have the change made. He might have had the certificate surrendered as required, but this was never done or attempted to be done, and no application to the secretary for a change was made. We conclude, therefore, that the case falls within the general rule, and that the beneficiaries named in the certificate were entitled to the money, and the court below should have so determined. We advise that the judgment and order be reversed, and the cause remanded,

with directions to the court below to enter judgment in favor of the appellants.

We concur: Searls, C.; Vanciel, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

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## SUPREME COURT OF APPEALS OF WEST VIRGINIA.

BON AQUA IMPROVEMENT CO. }

vs. }

STANDARD FIRE INS. CO.\* }

1. A motion to exclude or strike out evidence is not in all cases the equivalent of a demurrer to evidence, and should not in practice, without modification, be permitted to supersede and replace such demurrer.
2. A fire-insurance company, which contracts with and receives money from certain persons acting as a corporation under an invalid charter granted under a general law, but acting within both charter and general law, cannot, after the property insured has been burned, and its time to pay has come, avoid payment by denying the corporate existence of the insured.

CALDWELL & CALDWELL, for Plaintiff in Error.

W. P. HUBBARD, for Defendant in Error.

HOLT, J.

This was an action of assumpsit in the Circuit Court of Ohio County brought by the Bon Aqua Improvement Company, plaintiff below, against the Standard Fire Insurance Company, on a policy of fire insurance. The form of declaration was that given in section 61, c. 125, p. 791, Code. On the 20th April, 1890, defendant appeared and demurred. At September term the court overruled the demurrer. Defendant then moved that the plaintiff be ordered to file a more particular statement of its interest in the property insured, and in the policy, and in the loss sued on, of the nature of its claim, and of the facts expected to be proved; which motion was granted, and the plaintiff filed such statement; and defendant then moved to dismiss, and, if such motion to dismiss should be held to be improper, then defendant demurred to the declaration and the statement aforesaid; and thereupon the court overruled the motion to dismiss, and also overruled the demurrer. Thereupon defendant

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\* Decision rendered, Feb. 10, 1891. Syllabus by the Court.

filed an affidavit alleging that this suit, and one then pending in the same court in the name of R. Dudley Frayser against same defendant, were for the same cause of action; that the two policies sued on in the two cases were the same; and that the causes of action in the two suits were identical; and moved that the proceedings in this action be stayed until the one in the name of R. Dudley Frayser be decided. The court ruled that one of the actions be stayed, but that plaintiff could elect which one to proceed in, and, plaintiff electing to go on with this one, the court refused to stay the same. Thereupon defendant, under our statute (section 64, c. 125, Code), pleaded that it is not liable to plaintiff as in said declaration alleged, to which plaintiff replied generally; and on 3d October, 1889, defendant filed with its plea a particular statement of the nature of its defense, specifying plaintiff's failure to comply with certain clauses, conditions and warranties annexed to the policy; and plaintiff filed a statement that it intended to rely on waiver and estoppel on certain facts mentioned. Defendant tendered its plea, verified by affidavit, denying that plaintiff is a corporation; to the filing of which plaintiff objected, but the court permitted the plea to be filed, and plaintiff replied generally. Defendant excepted to certain parts of the deposition of R. Dudley Frayser, witness for plaintiff, which exceptions the court passed upon, sustaining some and overruling others, as set out in the record. On the 27th May, 1890, the cause came on for trial, the jury was impaneled and sworn, and, the evidence on behalf of plaintiff having been heard, the defendant moved the court to exclude plaintiff's evidence, without assigning any ground therefor, and the court sustained the motion, and the plaintiff excepted. Thereupon the jury rendered the following verdict: "We, the jury, find for the defendant." The plaintiff then moved the court to set aside the verdict, and grant a new trial, accompanying its motion with the affidavit of R. Dudley Frayser, but the court overruled the same, and gave judgment for defendant, and plaintiff excepted, and tendered his bill of exception, which was signed by the judge, and made part of the record. In this all plaintiff's evidence is set out, defendant having offered none.

I do not now propose to consider the practice of motions to exclude evidence from the jury, further than what may relate to one point involved in this case. Incompetent evidence is often excluded. A document permitted to be read, with a promise to prove its execution, which is not done, may be then excluded; and so in other cases. But our courts cannot compel the plaintiff to suffer a non-suit, although the result is not final. He has a right to have his

case go to the jury. But the court can instruct the jury that unless they believe from the evidence certain facts, there being as to one or more of them no evidence, or no proper evidence, then they should find for defendant. So, in a proper case, the court may virtually instruct the jury if they from the evidence believe, etc., then to find for the plaintiff or defendant, as the case may be. But I do not understand the law to be that a motion to exclude or to strike out can, at the option of the party, be made in all cases to take the place of a demurrer to evidence. If so, it puts it in the power of the party making the motion to get the benefit, without the risk of a demurrer to evidence, and leads to the multiplication of trials at law, and to indefinite protraction of the litigation.

The points made by the defendant to justify the rulings of the court are: (1) The plaintiff did not show that the assured, sustaining loss, had forthwith given notice in writing of the loss to the defendant. (2) That plaintiff sues as a corporation, and is therefore put to the proof, and wholly fails to show its corporate existence. (3) That defendant is sued as a corporation, but the case is destitute of evidence on that point. (4) The evidence introduced by plaintiff shows that it, or rather the beneficiary mortgagee, had attempted to commit a fraud on defendant by an attempt to bribe the adjuster.

1. Did the plaintiff, sustaining the loss, forthwith give notice in writing of such loss to the defendant company, or did defendant waive it? The evidence is that notice of the damage or loss by fire was given to the defendant company as soon thereafter as possible, which proof and notice were given in the manner required by the policy. This was the deposition of Frayser. The court, sustaining the exception, suppressed the latter part of the answer,—“which proof and notice were given in the manner required by the policy.” This is a question of fact for the jury, and with such evidence on the point, though general, not stating when, how, or to whom or by whom notice was given, we cannot undertake to say there was no evidence tending to show notice; especially as there is nothing tending to show want of notice, but, on the contrary, evidence tending to show that it was received or waived, for the defendant acted as though it had received notice, sending its adjuster to the locality on the 13th September, the fire having occurred 24th August, 1888. It is true we find, on the blank furnished assured, a provision that such furnishing of the blank, or making up of proofs by the adjuster for the company, is not to be considered as a waiver of any rights of the company; for though the rights may not be waived we cannot contract against the effect of certain things on the mind as evidence, though we may be estopped in certain



cases. Nor do I see anywhere among the multitudinous forfending clauses any one saying that a clause against waiver may not itself be waived, or, if there be such, that that also may not be waived. But, be these things as they may, we know from this record of a certainty that the defendant had knowledge of the fire very soon after it took place, and acted on such knowledge; but, more than that, the witness Frayser expressly says: "Notice of the damage or loss by fire was given to the defendant company as soon thereafter as possible." Therefore there was some evidence tending to show even written notice.

2. Is there any evidence tending to show that plaintiff is a corporation, defendant having filed a plea, supported by affidavit, denying plaintiff's corporate existence? The plaintiff professed to be and to act as a corporation under the corporate name of "Bon Aqua Improvement Company," created by and under the laws of the state of Tennessee. The laws of Tennessee authorized and permitted the formation of such private corporations. The plaintiff read in evidence a writing and certificate purporting to be the charter of incorporation. This instrument seems to be a formal charter. Article 1 gives the name; article 2, the general nature of the business,—to establish an institute of learning, a sanitarium for the benefit of invalids, with power to sell, buy, transact its business, etc., in the language of the Tennessee Code. Article 3 gives time of commencement (1st March, 1887), for purpose of securing subscriptions of stock. Article 4 provides that the business affairs shall be managed by a board of directors, five in number, who shall elect a president, secretary, and treasurer. Article 5 gives the capital stock, signed by the name of the five incorporators. It was acknowledged 15th February, 1887, before a notary public; seems to have been registered in Hickman County; and was filed 18th February, 1887, and recorded in the office of the secretary of state. But defendant claims that the incorporators having acknowledged their agreement before a notary, and not before the clerk of the county court, it is invalid and void. This seems to be conceded by plaintiff's counsel. Section 1712 of Code of Tennessee provides that "persons acting as a corporation under the provisions of this chapter will be presumed to be legally incorporated until the contrary is shown; and no such franchise shall be declared actually null and forfeited except in a regular proceeding brought for the purpose." Section 1713 makes contracts made with a body of men acting as a corporation enforceable for or against them, and neither party will be allowed to set up a want of legal organization; makes copies of such articles evidence for and against the corporation. Section 1697

requires the secretary of state to have published and bound with the acts of each general assembly a certified list of all such corporations, which is made legal evidence of their existence. It is fair to presume, therefore, when defendant contracted with the plaintiff company in its corporate name of Bon Aqua Improvement Company it knew that it claimed and professed to be a corporation, and was taking out its policies as, at least, a de facto corporation, and is therefore not permitted to deny it. A jury would be warranted, from all the facts and circumstances, in drawing such an inference. It signed notes and made out proofs of loss in its corporate name, signed by its president. Here we have the Tennessee law authorizing the formation of such corporations, proceedings taken for the purpose in professed compliance with the law in order to become a corporation by that name, and acts of subsequent user, and very slight evidence of user beyond this is all that can be required: *Merriman vs. Magiveny*, 12 Heisk., 494. On the motion to exclude this evidence, we must infer that defendant knew it was contracting with a party that professed to be a corporation, and when defendant contracted with plaintiff, and received its money, now, after the building is burned, and its time to pay has come, it cannot avoid payment by denying the corporate existence of the insured.

3. Is there any evidence tending to show that defendant is a corporation? It is sued as the Standard Fire Insurance Company, of Wheeling, and by that name it caused the policies sued on to be signed by its president and attested by its secretary, signed, "William Ellingham, President. Charles W. Connor, Secretary." From that alone, on the motion to exclude, we may infer that it professed to act as a corporation. Why in such a case, on their behalf, should we conclude defendant to be a partnership, rather than a de facto corporation? I notice during the progress of this cause, when an affidavit is to be made, such as the one denying that the plaintiff is a corporation, they call in, not the acting partner or head clerk or manager, but Charles W. Connor, who, "being duly sworn, says that he is the secretary of the Standard Fire Insurance Company," etc. They do not wish us to infer, for the purpose of this occasion, that there is either something wrong or something very unusual in their style or mode of doing insurance business, giving us not the slightest token of who or what they are, if not a corporation: In *Manufactory vs. Davis* (14 Johns., 238, 245), the court, in speaking of corporations created under general law, very much as ours are created, says: "The general act relative to incorporations for manufacturing purposes directs the certificate which is to contain the requisite evidence of the company's having

become a body politic or corporate to be filed in the office of the secretary of state, and declares that, as soon as such certificate shall be so filed, the persons who shall have signed and acknowledged the same, and their successors, shall become a body politic and corporate. This is a public law; certificate becomes matter of record. The incorporation ought not, therefore, to be considered a mere private act, since it was under a general law of the state, and the evidence thereof is matter of record." Our law (section 17, c. 54, p. 507, Code) makes it the duty of the secretary of state, at every regular session of the legislature, to deliver to the clerk of the house of delegates accurate copies of every certificate of incorporation not before reported by him; and it shall be the duty of such clerk to cause the same to be printed and bound with the acts of the session. By section 19 of same chapter (page 507), "the copy printed with the acts of the legislature shall, as evidence, be equivalent to the original." That the court will take judicial notice of such private corporations, created under general law, seems also to have been held in the cases of *Railroad Co. vs. People*, 116 Ill., 401; *Gormley vs. Day*, 114 Ill., 185; *Kelly vs. Railroad Co.*, 58 Ala., 489. But see 1 Whart. Ev., § 294; citing *Hard vs. Decorah*, 43 Iowa, 313. We do not now decide this question, because it may be of general importance in this state, and does not necessarily or distinctly arise out of the facts of the case as presented by this record.

4. Did plaintiff, through its agent and the beneficiary by mortgage, R. Dudley Frayser, attempt to commit a fraud on defendant? It is stated by counsel for plaintiff in error in their brief that the circuit court sustained the motion to exclude solely on the ground of an attempt at fraud. So many exceptions, qualifications, requirements, conditions, warranties, drawbacks, are now often found indorsed on or annexed to policies, bills of lading, and the like, that it has given rise to the charge that they are pitfalls for the unwary, and that payment of loss has now become matter of grace or of business policy, rather than a matter of enforceable right. Long experience, no doubt, has shown very many of them to be the dictates of prudence, if not necessary. Such a charge certainly cannot be made against the clause now in question. There is some evidence tending to show an attempt to bribe the adjuster, a charge of a criminal nature. It is based on the deposition of Mr. Hart, the policy broker and the adjuster of loss, taken by defendant to be read on its behalf, but read as evidence by plaintiff, and made against Mr. Frayser, plaintiff's witness, who had a mortgage on the property for more than the combined insurance, some \$14,000 or \$15,000; therefore by the beneficiary for whose use the suit was, in

fact, brought. Hart says that in placing the policies, one for \$500 running from noon 24th January, 1888, to noon 24th January, 1889, the other for \$1,000, on the same property, in favor of L. J. Worst, running from 7th January, 1888, to 7th January, 1889, on 12th January, 1888, by indorsement changed by defendant to cover in the name of plaintiff, he acted as broker of the plaintiff. The burning occurred 24th August, 1888; the property was worth \$24,000; it was a total loss; and there is no evidence or charge of complicity on the part of the assured. On the 28th August, 1888, Frayser wrote to Hart Bros. acknowledging the receipt of their letter of 27th inst., evidently written in regard to note given by plaintiff for premium taken up and then held by Hart. He speaks of having written to Hart on 24th August, evidently about the burning, and says in conclusion: "I have turned the matter of my interest in these policies over to Mr. J. M. Bonner, of your city, for collection, and you will please confer with him. By taking Worst's note, you have made yourself liable for the premium, and the policies would be good to the holder; but I don't intend to receive anything on these policies without you are paid for what you incurred as a liability, especially if I am to be benefited by it. Please act with Mr. Bonner in adjusting and securing my interest under these policies, and you shall not be out of pocket one cent, and may be in pocket many dollars." So far Hart was his agent, and not the agent of the defendant. By provision indorsed on policies, Hart could not in the matter be regarded as the agent of defendant. Some time after and before 13th September, 1888, Hart, as the agent of the defendant, went upon the ground to adjust the loss, and spent a day with Frayser at Bon Aqua Springs where the building had been. Now, Mr. Frayser, whose deposition was taken to be read and was read on behalf of plaintiff, says, among other things: "The frame building known as 'Bon Aqua Springs Hotel,' covered by these policies, was burned 28th August, 1888. The cost of the building was something over \$32,000; was worth at the time of the fire \$24,000 to \$26,000. The loss was total. Notice of the damage or loss by fire was given to the defendant company as soon thereafter as possible. The amount of loss was adjusted and received by the defendant, and it promised to pay the same. That Hart, the agent of the defendant company, went to the spot where the hotel was burned at Bon Aqua Springs, in Hickman County, Tenn., with witness, examined the loss, and as agent of defendant, admitted it was a total loss, and so notified defendant. The proof of loss was sworn to by an officer of the Bon Aqua Improvement Company, by the witness, and was received by the defendant company."

Now comes the important item of evidence in which Mr. Hart contradicts Mr. Frayser. The witness Mr. Frayser continues his testimony: "Mr. Hart, the agent aforesaid, proposed to witness that, if he would take off 10 per cent of the policy, he would have the company pay the amount of the policy, less the 10 per cent, immediately on receipt of proof of loss; and I agreed on that account to take off 10 per cent, provided the policy was paid within the sixty days after the proof had been sent on. As the company has not paid the policies up to the present time, and did not pay them within the sixty days, I decline to take off the 10 per cent, and so informed Mr. Hart." Mr. Hart in his deposition says: "After the fire I met Mr. Frayser at Bon Aqua, and, after spending a large part of the day inquiring as to the nature of the fire, Mr. Frayser and myself returned from the scene of the fire to the depot, and while returning he spoke to me about the fire, stating that there were some complications about it, and that he supposed that I had satisfied myself that it was a total loss, and that in view of these complications, that if I would make up the proofs for a total loss he would receipt for same, and would collect only 90 per cent, and leave me 10 per cent for my services." That he did not make to Mr. Frayser any such proposition as stated by him. "I agreed only to recommend payment, and Mr. Frayser so understood it." This issue had become important, involving a charge of attempted bribery as well as the indemnity for loss. Suppose it had been submitted to a jury. They, after putting their heads together, might well have said: "These two statements of what occurred at Bon Aqua Springs differ so widely in meaning that one is entirely innocent and the other criminal, yet they differ but little in words; the change of a word or two would change one into the other. Some people hear badly, apprehend indistinctly, remember imperfectly, and narrate incompletely. These two conflicting witnesses are not brought before us and confronted. We are not enlightened by their demeanor; at the most, it is but a question of veracity. The burden of proof on this issue is on defendant, the one who makes the charge, and this with a special force in criminal and quasi criminal charges. We are left in doubt and so we will leave the question where we find it, by finding for the plaintiff." Can the court say that it would at once, and without hesitation, have set aside such verdict because there was a clear and decided preponderance of evidence against it, or no evidence at all tending to sustain it? If not, and it was in other respects a question eminently fit to be submitted to a jury, then the motion to exclude should have been overruled, and the party at least put to his demurrer to evidence. This would have been attended with a

wholesome risk, and have brought the litigation to an end. The mere fact that both depositions are read on the same side may affect, but cannot control, the question. A man cannot impeach, but he may contradict, his own witness. Upon the whole, I do not think it can be said that plaintiff's case was entirely without evidence on any essential point, or of evidence tending to prove it, or that on any issue there was such a clear and decided preponderance of evidence against the plaintiff that the court would at once have set aside a verdict in its favor. The judgment complained of must be reversed, and a new trial be awarded.

Lucas, P., and English and Brannon, JJ., concurred.

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## SUPREME COURT OF MISSOURI.

WHITMORE ET AL.

vs.

SUPREME LODGE KNIGHTS & LADIES OF HONOR.\* }

Misrepresentations as to age, physical condition, or family history, in procuring a certificate, void the contract.

Insurance effected by parents for the benefit of their children on the life of one in whom neither has any insurable interest is a wager and void.

The pleadings in this cause are in substance as follows: Plaintiffs, Benjamin T. and Marie E. Whitmore, are husband and wife, and defendant is a corporation. On the 22d of November, 1883, Mary A. Mudd was a member of Nonpareil Lodge, No. 592, of defendant, in St. Louis, and entitled to participate in the relief fund of said order to the amount of \$1,000; said sum to be paid to plaintiff Marie E. Whitmore, as trustee of Marie L. Whitmore. Defendant issued its benefit certificate, under seal, to said Mary A. Mudd for \$1,000, payable on death of said Mudd to said Marie E. Whitmore, as trustee as aforesaid. Mary A. Mudd complied with all the conditions of said certificate, paid all assessments, etc., and died on the 21st of July, 1884, a member of said order in good standing. The certificate is filed as "Exhibit A." Plaintiff asks judgment for \$1,000. The petition has a second count, upon another certificate for \$2,000, filed as "Exhibit B." The answer, after a general denial, alleges that the deceased, Mary A. Mudd, procured the insurance in question by false and fraudulent representations as to her

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\* Decision rendered, Feb. 24, 1890.

health, and by false answers to the questions put to her by defendant as to the relationship of the beneficiary to her, as to the cause of death and age of her relatives. These answers are set forth in full, and alleged to have been as to material matters. The answer further sets up that Mary A. Mudd was of weak mind, and was induced by fraudulent representations and influence of plaintiffs, Benjamin T. and Marie E. Whitmore, to become a member of defendant; that Benjamin T. Whitmore, being a physician, caused himself to be made a medical examiner of defendant, and, as such, witnessed and subscribed the application of said Mary A. Mudd, and fraudulently recommended her to defendant as a good subject for insurance, and made false statements to defendant as to her health; and that he and his wife, by fraudulent acts and representations, induced the lodge of defendants to receive said Mary A. Mudd to membership, and procured further insurance on her life to the amount of \$9,000 within eight months from the date of the certificate in suit. That Marie L. Whitmore, the cestui que trust, is the infant daughter of plaintiffs, and that the insurance in question and the other insurance was obtained by a fraudulent conspiracy of plaintiffs. That Mary A. Mudd lived with plaintiffs, and that her death was caused by their ill treatment and neglect of her, and that her initiation fee and assessments were advanced for her by plaintiffs. The answer also denies that Mary A. Mudd was of kin to either of plaintiffs or to their daughter, the beneficiary in question under the certificate in suit. The replication specifically denies the new matter set forth in the answer. It is admitted by the pleadings that the defendant was an incorporated co-operative benevolent insurance society.

The evidence is not preserved at length in the bill of exceptions, but only in short form, and, omitting the cross-examination of Williamson (afterwards ruled out and instructed against by the court), is the following: Plaintiffs introduced evidence tending to prove all the material allegations of the amended petition, and also introduced the constitution and by-laws of defendant. Defendant introduced testimony tending to show that the statements made by Mary A. Mudd, in her written application to defendant for insurance, as to her health, the relationship of the cestui que trust of plaintiffs to her, and the age and cause of death of her relatives, were, in some respects, untrue; also that said Mary A. Mudd was of weak mind, and under the influence of plaintiff, Benjamin T. Whitmore; that said Whitmore was a member of the lodge of defendant to which said Mary A. Mudd belonged, and was a medical examiner of the same, and, as such, at the time of such insurance, and in order to effect the same, signed a physician's certificate as to the health of

said Mary A. Mudd, which was, in some material respects, false. Defendant introduced evidence tending to show that the life of Mary A. Mudd was also insured in four other benefit societies for the benefit of the children of said plaintiffs, Benjamin T. and Marie E. Whitmore, to the amount of \$19,000; all of which testimony as to other and further insurance was then and there objected to by plaintiffs as incompetent and irrelevant, and the objection overruled; to which rulings the plaintiffs then and there excepted. Defendants introduced evidence tending to show that the health of said Mary A. Mudd was weak; that she was no relation to plaintiffs or to either of them, or to their children; that plaintiffs allowed said Mary A. Mudd to sleep and live in a cellar-room in their house after she was insured, and that she lived with them in a menial capacity, and that she had no money except what plaintiffs gave her; and that plaintiff Benjamin furnished her with the money with which the insurance in question was effected, and the monthly assessments with which it was kept up. And defendant also offered evidence tending to prove the several facts stated in the instructions afterwards given by the court in this cause. Plaintiffs introduced evidence tending to show that Mary A. Mudd, deceased, was of good health and fair intellectual abilities, and of good education; that she was not under any undue influence of plaintiffs, or either of them; that she was a first cousin of plaintiff Benjamin T. Whitmore; that the children of plaintiff, who are beneficiaries of the policy, were two girls of tender age; that deceased was devotedly attached to them; that she was treated always by plaintiffs as an honored member of their family, and not as a menial; that she loved them, and they her; that the most friendly relations existed between deceased and plaintiffs; that her room in their house was cheerful, wholesome, and comfortable, and not a cellar-room; that the deceased had money of her own, and that the money with which she kept up and paid the insurance in question was her own; and that no statements were made at any time to the defendant by the deceased, or by plaintiff Benjamin T. Whitmore, which they, or either of them, believed to be false, or that were false, in regard to said application for insurance; that the said Mary A. Mudd, at or about the time of the insurance in question, was examined for other insurance by two other physicians, and was passed by them, and recommended by them for membership into two of the other orders to which she belonged.

The court refused all instructions asked by either party, but gave of its own motion the following: "(1) The court instructs the jury that the relationship existing in this case between the beneficiary,



Marie L. Whitmore, and the insured, Mary A. Mudd, was such that while Mary A. Mudd, under the charter of defendant, might lawfully effect such insurance on her own life for the benefit of said beneficiary, as the certificates read in evidence express, it would not have been lawful for the beneficiary, Marie L. Whitmore, or for either of plaintiffs for their said child, to effect such an insurance on the life of Mary A. Mudd. Hence, if you find, from the evidence, that Benjamin T. Whitmore procured or caused Mary A. Mudd to insure her life as expressed in the certificates read in evidence (as Exhibits A and B), and that he paid for said insurance out of his own funds, then said certificates are void, and your verdict should then be for defendant; but if, on the other hand, you believe, from the evidence, that said certificates were issued to said Mary A. Mudd upon her application, and the payments made to obtain the same, and keep the same in force, were made by her (Mary A. Mudd), or by any person on her behalf, with her money, and that during July, 1884, said Mary A. Mudd died a natural death, you should then return a verdict for plaintiffs, unless you should believe, from the evidence, that said insurance was fraudulently procured. (2) The insurance recited in the certificates read in evidence would be 'fraudulently procured,' as mentioned in instruction No. 1, if obtained by any such misrepresentation as is defined in the next instruction, No. 3. (3) The court instructs the jury that if they believe, from the evidence, that Mary A. Mudd, at the time of becoming a member of defendant, made to it any misrepresentation (in the papers read in evidence as Exhibit C or D) with regard to her age, physical condition, or family history, and that the fact so misrepresented actually contributed to her death, then plaintiffs cannot recover in this case, and the jury should find for defendant. By 'misrepresentation,' in this connection, is meant any statement of fact not then known by her to be true. (4) The court instructs the jury that, for the purposes of this case, the word 'cousin,' as used in the benefit certificates in evidence, may be interpreted to mean a degree of relationship more distant than that of first cousin. (5) The jury are instructed to disregard any statement made by any witness concerning the alleged death of James Milburn, or concerning any alleged insurance upon his life, and to give no effect to any such statement in their consideration of this case. (6) The petition of plaintiffs in this case presents two counts or demands for decision. Your verdict should contain a separate and distinct finding as to each of said counts. If you find for plaintiffs, you should assess their damages at the sum of \$1,021.66 on the first cause of action, and at the sum of \$2,043.32 on the second cause of action, stated in

the petition. If you find for defendant as to either or both of said counts, your verdict then should simply recite that you find in favor of defendant as to such count or counts as to which you so find." The jury found the issues in favor of the defendant, and the plaintiffs appealed.

R. A. BAKWELL, *for Appellant*.\*

D. HERMANN and VALLE REYBURN, *for Respondent*.

SHERWOOD, J. (after stating the facts as above.)

It is the settled law of this court that, in order to the validity of a life-insurance policy, the person who secures such policy must have a pecuniary interest in the life of the person assured, or else the policy will be a gambling or wager policy, which the law will not enforce. Thus, in *Singleton vs. Insurance Co.* (66 Mo., 63), it was ruled that an uncle had no insurable interest in the life of his nephew; and, therefore, such a policy, based merely upon such relationship, was void. In that case the authorities both in this state and elsewhere are well reviewed, and the principle already announced declared. This, it seems, was the rule at common law; and the statute of 14 Geo. III, avoiding wagering policies, was but declaratory of the common law: *Ruse vs. Insurance Co.*, 23 N. Y., 516. In addition to the authorities cited in *Singleton's Case*, *supra*, will be found *Warnock vs. Davis*, 104 U. S., 775; *Insurance Co. vs. Hazzard*, 41 Ind., 116; *Association vs. Hoyt*, 9 N. W. Rep., 497; *Brockway vs. Insurance Co.*, 9 Fed. Rep., 249; *Association vs. Houghton*, 13 Ins. Law Jour., 895; 17 West. Jur., 297. The principle announced in these authorities is expressed in the instruction given by the court of its own motion; and the declaration in that instruction contained, that what Benjamin T. Whitmore could not do directly, in the way of effecting an assurance on a life in which he had no insurable interest, he could not do indirectly, is obviously correct. A party will not be permitted to obtain an advantage by indirect methods which would be denied him if done openly: *Brockway vs. Insurance Co.*, 9 Fed. Rep., 249; *Swick vs. Insurance Co.*, 2 Dill., 160; *Nino & N. Dig.*, 75.

Nor is anything objectionable seen in instructions 2 and 3, which the court gave. Indeed, those instructions were in substance asked by plaintiffs in instructions 21 and 22, which were refused. Where a party has asked similar instructions to those given, he is in no position to complain: *Harris vs. Hays*, 53 Mo., 90; *McGonigle vs. Daugherty*, 71 Mo., 259; *Bank vs. Hammerslough*, 72 Mo., 274; *Smith vs. Culligan*, 74 Mo., 387; *Fairbanks vs. Long*, 91 Mo., 628, 4

S. W. Rep., 499; *Bettes vs. Magoon*, 85 Mo., 580; *Noble vs. Blount*, 77 Mo., 235; *Holmes vs. Braidwood*, 82 Mo., 610; *Reilly vs. Railway Co.*, 94 Mo., 600, 7 S. W. Rep., 407. And it may be said that the third instruction given by the court was even more favorable for plaintiffs than the law warranted; because sections 5976, 5977, 2 Rev. St. 1879, do not apply to benevolent or charitable incorporations. See Laws 1881, p. 87. In the absence of such statutory regulations, then, as prevail in cases of ordinary insurances, declarations in any respects, if false, if made contrary to the agreement of the parties, will vitiate and avoid the policy, though such declarations be not material to the risk: *Insurance Co. vs. France*, 91 U. S., 510; *Jeffries vs. Insurance Co.*, 22 Wall., 47; *Brockway vs. Insurance Co.*, 9 Fed. Rep., 249. And courts will enforce all reasonable laws and rules established by these benevolent organizations for their guidance and the regulation of their relief funds, if in conformity with the laws of the state: *Holland vs. Taylor*, 12 N. E. Rep., 116; *Osceola Tribe vs. Schmidt*, 57 Md., 98; *Society vs. Baldwin*, 86 Ill., 479; *Borgraefe vs. Lodge*, 22 Mo. App., 127. The constitution and by-laws of the defendant were not preserved in the record, and, therefore, it is impossible to pass properly upon any matters connected with such constitution and by-laws.

There was no error in admitting evidence tending to show that the beneficiary effected other insurances upon the life of the party in question, when the issue was, as here, that the object was to defraud the insurance company. The Supreme Court of the United States, in passing upon this point, says: "The theory of the defense is that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position, evidence that he effected insurance upon the life of Armstrong in other companies, at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicate the same purpose in all of them; and, if, when considered together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act:" *Insurance Co. vs. Armstrong*, 117 U. S., 598, 6 Sup. Ct. Rep., 877.

In regard to the evidence elicited on the cross-examination of Williamson, it was admitted without objection by plaintiffs' counsel; and afterwards the court gave an instruction, as already seen, which excluded such evidence from the consideration of the jury. This cured the error, if any could be said to have been committed, in the circumstances mentioned. Moreover, there was no objection taken in the motion for a new trial to the instructions given by the court

of its own motion. Considering all of these things, and looking at the record as a whole, we are not prepared to say that any reversible error was committed at the trial, and so we affirm the judgment.

All concur but Barclay, not sitting.

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## SUPREME COURT OF RHODE ISLAND.

CORNELL

vs.

TIVERTON & L. C. MUT. FIRE INS. CO.\* }

A letter written by the secretary of an insurance company, in ignorance of the true state of the plaintiff's title, cannot operate as a waiver of the right of the company to insist on breach of policy condition as a defense.

WILSON & JENCKES, *for Plaintiff*

JAMES, WM. R. & T. F. TILLINGHAST, *for Defendant.*

PER CURIAM.

The policy contains a condition that, in case of the alienation of the property insured by devise, the policy shall be void unless the devisee or the executor shall, within 30 days after the probate of the will, procure a revival of the policy as provided in it. It also contains a condition that no part of the contract can be waived except in writing, signed by the president and secretary. The plaintiff relies on a letter written to his guardian by Brownell, secretary of the defendant, to the effect that his claim for insurance would be settled in due time, as a waiver by the defendant of the condition in the policy making the policy void in case of the devise of the property unless it should be revived as stated. The testimony, however, shows that Brownell, when he wrote the letter, did not know that the plaintiff took his title to the property by devise, and that he was misled in relation to that fact by the signature of the plaintiff's guardian to a letter to him, in which she signed herself as guardian for the "heir." The letter, having been written by Brownell in ignorance of the true state of the plaintiff's title, cannot operate as a waiver of the right of the company to insist on the breach of condition as a defense. Judgment must therefore be rendered for the defendant for costs.

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\* Decision rendered, October 13, 1896.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

CLARKE

vs.

SWARTZENBERG ET AL.\*

Under the statutes of Massachusetts a mere creditor could not, prior to May 21, 1895, be named as a beneficiary in a certificate issued by an assessment association, even though the indebtedness was proved and the certificate specified as a collateral for its payment and had been in the possession of the creditor for eight years. It does not appear that subsequent legislation has changed the statutes in that respect.

The certificate being issued to the insured the money must be paid to his wife as executrix and held in trust for the benefit of those who, at the time the contract was made, were entitled to be named as beneficiaries.

BUMPUS, TRASK, SIMES & ADAMS, *for Plaintiff.*

W. N. BUFFUM, *for Defendant Swartzenberg.*

LATHROP, J.

This is a bill in equity against the first-named defendant, as executrix of the will of her husband, Moses H. Swartzenberg, and in her own right, and against the Massachusetts Benefit Association. From the pleadings and the report of a single justice, upon which the case is reserved for our consideration, the following facts appear: On May 5, 1885, the Massachusetts Benefit Association issued to Moses H. Swartzenberg a benefit certificate, under seal, by the terms of which, in consideration of the payment of \$15 by Moses H. Swartzenberg, and the agreement on his part to accept certain conditions and rules as a part of the contract, the association constituted Swartzenberg a benefit member, and agreed "to pay to Barnabas Clarke (a dependent), if living, if not living, to the heirs at law of said Barnabas Clarke, in sixty days after satisfactory proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed five thousand dollars." The conditions and rules provide, among others things, for an annual payment of \$6, and for the payment of an additional assessment of \$11.75 upon the death of any member. On May 7, 1885, the plaintiff and Swartzenberg executed the following instrument: "Boston, May 7, 1885. I, Moses H. Swartzenberg, of Boston, in consideration of one dollar to me paid by Barnabas Clarke, of said Boston, and for no other consideration except moral and equitable ones, hereby promise and agree to pay to said Clarke, his heirs, executors, and assigns, on the 15th day of May, current, the sum of twenty-five-

\* Decision rendered, September 6, 1894.

dollars, and upon the 15th day of each and every month hereafter the sum of twenty-five dollars, until said payments shall amount to the sum of twenty-seven hundred and forty-five dollars and ninety-four cents together with interest thereon from date. To secure the payment of said sum, I have given to said Clarke an insurance policy upon my life for \$5,000, in the Mutual Benefit Association, which policy the said Clarke, for himself, his heirs, and assigns, hereby agrees to transfer to Rachel A., the wife of the said Moses H., in case said sum of \$2,745.94 and interest paid before the death of the said Swartzenberg, and in case of his death before such payment, then said Clarke agrees to pay out of any money received from said policy all that sum which may be left after payment of said \$2,745.94 and interest, or any balance due thereon to the said Rachel A. The said Clarke does not agree to do any other or further thing than is above set forth, except that he promises to aid the said Moses H. in his business as far as he conveniently can." The policy referred to in this agreement as being in the Mutual Benefit Association was so stated by a mistake. It was in fact in the Massachusetts Benefit Association. Moses H. Swartzenberg died on July 23, 1893. There is due on the policy the sum of \$4,000. The plaintiff has had possession of the policy since May 7, 1885.

It is in dispute whether the parties to the agreement subsequently varied it, and what amount was due to the plaintiff from Swartzenberg at the time of the death of the latter; and these questions are to be determined hereafter, if necessary. There is nothing to show that the plaintiff paid any assessment, and we assume that all the assessments were paid by Swartzenberg. The defendant association submits itself to the direction of the court, and says in its answer that it will pay the sum of \$4,000 to whomsoever the court directs. Under the statutes in force when the certificate in this case was issued, a member could not designate one who was merely a creditor as a beneficiary: Pub. St., c. 115, § 8; St. 1882, c. 195, § 2; *Briggs vs. Earl*, 139 Mass., 473; *Skilling vs. Association*, 146 Mass., 217; *Rindge vs. Society*, 146 Mass., 286.

The question, then, is whether, as contended by the plaintiff, subsequent legislation has so changed the status of a beneficiary that the plaintiff is entitled to recover. We assume, in favor of the plaintiff, that the defendant was not an organization conducting its business as a fraternal society on the lodge system; and that it did not come within any of the other exceptions mentioned in section 1, c. 183, St. 1885; and that, at some time subsequent to May 21, 1885, when that statute took effect, it conducted its business so as to come within the general provisions of that chapter. See *Harding vs.*

Littlehale, 150 Mass., 100. We also assume that under that statute any person may be named as a beneficiary if he has an interest in the life insured: Section 10. But the whole scope of the statute is prospective in its character, and section 5, in terms, applies only to a policy or certificate "hereafter issued by any corporation doing business under this act." The same remarks are true of St. 1890, c. 421. St. 1888, c. 429, applies only to a fraternal beneficiary association; and its beneficiaries, by section 8, can only be the husband, wife, children, relatives of, or persons depending upon, such member. St. 1890, c. 341, also applies only to fraternal beneficiary associations. It amends several sections of the Statute of 1888, and adds to the persons who may be beneficiaries, but does not mention creditors. We find nothing, therefore, in the legislation subsequent to the issuing of the benefit certificate in this case which makes valid the designation of a beneficiary who could not be so designated at the time the certificate was issued. The case of *Dean vs. Legion of Honor* (156 Mass., 435), which decides that a person named as a beneficiary in a certificate issued by a corporation organized under Pub. St., c. 115, § 8, might, since the passage of St. 1888, c. 429, sue thereon in his own name, has no application to the case at bar. It was the case of a fraternal beneficiary association, and the question before the court was as to the construction of a statute which does not apply to the case at bar. In *Tateum vs. Ross* (150 Mass., 440), the question which is now presented was not considered by the court or discussed in the opinion, and that case cannot be considered as a precedent in favor of the plaintiff. We are, therefore, of opinion that the plaintiff is not entitled to recover any part of the proceeds of the policy.

The remaining question is whether the first-named defendant is entitled to receive the proceeds of the certificate, and we are of opinion that she is. Though the designation of the beneficiary was invalid, this did not render the whole contract void. The executrix is entitled to the money in trust for the benefit of those who at the time the contract was made were entitled to be named as beneficiaries: *Legion of Honor vs. Perry*, 140 Mass., 580; *Daniels vs. Pratt*, 143 Mass., 216; *Rindge vs. Society*, 146 Mass., 286; *Burns vs. Grand Lodge*, 153 Mass., 175. Decree accordingly.

## SUPREME COURT OF GEORGIA.

SOUTHERN HOME BUILDING &amp; LOAN ASS'N }

vs. }

HOME INS. CO., OF NEW ORLEANS.\*

The so-called "New York Standard Mortgagee Clause" in a policy of fire insurance, which declares, in substance, that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with making the proof of loss stipulated for in the policy, and within the time stipulated. If the mortgagee would not have the right in all cases to furnish the proof, he certainly would have it in a case in which the mortgagor refused; but in every case, unless waived by the underwriter, it must be furnished by one or the other.

R. L. SIBLEY and G. B. WHATLEY, *for Plaintiff in Error.*  
DENMARK & ADAMS, *for Defendant in Error.*

SIMMONS, J.

The Southern Home Building & Loan Association sued the Home Insurance Company upon a policy of insurance issued by the defendant insuring Rosa Tutty upon certain property for one year from December 17, 1892, to an amount not exceeding \$1,000, "loss, if any, payable to the Southern Home Building & Loan Association, as their interest may appear." Attached to the policy was what is called the "New York Standard Mortgagee Clause," in which it was stated that loss under the policy should be payable to the Southern Home Building & Loan Association, as mortgagee, as its interest might appear, and that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor or owner of the property. The declaration alleged that while this policy was in force, on June 4, 1893, a fire occurred in the premises covered by the policy, by which the property insured was entirely destroyed; that immediately after the fire occurred notice was given the insurance company of the loss, and afterwards, during August, the usual "proof of loss" was made out by Prioleau, adjuster of the defendant, showing the premises insured under the policy to be of the value of \$1,948.80, but, failing to obtain the signature of the assured, Rosa Tutty, to the proof of loss, the defendant refused in consequence to pay over the loss to petitioner; that petitioner demanded payment of the loss as required by the policy, but the defendant refused to pay, etc. The defendant demurred to the declaration on the ground that it did not set forth

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\* Decision rendered, July 16, 1894. Syllabus by the Court.



any cause of action against defendant. In the argument upon the demurrer the defendant urged that the demurrer should be sustained, because the declaration did not aver that any proof of loss had been submitted to defendant, as required by the contract or policy of insurance, or that any effort had been made by plaintiff to make such proof, or comply in any way with this requirement of the policy. The demurrer was sustained, and the plaintiff excepted. The policy, a copy of which was attached to the declaration, contained a stipulation that if fire occurred the insured should give immediate notice of any loss thereby in writing to the insurance company, and should render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, etc. Under this stipulation, it was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company, and within the time stipulated. If the mortgagor failed or refused to comply with this condition, it was incumbent upon the mortgagee to comply with it. If the mortgagee would not have the right in all cases to furnish the proof, he would certainly have that right in a case in which the mortgagor refused to do so. In every case, unless waived by the insurance company, it must be furnished by one or the other. See *Richards, Ins.*, § 158, and cases cited. It was contended that, so far as the mortgagee was concerned, this requirement was dispensed with by the stipulation in the "mortgagee clause" that the insurance, as to the interest of the mortgagee, should not be invalidated by any act or neglect of the mortgagor or owner of the property. We do not think so. We think this refers to acts or neglect in connection with the property while the risk is subsisting, and which, under the terms of the policy, would invalidate the insurance; such as conduct increasing the hazard, and not the omission, after a fire has occurred, to comply with provisions designed to secure evidence as to the nature and extent of the loss. It is apparent from a reading of this clause, which, in addition to the stipulation referred to, contains others enumerating various acts which shall not invalidate the insurance as to the mortgagee, that the object of the clause was to afford protection to mortgagees against conduct beyond their control on the part of the mortgagor or others which, under the terms of the policy, would invalidate the insurance. We see no reason for holding that it was intended also to relieve a mortgagee, where loss occurred, from proving the loss as a condition precedent

to collecting his claim against the insurance company,—a condition which, as we have shown, the policy required the mortgagee himself to comply with, unless the mortgagor should do so. The declaration failing to show that the insured or the mortgagee complied or attempted to comply with this condition, or that there was any waiver thereof on the part of the insurance company, the court below was right in sustaining the demurrer. The allegation that the adjuster of the company made out a proof of loss does not of itself show a waiver on the part of the company. If he made it out in behalf of the insured, it does not appear that she authorized or adopted it, for it is alleged that he failed to obtain her signature thereto. We affirm the judgment of the court below, with direction that the plaintiff may, if it can, make good its declaration by alleging the facts necessary to show its interest as mortgagee, and the amount thereof, and by alleging also that the proof of loss was waived, and how and when waived, or else that it was made within due time, and how and when made; these amendments to be filed not later than the time of entering in the court below the remittitur from this court.

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## SUPREME COURT OF GEORGIA.

UNITED UNDERWRITERS' INS. CO. ET AL. }

vs.

POWELL ET AL.\* }

1. The action being against several defendants, and some of them having demurred severally to the petition, as presenting no cause of action against them, and the court having over-ruled their demurrers, they were entitled, by virtue of the act approved October 16, 1891, amending section 4250 of the Code, to bring that decision, by a direct writ of error, to this court for review, although the suit was still pending below as to a defendant who did not demur.
2. A floating policy of insurance, which declares that it does not cover cotton on which there is any more specific insurance, does not embrace or apply to any cotton which is specifically insured in another company, and therefore is not subject to share with the other company the burden of loss sustained by the latter or by the insured in respect to the cotton covered by the more specific insurance; and for this reason, the company issuing the floating policy cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance, although the policy, touching the latter, contained a clause declaring that "in case of any other insurance upon the property hereby insured, whether made prior to or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater pro-

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\* Decision rendered, Aug. 31, 1894. Syllabus by the Court.

portion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies.

JACKSON, LEFTWICH & BLACK, for *Plaintiffs in Error*.

DORSEY, BREWSTER & HOWELL, for *Defendants in Error*.

SIMMONS, J.

1. Powell & Co. filed their petition against the Macon Fire Insurance Company, the Liverpool & London & Globe Insurance Company, the United Underwriters' Insurance Company, and the Hartford Fire Insurance Company. The three companies last named filed demurrers on similar grounds, which demurrers were overruled, and to this ruling they excepted. The Macon Fire Insurance Company did not demur, and the action is still pending in the court below against it. The other companies sued out their bill of exceptions to this court, and when the case was called here the defendant in error moved to dismiss it on the ground that the judgment was not final in the court below, but the case was still pending therein. The act approved October 16, 1891, amending section 4250 of the Code (1 Acts 1890-91, p. 82), adds to that section the words, "or final as to some material party thereto," so that the section, as amended, reads: "No cause shall be carried to the supreme court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the case, or final as to some material party thereto," etc. If the demurrers filed by the three insurance companies which are now plaintiffs in error here had been sustained, the judgment of the court below would have been final as to them; and under the amendment above recited, we think they had a right to except to the ruling of the court below, and bring the case here, although the suit was still pending against one of the defendants who did not demur, and, by reason of the decision complained of, against the excepting defendants also. These plaintiffs in error were material parties to the action, as brought in the court below; and, if there was no cause of action set out against them in the equitable petition, it was useless to keep them in court until the action against the fourth company had been finally disposed of. This may have been the reason for the passage of this act of the legislature, but, whatever the reason may have been, it is sufficient for us to say that the law is thus written.

2. It appears from the petition that Powell & Co. procured insurance upon certain cotton in a particular warehouse in Newnan, Ga., with five different insurance companies, to the amount of

\$2,000 in each company. They afterwards took out other insurance, to the amount of \$10,000, in what are called "floating policies," with four insurance companies. A fire occurred, and cotton to the amount of \$13,000 in value was burned. Four of the five companies which had issued what are called "specific policies" on the cotton in the particular warehouse paid up their losses, to the amount of \$2,000 each; and the companies which had issued the floating policies paid the loss in excess of \$10,000, to wit, \$3,000, pro rata among themselves. When the fifth of the companies which had issued specific policies, to wit, the Macon Fire Insurance Company, was called upon to pay its \$2,000 of specific insurance, it declined to do so, on the ground that its policy contained a clause declaring, "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies." The Macon Fire Insurance Company claimed that under this clause of its policy it was not liable for the whole amount thereof, but was only liable to pay its proportion of the total amount of insurance, counting the floating and specific policies, and refused to pay any more. The petition, after alleging that the Macon Fire Insurance Company was indebted to the petitioners the full amount of its policy, and praying judgment for that amount (\$2,000, with interest), contained an alternative prayer that, if the court should hold that the Macon Company was not liable for the full amount of its policy, the other companies which had been made defendants, and with whom the petitioners had settled upon their floating policies, as before mentioned, be required to pay, in addition to what they had already paid, their part of such sum as, by a proper construction of the policy of the Macon Company, the court might find to be due by said companies.

The policy of the Macon Fire Insurance Company recited that it was "on cotton, in bales, \* \* \* contained in Smith's Warehouse, situate in Newnan, Ga." The floating policies recited that they were "on cotton, in bales, \* \* \* in all or any of the stores, presses, warehouses, sheds, yards, railroad yards, and wharves, \* \* \* or while in transit in, or while on any of the streets in, ———." No particular warehouse, and no cotton stored in any particular warehouse, was mentioned. Each of the floating policies contained also the following condition: "This policy shall not apply to or cover any cotton which may at the time of loss be covered, in whole or in part, by \* \* \* any more specific insur-

ance." The policies containing this condition do not, in our opinion, embrace or apply to any cotton specifically insured in another company, and therefore are not subject to share with the other company the burden of loss sustained by the latter or by the insured in respect to the cotton covered by the more specific insurance; and for this reason the companies issuing the floating policies cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance, notwithstanding the clause in the Macon Company's policy, already quoted, under which that company claimed exemption from liability for anything more than the proportion its insurance bore to the whole insurance, counting floating as well as specific policies. According to their express language, the floating policies do not apply to or cover the same cotton which was insured by the Macon Fire Insurance Company, for the latter company insured cotton in a designated warehouse, and this is specific insurance,—certainly it is more specific than that of the floating policies. Such being the fact, the companies issuing these policies have protected themselves by their contract with the insured against liability, whether by contribution or otherwise, for the loss of any cotton which the policy of the Macon Fire Insurance Company covers. Where the property insured is not the same, there is no common insurance, and consequently no contribution. Judgment reversed.

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## SUPREME COURT OF RHODE ISLAND.

JERRETT ET AL.

vs.

JOHN HANCOCK MUT. LIFE INS. CO.\*

An application for a life insurance provided that the policy should be void if the statements in the application were untrue, and declared that the applicant knew that untrue answers or suppressions of facts as to her health would vitiate the policy.

*Held*, That where both the mother and sister of an applicant, who afterwards died of consumption, had died of that disease, the applicant's failure to mention the sister's death avoided the policy, though the doctor who examined her had previously rejected her, during her mother's life, as being liable to contagion from the latter.

HUGH J. CARROLL, *for Plaintiffs*.

McGUINNESS & DORAN, *for Defendant*.

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\* Decision rendered, Dec. 21, 1894. From *Atlantic Reporter*.

ROGERS, J.

This is an action of covenant on a policy of insurance issued by the defendant corporation on the life of Rose Harney (afterwards Jerrett), and payable to her father, David Harney. The assured, after the issuance of the policy, and before her death, married John Jerrett, and this suit, originally brought in the name of John Gerrett and David Harney, has been discontinued as to John Gerrett. The policy was dated July 6, 1892, and contained, *inter alia*, these provisions: "If any statement or answer in said application, which application is hereby referred to and made a part hereof, is in any respect untrue, \* \* \* then this policy shall be void." "No person, except the president or secretary, is authorized to make, alter, or discharge contracts, or waive forfeiture." It was also in proof that rejections could only be made at the home office. The application showed that the assured was born January 13, 1871, and the proof showed that she died August 23, 1893, of consumption. The application contained various questions to be answered, and that were answered, by the assured; and following the questions, and immediately preceding the signature of the assured, was this declaration: "I hereby declare that I am the person described in this application; that I have given true answers to all questions put to me, and I am aware that any untrue or fraudulent answers to any questions, or any suppression of facts with regard to my health, will vitiate the policy." The application, at its beginning, contained this statement, *viz.*: "Application is hereby made to the John Hancock Mutual Life Insurance Company for insurance, and, as the basis of such insurance, the following statements are made, which, including those made to the medical examiner, shall form a part of the contract for insurance, and, if in any respect untrue, the policy issued on this application shall be void." To one of these questions in the application, *viz.*: "Has this company ever refused to issue a policy on this life?" the assured answered, "No;" but the proof was that the assured had made a previous application to the defendant company for insurance, April 3, 1892, which had been refused. To one of the questions in the application, *viz.*, "Have any members of your immediate family (parents, brothers, or sisters) ever been, or are they now, affected with consumption? If so, state age and relationship, and whether living or dead," the assured answered, "Yes; mother died of phthisis, aged 37;" but the evidence showed that the assured's sister, Mary A. Harney, had died of pulmonary tuberculosis, June 25, 1891, aged 21 years, 3 months, and 16 days. The proof was that it was a rule of the company, though not printed on the application, that a death from consumption in each of two

succeeding generations would cause rejection of the application of a member of that family. It was in proof that consumption, phthisis, and pulmonary tuberculosis are only different names of the same disease. Dr. F. G. Bennett was the medical examiner upon both of the assured's applications. At the date of the assured's first application, her mother was sick with consumption, and the medical examiner recommended rejection, and it was rejected at the home office, where alone the power to reject existed. At the date of the assured's second application, assured's mother had died of consumption; and the medical examiner recommended that a policy be issued, and the home office issued one. The testimony showed that the reason for rejection, by examining physician, of the first application, was because, the mother then being sick, and the assured being at home, attending her, there was danger of infection or contagion, whereas after the mother's death the only danger was from heredity, so far as the mother's sickness or death was concerned. The examining physician knew at the time of the second application by assured that the assured was the same person that he had examined and recommended for rejection; but there was no proof that he knew whether her application had been rejected at the home office, or whether she had voluntarily withdrawn it, or what disposition had been made of it. At the time of neither application did the medical examiner know that the assured's sister had died of consumption.

The defendant contends that the policy is void on account of the assured's misrepresentations and suppression of facts, both as to her sister's death from consumption and as to the defendant's refusal to issue a policy on assured's own life. The plaintiff contends that there is no proof that assured knew that her sister, Mary, died of consumption; and he also contends that there was a waiver of any forfeiture or avoidance of the policy on account of the misrepresentation in regard to the rejection of the assured's first application, because the same medical examiner examined her at time of both applications. In the opinion of the court, the policy was avoided. The assured's answers to questions were warranties, at least as to important subjects; and the death of assured's sister, near her own age, from consumption, but a year or so before her own application, especially when her mother had also died of consumption, was information of such importance as the defendant company was entitled to, in determining whether it would accept the risk: 1 May, Ins., § 201. It was not claimed that assured did not know that her sister, Mary, had died of consumption, but only that there was no proof that she did know it. Even granting that it

was necessary to prove knowledge on the part of the assured of the cause of her sister Mary's death,—which the court does not think necessary,—yet the proof does show that the assured was on friendly terms with her family; her policy being made payable to her father, and she having been home, caring for her mother, during her mother's sickness, after her sister's death. The assured was nearly or quite 20 years old when her sister died, and the court is satisfied from the evidence that the assured must have known of the cause of her sister Mary's death, which occurred no further away than Attleborough, she living at Central Falls, and it appearing in proof that the sister was buried at Pawtucket. The court is also of the opinion that there was no waiver of the avoidance of the policy on account of the misrepresentation as to defendant's refusal to issue a policy. The decision of the court is that, for the reasons above set forth, the defendant corporation is entitled to judgment for costs.

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## SUPREME COURT OF MISSISSIPPI.

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BOYD

vs.

MISSISSIPPI HOME INS. CO.\* }  

The policy on a paster denominated "Form for Gin Houses and Contents" insured cotton seed, and also cotton "in cotton house adjacent to gin," and following this in print after a blank for total loss and value of the things insured, were the words "all while contained in the above-described gin-house building." The gin-house building was not insured.

*Held*, That the policy when ambiguous must be construed most strongly in favor of the insured, and with regard to the nature and uses of the property and the custom of the country.

*Held*, That cotton in the gin-house building was covered.

SILLERS & OWENS, *for Appellant*.

CHAS. SCOTT and E. H. WOODS, *for Appellee*.

WHITFIELD, J.

Boyd was insured against loss by fire on cotton seed to the extent of \$100, and on cotton to the extent of \$400. The particular part of the policy brought under review is pasted in the face of the policy, and denominated, "Form for Gin Houses and Contents;" and the controversy is as to whether the policy covered the prop-

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\* Decision rendered, March 29, 1897.



erty, it being destroyed while in the gin-house building. The property so destroyed consisted of 23 tons of cotton seed, of the value of \$184.13; 13 bales of lint cotton, of the value of \$600; one bale of unbaled lint cotton, of the value of \$50; and one bale of unginned seed cotton, of the value of \$50,—the total value of \$934. It will thus be seen that cotton seed, unginned cotton, and ginned cotton, baled and unbaled, were destroyed. The gin-house building was “a two-story frame, steam-power, gin-house building, with wood roof,” and was not itself insured. The “form” referred to contained separate specifications for the building and a variety of contents. The only “contents” insured in this policy were cotton seed, in one specification, and “cotton, ginned and unginned, baled and unbaled,” in another specification, at the end of which specification follow the words, in writing, “in cotton house adjacent to gin.” The additional words do not follow the specification as to the cotton seed. Cotton seed to the value of \$100 was insured, and cotton of the kind described to the value of \$400. Just after the last specification, “cotton, ginned or unginned,” etc., “in cotton house adjacent to gin,” follows, in print, a blank for total dollars in value of the things insured, and the words, in print, “all while contained in the above-described gin-house building.” There then follows a prohibition against the use of artificial light, or the operating of the machinery at night, without indorsed permit, and against smoking “in or about the building;” meaning, of course, the “steam-power gin-house building.” When destroyed, the property was in the gin-house building, and the contention is that the policy does not cover the property while contained in the gin-house building. It is obvious that the construction is technical, to the last degree, in favor of the insurer, and is wholly untenable. There are two fundamental rules governing the construction of fire-insurance policies: First, since these policies are usually prepared by the insurer, the construction is to be made most strongly against the insurer in favor of the assured. Second, such policies must always be construed with reference to the nature and kind of property insured, the uses to which it is ordinarily, within the common knowledge of men, put, and the custom of the country in dealing with it, and the parties to such contracts must be held to have all this in view in making the contract. These propositions are most abundantly supported by the highest authority, and are now thoroughly settled. See, especially, *Noyes vs. Insurance Co.* (64 Wis., 415), where the authorities are elaborately collated and discussed. Where a sealskin dolman was insured “while contained in a dwelling house,” but was burned at a furrier’s, though

the risk was greater there, the insurer was held liable: Case *supra*. Where the policy insured "seven horses \* \* \* situated section 22," etc., and they were burned up at a hotel not on section 22; where a policy insured live stock on premises situated on sections 7, 76, 27, and a horse was killed six miles distant from the place; where a policy insured a phaeton "contained in a barn," and the vehicle was destroyed while in a carriage shop, while undergoing repairs; where a policy insured "family wearing apparel contained in two-story frame building on lot 6," etc., and the apparel was burned while the owner was riding in a sleigh; where the policy insured a threshing machine "stored in barn on section 36, T. 23, R. 28," etc., and the machine was burned while standing in a field on that section; and where the policy insured mules as being all contained in a certain barn, and while such barn was being repaired the mules were removed to another barn on same section, where they were burned up,—in all these cases the insurers were held liable: *Peterson vs. Insurance Co.*, 24 Iowa, 494; *Mills vs. Insurance Co.*, 37 Iowa, 400; *McCluer vs. Insurance Co.*, 43 Iowa, 349; *Longueville vs. Assurance Co.*, 51 Iowa, 553; *Everett vs. Insurance Co.*, 21 Minn., 76; *Holbrook vs. Insurance Co.*, 25 Minn., 229; *Langworthy vs. Insurance Co.*, 85 N. Y., 632; *Degraff vs. Insurance Co.*, 8 Am. St. Rep., 685 (a very instructive case, directly in point); 11 Am. & Eng. Enc. Law, p. 289, and note 2, tit. "Location." The principle of these cases is obvious. Wearing apparel is to be worn on the person, and phaetons are to be ridden in, and mules are to be used in the cultivation of crops, and threshing machines are to be taken to the fields where threshing is to be done; and, though policies may refer to them as in or contained in particular houses, the insurers necessarily know—what all men commonly know—that such uses will be made of them, and are liable, though they be destroyed elsewhere, if they are put to such customary use only. So, here, "the cotton house adjacent to the gin" was manifestly a cotton house used to hold seed cotton; not ginned cotton or cotton seed, or ginned cotton baled. Lint cotton is not usually mixed with seed cotton or cotton seed or baled cotton. The seed cotton, after being ginned, would not usually be put back with cotton in the seed. This policy is an open one, covering any cotton seed during its life, from the 1st of October, 1895, to the 1st of October, 1896, to the amount of \$100, and any cotton, ginned and unginned, baled and unbled, to the amount of \$400. The contemplation was, necessarily, that the farmer would gin up the particular quantity of cotton in the cotton house, resulting in lint and seed, and bale the lint, and fill the cotton house again. The risk insured against manifestly was the danger

of fire from the steam-power gin, resulting from friction, etc.,—a well-known danger in a cotton-farming community. It is just as illogical to suppose that the parties to this contract intended the particular lot of cotton in the seed to remain in the cotton house, and to be covered by the policy only if it remained there, as it would have been to suppose that in the cases cited the phaeton or wearing apparel or live stock were so to remain at the place in which they were when insured. In all these cases the statement that the property is in, or contained in, a particular house, is not a promissory stipulation or warranty that the property will remain there at all times during the life of the policy, but is used merely to identify the particular property insured. Nor do we think appellee is aided by a sound technical construction, even. That construction would not take the clauses of this policy, separately, disconnected from each other, but according to the established canon of construction, together, and, so taken, construe the whole policy so as, if reasonably it can be done, to uphold it and prevent a forfeiture. So read, the policy reads, literally: “\$400 on cotton, ginned and unginned, baled and unbaled, in cotton house adjacent to gin, all while contained in the above-described gin-house building;” that is, the cotton that was, when the policy was written, and that might from time to time, within its life, be put, in the cotton house adjacent to the gin, while contained in the gin-house building, in its ordinary use while being controverted into seed and lint and baled cotton. It will be noted that the cotton seed, on any construction, is in the gin-house building. The argument that the words, “in the cotton house adjacent to the gin,” because in writing, control the words following, “all while contained in the above-described gin-house building,” invokes a well-known rule, but one applicable only where there is irreconcilable conflict between a printed and a written clause. There is no such necessary conflict between the clauses here. They are perfectly harmonious, when construed with reference to the nature of the property, its ordinary uses, in preparation for market. In *Insurance Co. vs. Hazelet*, one clause worked absolute forfeiture upon a certain contingency, but another secured, upon the same contingency, “a surrender value.” The court said (105 Ind., at page 216, 4 N. E., 584): “When a party uses an expression of his liability having two meanings, one broader and one more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction. The policy before us having been presumably prepared by the company, and containing on its face inconsistent and ambiguous stipulations as to the consequences, the meaning most favorable to the

assured must be attributed to it. To hold otherwise would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums; to insist upon a forfeiture or not, according to its pleasure." In the case at bar the only "probable" meaning is the one we have put upon the terms of the policy. But the principle announced in the case cited shows that, were the clauses ambiguous, the construction should be still in favor of the assured. On either view, indisputably, the appellee is liable for the \$500. The judgment is reversed, the demurrer overruled, and the cause remanded.

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## SUPREME COURT OF LOUISIANA.

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KONRAD

vs.

UNION CASUALTY & SURETY CO., OF ST. LOUIS, MO.\* }  
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The action was brought upon a policy of accident insurance. Plaintiff, under the circumstances of the case, gave notice of death sufficiently in time.

The policy did not require, as a condition precedent to recovery by the beneficiary, proof positive and direct of the cause of death, as is required in some casualty and surety companies.

There was enough to prove that death was the result of accident, rather than natural causes or design.

HOWE, SPENCER & COCKE, *for Appellant.*

ROGERS & DODDS, *for Appellee.*

BREAUX, J.

Plaintiff, beneficiary of a policy of accident insurance, brought this action to recover the amount of the policy. The grounds of defense are three: First, no notice of death was served within the time contemplated by the policy; second, a special and general denial that the death of the assured was caused by any accident covered by the policy; third, that the assured committed suicide. The policy was issued in October, 1895. It covered bodily injuries sustained through external, violent, and accidental means, and stipulated that if death resulted within ninety days from such injuries, independently of all other causes, the company would pay the amount of the policy to the plaintiff, who was his sister. The insured and insurer agreed that immediate written notice would be given to the general agency issuing the policy, or to the company at St. Louis, Mo., on blank provided for the purpose, of any accident and injury for which

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\* Decision rendered, Mar. 23, 1897. Syllabus by the Court.

a claim is to be made, with full particulars; that affirmative proof of death, or loss of limbs or of sight, or of duration of disability, would also be furnished to the company within two months from time of death, or of loss of limb or of sight, or of termination of disability.

The insured, Edward B. Kourad, left West End on the morning of the 24th of February, 1896, in a skiff. A sailor from the shore of the basin pleasantly remarked to the young man, who was leisurely and awkwardly pulling the boat to the lake, "that he was not much of a hand" at rowing a boat. To this he made some answer, and began to pull as one accustomed to rowing. He said something about the weather, and asked where the best fishing banks were, and went out of the basin, and turned westward into the lake. About half past nine of the day before mentioned, another witness saw a young man in his shirt sleeves, his hat off, rowing towards West End. "He was pulling a good, ordinary stroke," said the witness. He was about two miles from the main shore. It had been quite foggy during the early morning. It was clearing off when witness passed him. Subsequently, during the forenoon of the day, a trapper, on his return from his usual daily work, saw a skiff on the lake, about a mile from West End. The young man's coat and hat were in the skiff, and a small can of bait. When the skiff was found, no one believed among the fishermen at the lake that the young man was drowned. It was thought that he had gotten out of his boat and had gone ashore. No search was made for him on that day. About fifteen days afterwards his body was found floating in the lake about four miles from West End. The evidence does not indicate that prior to the date of his death the assured had suicidal intent. The certificate of the coroner stated that drowning was the cause of death. The plaintiff forwarded her affidavit to the defendant company, stating that she was not aware until April 20, 1896, that the deceased held a policy in the defendant company. In answer to plaintiff's demand of payment, the agent wrote to the plaintiff, informing her that on account of delay in giving notice of death the company disclaimed liability; in other words, that the delay was in violation of the policy contract. The district court gave judgment in the favor of plaintiff. The defendant took a suspensive appeal.

The first ground of defense is that immediate notice of death was a condition precedent to recovery, and that it was no excuse, in this respect, that the beneficiary was not aware of the policy. The verity of plaintiff's affidavit, in which she declared that she did not know of the policy in her favor, and that she only found it the day prior to the date of notice, is not questioned. The principles governing

fire-insurance companies in the matter of the nullity of the contract of insurance, the forfeiture of the policy, and conditions precedent to a recovery upon a policy, apply as well to a contract of insurance against accident, except if there is some modification or change in the stipulations. The time of notice is specified in fire-insurance policies. The language of the condition usually reads, as in the case of life or accident policies, "immediate notice to be given." The weight of the decisions, as we have read them, does not, under all circumstances, require immediate notice as a precedent condition. The words "immediate," and "forthwith," "as soon as possible," used in policies, are not always taken literally. It will meet the requirement, says May, in his work on Insurance (section 462), "if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay." "To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become engines of fraud." We are informed by this text writer that notice within eight days after the fire, and within five days after it comes to the knowledge of the insured, has been held reasonable; in another case, that notice was reasonable where the fire happened on the 10th, and notice of loss, dated the 11th, reached the insurers on the 15th. But a delay of four months in one case, of eleven days in another, there being no sufficient excuse therefor, has been held to be unreasonable. To decide that one was not duly diligent, and that she lost her right as a beneficiary because she did not give notice of a policy of which she knew nothing, would be more strict and exigent than, in our opinion, the language of the policy required. There was timely notice given after the fact of insurance came to the knowledge of the plaintiff. The delay in finding the policy was not strange and unexplainable. On the contrary, it appears to have been entirely consistent with good faith. The case of *Insurance Co. vs. Baum* (29 Ind., 236, 241) was an action on an accident-insurance policy. The court said, in answer to the complaint that notice was not given in time; that the law, as stated in Angell on Fire and Life Insurance, is that "there must be no unnecessary delay, — nothing which the law calls laches." Applying the interpretation to the contract in case of notice to the underwriters of a loss by fire, the court held that the terms "forthwith," and "as soon as possible," in a policy of insurance, after the accident, are not to be taken in a severe literal sense, but mean with due diligence, or without unnecessary procrastination or delay.

We pass to the next objection urged by the defendant, that the plaintiff cannot recover except upon some affirmative proof that the

death of Edward B. Konrad was caused by an accident insured against and covered by the policy; that is, by external, violent, and accidental means, of which, the defendant contends, the record contains no proof. This ground of defense rendered it necessary to carefully consider the conditions of the agreement indorsed on the reverse of the policy. It devolved upon the insured, in case of accident not resulting in death, to furnish affirmative proof of loss of limb or of sight. In case of death it was incumbent upon the beneficiary to furnish affirmative proof of death, but direct and positive proof that death or personal injury was caused by external violence and accidental means was not one of the conditions. This question was left to a decision under the rules of evidence. The necessity of giving notice of death does not include notice of the cause of death, nor does the necessity of proving death affirmatively cover affirmative proof of the causes of death. The insurance, it is true, was against bodily injuries sustained through external, violent, and accidental means. These may be considered established, although a plaintiff may not have furnished direct and positive proof of the facts as required by some of the policies issued by some casualty and surety companies. If it be manifest that death was neither occasioned by natural causes nor by the deceased himself, it at once becomes evident that the "violent and accidental" must be considered as cause.

We are brought to the defense that the assured committed suicide, and that death by suicide was excepted from the risk covered by the policy. "Death by accident" is defined as an unexpected event,—not according to the usual course of things. Applying this definition, it has been held, that where a person is drowned while bathing, it is accidental death, although no proof is offered of the circumstances: *Trew vs. Assurance Co.*, 6 Hurl. & N., 839. Also, where the insured fell in a fit in shallow water and was drowned, it was held to be a death by external and material causes. In the case in hand there is no direct proof of the cause of death. The indications are that the insured was drowned. Without more proof, it would be difficult to conclude that he deliberately destroyed himself. The natural presumption arising from the love of life, of itself, negatives all idea of suicide. The one destroying himself is guilty of a moral crime, with which his memory should not be made to suffer unless proof is evident. We conclude that the evidence does not sustain the defense that he committed suicide; in the second place, that he did not die a natural death. The good health of the assured, and the circumstances preceding the death, do not tend to establish the theory that death resulted from natural causes. It may be logically

inferred—indeed, it must be inferred, as it was not a natural death or a suicide—that the death was caused by external violence and accidental means. There was enough to prove that death was the result of accident, rather than design or natural causes. It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

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## SUPREME COURT OF MISSISSIPPI.

STEPHENS

vs.

RAILWAY OFFICIALS' & EMPLOYES' ACC. ASS'N.\*

The indemnity stipulated for in an accident policy was divided into two categories. The first provided for full indemnity in cases of death or injury leaving a visible, external mark. The second provided for the payment of one-tenth where the injury left no external mark, and was found sufficient to cause death, or if such injury or death was caused by rupture, or poison, or strain, or explosives, or if such injury or death be caused by the intentional act of another.

*Held*, That the second category referred to such intentional acts of another as left no visible, external mark, and where the insured died from injuries at the hand of another, leaving a visible, external mark, the whole amount was payable.

It was agreed that Jeff Stephens and one Tidd Stover were working together on a railroad, when they became involved in a quarrel; and Stover struck Stephens with a shovel, splitting his head open, from the effects of which he died. The court granted defendant a peremptory instruction to the jury to find only one-tenth the amount of the policy. Under this instruction a verdict was returned for one-tenth of the amount of the policy, and judgment entered on the verdict.

FEWELL & BRAHAN and J. A. P. CAMPBELL, *for Appellant*.

MILLER & BASKIN, *for Appellee*.

WHITFIELD, J.

The indemnity provided by the policy is broadly distinguished into two classes: "First, against those injuries, or death, caused by external, violent, accidental means which leave a visible mark upon the body; and, second, against those injuries, or death, caused by means which leave no visible, external mark upon the body. The first category is then subdivided into (a) weekly indemnity against

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\* Decision rendered, March, 1897.



loss of time resulting from total disability so caused, of the amount and during the time specified; (b) indemnity against permanent disability, to the extent of one-half the face of the policy, on the terms specified in the clause governing that case; and (c) indemnity to the full amount of the policy, when death so results within 90 days from the injury, upon the terms in that clause stated. After this first category there follows a specific enumeration of cases in which nothing shall be paid. Then comes a wholly separate and independent paragraph, disconnected entirely from what has gone before, providing for the second category, in which fall the cases wherein no visible, external mark is left upon the body. By this independent paragraph it is provided that the appellee will pay one-tenth of the face of the policy where

The member shall suffer an injury of which there shall be no visible, external mark on his body sufficient to cause death, and it shall appear by an autopsy that such injury contributed to his death, or if such injuries or death shall be caused by rupture or hernia, or contact with poisonous substances, over-exertion, excessive lifting, gymnastic sports, handling or using dynamite or other explosives, or if such injuries or death shall result from the intentional acts of any person other than the insured, except as the result of quarreling or fighting, whether such other person be sane or insane.

It is to be noted carefully that there is no exception in the first category against liability when the body shows the visible, external marks of violent, accidental death, when death is caused by the intentional act of another than the insured. That exception applies alone to the second category, and this second category embraces the distinctive class of injuries, "of which there shall be no visible, external mark on the body." And this class may include (a) cases of injuries or death caused by violent, external, accidental means, leaving no such visible, external mark; or (b) cases of injuries or death produced by secret and hidden causes, such as "contact with poisonous substances," etc., leaving no such visible, external mark; or (c) cases of such injuries or death resulting from the intentional act of another than the insured, leaving no such visible, external mark. It thus clearly appears that all the cases provided for in this second category are cases in which there shall not be upon the body any visible, external mark, and the words, "such injuries or death," preceding the words, "resulting from the intentional act of another," etc., of course, under the maxim, "Noscitur a sociis," etc., mean injuries or death of the kind with those just before in the same sentence specified,—“such injuries or death” as those; that is, injuries or death when no visible, external mark is left on the body. In this case the insured came to his death by the intentional act of another, which act left its visible, external mark upon the body; his

head having been split open. The case falls manifestly, therefore, in the first category, and the plaintiff was entitled to recover the whole amount of the policy. It was easy for the appellee to have put in the first category an exception against liability in case the insured suffered death, where a visible, external mark on the body was left, as the result of the intentional act of another. This it did not do, and the rule is fundamental that the provisions of insurance policies—usually prepared by the insurers—are to be construed most strongly in favor of the insured. The cases cited by learned counsel for appellee are cases wherein the exception against liability for death resulting from the intentional act of another, in the particular instance, was expressly made a part of the policy. They are *Insurance Co. vs. McConkey*, 127 U. S., 661; and *Hutchcraft's Ex'r vs. Insurance Co.*, 87 Ky., 300. The same insurance company was involved in both cases, and the clause in both policies provided

No claim shall be made under this policy when the death may have been caused by \* \* \* intentional injuries inflicted by the insured or any other person,

—wholly different cases.

There is no cross appeal, and hence we cannot notice the cross assignment of errors, or the argument applicable thereto. Reversed and remanded.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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RICHARDSON )  
vs. )  
WHITE ET AL\* )

An assignment of a life-insurance policy, if in legal form of words and not in conflict with the provisions of the policy, is valid, especially as between assignor and assignee.

LUTHER WHITE, *pro se*.

GILLET & McCLENCH, *for Appellee*.

HOLMES, J.

The plaintiff advanced money to the defendant's intestate, Edson Clark, on the strength of the latter's promising to take out, and taking out, this policy as security for the advances. Clark wrote into the policy on its face, "Payable in case of death to Wm. H. Richardson, as his interest may appear," and several times exhibited

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\* Decision rendered, October 23, 1896.

the policy to the plaintiff. These facts are sufficient to give the plaintiff the security which he understood that he got: *Bank vs. Benson*, 24 Pick., 204, 210; *Stearns vs. Insurance Co.*, 124 Mass., 61, 62. It turns out that the plaintiff's claim will exhaust the policy. But if this were otherwise there is no longer any doubt that an assignment of part of a fund is good in equity, as between the assignee and assignor; that the insistence on the necessity of a delivery of the document of title in *Palmer vs. Merrill* (6 Cush., 282, 286) is a mistake, so far as equity is concerned, if the assignment has been communicated to the assignee, and assented to by him, or that such an order as the above, under the circumstances, is sufficient to constitute an assignment in point of form: *James vs. Newton*, 142 Mass., 366, 8 N. E., 122; 3 Pom. Eq. Jur. (2 Ed.), § 1280, note; *Macomber vs. Doane*, 2 Allen, 541.

In this case, as in *James vs. Newton*, the insurance company sets up no defense to the policy, and submits to the court the question who is entitled to the fund, so that there is no need to consider what its rights would have been.

It is fair to mention that in *James vs. Newton*, notice of the assignment had been given to the debtor, which does not appear affirmatively in the report of the evidence in the case at bar. But assuming that notice would be necessary as against a later bona fide purchaser for value, the insolvent laws do not put an assignee in the position of a bona fide purchaser of property of which the insolvent had the bare legal title. *Low vs. Welch*, 139 Mass., 33, 29 N. E., 216. As between the parties and those who stood in their shoes, notice was not necessary: *Gorringe vs. Gutta Percha Works*, 34 Ch. Div., 128. Decree affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

GALLANT

vs.

METROPOLITAN LIFE INS. CO.\* }

The policy provided that no obligation was assumed by the company prior to the date of issue, nor unless on said date the insured was alive and in sound health. The company's medical examiner examined the assured twelve days prior to the date of the policy and found her in sound health, but, it being proved by another physician that she was not so at the date of the policy, it was held that the company was not bound by the prior finding of its medical officer, when the facts were against such finding, and the company is not liable.

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\* Decision rendered, October 23, 1896.

W. A. GILE and C. T. TATMAN, *for Plaintiff.*

FRANK P. GOULDING and FRANK L. DEAN, *for Defendant.*

FIELD, C. J.

The policy, which is dated February 11, 1895, contained a proviso as follows: "Provided, however, that no obligation is assumed by this company prior to the date hereof, nor unless on said date the insured is alive and in sound health." An examining physician employed by the defendant company examined the insured on January 30, 1895, and, on the 4th day of the next February, returned to the company a certificate that he found the insured to be in sound health. The defendant, against the objection of the plaintiff, was permitted to introduce the testimony of one Dr. Booth, to the effect "that he had attended the insured in 1893 for the grip; that he had seen the insured in 1894, but had not been called to attend her in that year, and that he had attended her in her last sickness in May, 1895; that in his opinion, she was not in sound health when she was insured, in February, 1895." The plaintiff "asked the court to rule that the defendant company was bound by the examination made and reported by its agent, the examining physician," which the court refused to do, and the plaintiff excepted. There seems to have been no objection that Dr. Booth was not shown at the trial to be qualified to give the opinion he gave, or that he did not use the words in the same sense as they were used in the policy; but the sole contention is that the company was bound by the report of the examining physician whom it employed. The report relates to January 30, 1895, and the policy to February 11, 1895, and it is possible that the insured may have been in good health at the former time, and not at the latter. But, apart from this, the examining physician was only the agent of the defendant to make the examination, and report the result of it. He had no authority to make a contract of insurance for the company, in which the results of his examination should be conclusively taken by the company to be true. The company made its own contract, a part of which was that no obligation was assumed by the company unless, at the time when the policy was issued, the insured "was alive and in sound health." If, in fact, the insured at that time was not in sound health, the defendant is not liable on the policy, and this fact can be shown by any competent evidence: *Vose vs. Insurance Co.*, 6 Cush., 42; *McCoy vs. Insurance Co.*, 133 Mass., 82. Exceptions overruled.

## COURT OF APPEALS OF KENTUCKY.

HOME INS. CO., OF NEW YORK, )  
 vs. )  
 KARN.\*

The policy by its terms was suspended in case of nonpayment of note when due, but the note could be collected by suit. The insured when threatened by the agent with suit, claimed that his understanding was that the policy could be dropped. The agent told him he was liable on the note and he requested postponement until the next premium came due, saying he would then pay "if he had it to pay." The agent agreed to submit his request to the company, telling him, however, that he would have to carry his own risk. The loss occurred pending the company's decision.

*Held*, That the agreement of the insured to pay was only conditional upon his obligation to do so, which he doubted, and the suspension of liability on the policy was not waived.

*Held*, That a promise by the agent to suspend suit pending submission to the company did not waive suspension of liability on the policy, where sufficient time had not elapsed before the loss for the company to decide.

J. A. DEAN, *for Appellant*.

SWEENEY, ELLIS & SWEENEY, *for Appellee*.

BURNAM, J.

The appellant, the Home Insurance Company, issued to the appellee, Powell Karn, a policy of insurance upon his dwelling-house, household furniture, family wearing apparel, provisions, etc., on the 1st day of August, 1888, for a period of five years, in consideration of the sum of \$4.80 paid, and the payment of installments on installment note of \$19.20, due as follows: \$4.80 on the 1st day of August of the years 1889, 1890, 1891, and 1892. The said policy contained on its face this agreement:—

But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for premium upon this policy remains past due and unpaid, or while any single payment, promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium, remains past due and unpaid. Payments of notes and installments thereof must be made to said Home Insurance Company at its Western department office at Chicago, Illinois, or to a person or persons specially authorized to collect the same for said company. The company may collect, by suit or otherwise, any past-due notes or installments thereof, and a receipt from the Chicago office of the company for the payment of the past-due notes or installments must be received by the assured before there can be a revival of the

\* Decision rendered, March 10, 1897.

policy, such receipt in no event to carry the insurance beyond the original term.

The first two deferred premium installments were paid promptly, but the third one, due August 1, 1891, was not paid, and was, after default, sent to the company's local agent for collection. The local agent, May, called on the insured at his dwelling for the purpose of collecting the past-due installment, but failed to collect same. The agent testifies positively that this call was made on the 5th day of May, 1892, and that on the following Sunday, the 8th day of May, about noon, the dwelling-house was destroyed by fire, and the said overdue installment or premium remained unpaid. The company declined to pay the loss, and the insured brought this suit to coerce payment. The appellant pleaded and relied on the foregoing provision of the policy as to the date when the installment premium should have been paid, and seeks to avoid responsibility because of the nonpayment of the premium note. Appellee, in reply to this, seeks to escape the forfeiture provided for in the policy by default in the payment of the premiums upon the following grounds, viz.: Because he says that his note due August 1, 1891, had been placed by the defendant company in the hands of one May, its duly-constituted agent, who had power to extend the time of payment of said note; that said agent presented said note to appellee, and appellee explained to him that he was not at that time prepared to pay same, and wished an extension of time on same until the note of August 1, 1892, fell due, when he would pay both of said notes. And the appellee avers that said agent, having the authority in law to contract with plaintiff, stated to plaintiff that it was satisfactory to him; that he was willing to make the extension; and that he would extend the time of the payment of the note due August 1, 1891, until the maturity of the note due August 1, 1892; but that he would write to the defendant company, and state plaintiff's request, and, if said request was not satisfactory, he would at once notify plaintiff; and that plaintiff relied upon the agreement with said May that the time of the payment of said note would be extended, and that if said extension was not satisfactory to the company, that he would receive notice thereof. And, upon the issues thus joined, the case went to trial.

The questions of the forfeiture provided by the policy, and the waiver thereof, can best be understood and determined by recalling the evidence of the witnesses who testified on this point, especially as they are few in number, and their statements clear. The plaintiff in answer to an interrogation of his counsel, said: "May came to see me about the note that was past due. My understanding was,

when I took the policy out, that, when I got tired of it, I could drop it. He came to notify me of its being due, and said I had it to pay; that I could not drop it when I wanted to; that they had my notes, and they had been given to him to collect; that they had a right to collect them by law; and that he was going to sue on them. I told him that I was not prepared to pay it right then, and that, if he would let it go on until the other note became due, I would pay them together; if I had it to pay, I would let it go that way; that I could not pay it then. He said it was agreeable to him if it was to the company, and that he would write to the company, and see, and, if it wasn't, he would let me know." He claims that he relied upon this agreement made with May, and that he never heard anything from the company before the fire, and he says this conversation with May occurred about a week before the fire, and that he would have paid the note, rather than be sued on it. On cross-examination, plaintiff admitted that May told him that, if he chose to carry his own insurance, he had better have his flue fixed, and that he told him he was not protected as long as the note was unpaid, and that he advised him as a friend to pay the note, and reinstate the insurance. L. G. Smyser also testified as to what occurred between the agent May and the plaintiff. He says May came and asked Mr. Karn why it was that he did not answer his letters. "Powell told him just because he was aiming to drop the insurance, and did not want to keep it any longer; that it was his understanding, when he took it out, that he could drop it whenever he wanted to; and Mr. May told him he could not do anything like that. Karn told May that if he was bound to pay it, he would wait until the last payment was due, and then pay it off; and Mr. May said it was agreeable to him, that he would write to the company, and, if it was not agreeable to them, they would notify him." On cross-examination he said that he remembered Karn telling May that he wanted to carry his own insurance and take his own risk. This witness also said, in answer to this question: "After the agreement between May and Karn, which you have detailed here,—that it was satisfactory with May that this note that was past due might be paid off in August with the other note; that he would notify the company, and, if it was not satisfactory to them, they would notify Karn,—what was said about the policy being in full force, if anything?" "I think Mr. May told him he would have to carry his own risk." This was all the testimony of the plaintiff. Defendant's agent May testified as follows: "I received the note late in 1891, or early in 1892. It was sent to me for collection, being past due and unpaid. After notes are three months past due, they are sent to me for collection

the company having been unable to collect same." He says further that he wrote Karn that the note had been sent to him for collection, and asked a remittance; that he received no response; that he did this several times; that finally he went to see plaintiff, and says: "I told him that I had come to collect the premium, and asked him why he had not answered my letters and the letters the company had written. He said that he had concluded to drop the insurance; that he had been insured for eight or ten years; and that he had concluded to carry his own risk. I called his attention to the fact that he had executed his note for five premiums, and I told him, in order to surrender him the notes, he would have to pay up the past-due premium, and he would also be compelled to pay for the short rate of insurance, which was greater than the rate for five years. I told him that it was leniency on my part that he had not been sued before; that I did not want any lawsuits, and had come to see him about the matter. He said that he understood that he could drop it at any time. I told him that that was not right, and he said he did not want to be sued. I asked him how soon he could pay it. He said he did not know how soon; that he might be able to pay the next August, and he might not; he did not know. He said he had some money out. He did not give me any definite understanding about it, but did not want to be sued, and asked me if I could hold up on it awhile. I told him, so far as I was concerned, I would not bring suit until the company ordered it; that I would write the company the state of the case, and tell them how he was fixed. He did not give me any positive or definite answer as to whether he was going to pay or not. This was on the 5th day of May, 1892. I expressly told him that I would write to the company, and submit the case the way it was; that I had no jurisdiction in the matter until further orders were received. He said he was going to carry his own risk, and, after I got into my buggy, I remarked, 'If you are going to carry your own risk, you had better fix that flue.' He said that it had been there for seven years, but I told him it was not safe." This witness further testified that he got notice, on the Sunday following this visit to Mr. Karn's house, that the house had burned down, and that Karn wanted to see him. He says he went to see Karn the next day, and said to him that he had no consolation for him; that he had done all he could to get him to reinstate the policy, and that was all there was about it. He also proved that he had never communicated plaintiff's request to the company about the note; that he did not have time to do so between the time he saw plaintiff and the time of the fire. He testified that plaintiff had said to him: "Times are hard, and I am going to quit paying insurance. I have



not the money to pay it, and it was my understanding that I could drop the insurance at any time. I have been paying out money for seven or eight years, and I am going to quit." This was all the testimony upon this point.

The provision of the policy providing for a forfeiture in the event of the nonpayment of the installment premium at maturity is such a provision as the company or its authorized agents had the right to waive, and the courts, in construing such provisions, not only hold that they may be waived, but that they may be waived by the local agents of the insurance company who are intrusted with its business in the locality. In the case of *Insurance Co. vs. Spiers* (87 Ky., 297), the court said: "As to third parties, the agent, in the absence of notice to the contrary, should be regarded as possessing all the powers which his occupation imports to the public; and, under this rule, an agent who solicits insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture; and the tendency of recent decisions is to hold the insurer bound by the acts and conduct of the local agent whenever it can be done consistently with the rules of law." It seems to us in this case that May, the local agent of the company, having been intrusted with the collection of the note, had the authority to have entered into a valid and binding agreement for the company to postpone the collection of the note to a given day, and to have waived the forfeiture of the policy; but the question is whether he did so. It must be borne in mind that this was not a question of preventing the lapse of a live policy, but a question of reviving a policy which was already forfeited, and which the appellee himself regarded as dead up to the time the conversation with the agent took place. The question discussed between the parties was not one as to the forfeiture of the policy, but simply referred to the payment of the note,—the liability of appellee for same, and as to whether he would pay without being sued. Appellee said in the conversation, "My understanding was, when I took the policy out, that, if I got tired of it, I could drop it;" and, when May insisted that he would have to pay the note anyhow, that he told him that he was not prepared to pay it then, but that, if he would let it go over till the other note became due, he would pay them together; that, if he had it to pay, he would let it go that way. Now, this language on the part of appellee clearly imported a doubt in his mind as to his liability on said note. It was certainly no unconditional agreement and promise to pay it at a definite and fixed time. The whole question in his mind was one of liability on the note, and not a

question of the waiver of the forfeiture of the policy. On cross-examination, appellee admitted that May told him that he was not protected as long as the note was unpaid, and that May advised him as a friend to pay the note, and reinstate the policy. The witness also says that "he was aiming to drop the insurance, and did not want to keep it up any longer. He said that it was his understanding, when he took it out, that he could drop it whenever he wanted to, and also told May that, if he was bound to pay it, he would wait until the last payment became due; and May said it was agreeable to him if it was to the company, and that he would write to the company and see, and, if it was not, that they would notify him." This witness, on cross-examination, says that May told him he would have to carry his own risk. The testimony of the agent May is very clear and explicit as to the time when he was present at the house of appellee, and also as to the time of the fire. He testifies on the question of payment that appellee claimed that it was his understanding that he could drop the policy at any time, and that when he told him it was not right, and explained the matter to him, and told him he would have to sue him if he did not pay it, he said that he did not want to be sued. May then asked him how soon he could pay it, and in response to his question, appellee answered that he might be able to pay it in August, and he might not; he did not know. He did not give any definite understanding about it, but he did not want to be sued, and asked May if he could hold it up awhile. May told him that, so far as he was concerned, he would not bring suit until the company ordered it, and that he would write to the company, and state appellee's request; that he had no jurisdiction in the matter until further orders were received. May further says that, after he got into his buggy, he said to the appellee, "If you are going to carry your own risk, you had better fix that due;" and that appellee replied that it had been there for seven years, but May told him it was not safe.

There is nothing in the conversation between these parties relative to the payment of the note which clearly and unequivocally shows that the parties arrived at any agreement whatever in regard to the time when the note was to be paid, or that appellee intended unconditionally to bind himself. It is manifest that the appellee's promise to pay was at all times conditioned upon the question of his liability on the note. In order to have revived and given life to this suspended policy, we think there ought to have been at least reasonable certainty as to what was the precise contract entered into between the parties. During the whole of this conversation, nothing whatever was said about reviving the policy. The entire conversa-

tion, so far as appellee is concerned, was a plea on his part that he should not be sued on the note; that he should have time given him until he could determine the question as to his liability on same. And his intention to pay the note at any time, we think,—judging from the language used by him, and from his contentions at the time,—depended entirely upon the question as to whether, after consideration, he determined that he was liable therefor. He contended that he was not liable; that he had a right to drop the insurance at any time; and the only interpretation which we can place upon the words, “If I have it to pay, I will let it go that way,” is that he reserved the right to determine the question as to his liability on the note for himself. Certainly, this was not an unconditional and positive agreement to do anything, and it seems to us that the only agreement which was made by the agent May with appellee was that he would not institute suit on the note in accordance with his instructions, unless directed to do so by the company. He never said one word about waiving the forfeiture of the policy. On the contrary, he expressly warned appellee that he was carrying his own risk during the suspension. It seems to us that there could have been no misapprehension on this point by appellee after the conversation with the agent May.

Upon the trial of the case, the court gave a number of instructions to the jury. By the third instruction, the jury were told: “If the jury believe from the evidence that plaintiff requested the extension of time of payment, as stated in the foregoing instruction, and May as agent of said company, undertook and agreed to communicate the same to the company at Chicago, and plaintiff relied upon such promise, and, but for the same and his reliance thereon, plaintiff would have immediately, or before his property burned, paid said past-due installment, and they believe from the evidence that said agent failed to communicate said request to defendant at all, or failed for an unreasonable period of time to do so, they should find for the plaintiff.” We think the facts in this case show that only three days elapsed from the time of the conversation between the agent and appellee before the house was destroyed. This instruction requires the jury to find for the plaintiff whether the agent was guilty of unreasonable delay or not, and regardless of whether plaintiff’s request could have been received in time to be acted upon by the company before the fire. Certainly, this instruction was erroneous and prejudicial to the defendant. But being firmly convinced that what took place between the appellee and the agent of the company did not amount to a waiver of the forfeiture, or have the effect of reviving the liability of the defendant company under

same, it is unnecessary to go further into the discussion of the numerous errors complained of on the trial of the case. We think that the peremptory instruction should have gone in favor of the appellant, and the case is therefore reversed, and same is remanded for further proceedings consistent herewith.

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UNITED STATES CIRCUIT COURT OF APPEALS.  
NINTH CIRCUIT.

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PHENIX INS. CO. )  
                  *vs.* )  
WARTTEMBERG.\* )

The policy provided that any false answer in the application should render it void, and that no agent could alter or waive its terms. The applicant told the agent, in answer to the question whether the property was mortgaged, that it was mortgaged for \$1,000, but he was going to pay it off. The agent said it was then not material, and he filled in the answer as "No." The fire occurred about two months later, when all but \$300 of the mortgage had been paid.

*Held*, That where there was no evidence that the company would have declined the risk, or that any fraud was intended, the company was liable.

FORNEY, SMITH & MOORE and JAMES H. FORNEY, *for Plaintiff in Error*.  
EUGENE O'NEILL and JAMES E. BABB, *for Defendant in Error*.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

GILBERT, C. J.

The defendant in error was the plaintiff in an action which was brought against the Phenix Insurance Company to recover upon a policy of fire insurance, the loss and damage by fire to the property of Peter Thompson. On October 23, 1893, Peter Thompson made a written application for insurance to the amount of \$3,500 upon his barn, hay, grain header, binder, and other farming implements, with the loss, if any, payable to C. Warttemberg, mortgagee. One of the defenses made by the insurance company to the action was that the insured, in his written application, had falsely warranted that the property upon which the insurance was sought was not incumbered. The insurance was obtained through one R. D. McConnell, an agent of the insurance company residing at Moscow,

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\* Decision rendered, Feb. 23, 1897.

Idaho, and, when the policy was delivered to the insured, it bore the indorsement, "McConnell & Cobbs, Agents." The application contained the following:—

It is expressly understood and agreed that the valuation of all the property herein described is made by the applicant, and, if this blank be filled out by the agent, it is done at dictation of applicant, and every statement herein contained is to be deemed his own. This company will be bound by no statement made to or by the agent, unless embodied in writing herein.

The policy contained also the following:—

This insurance is based upon the representation contained in the assured's application of even number herewith, on file in the company's office in San Francisco, each and every statement of which is hereby specifically made and warranted and a part hereof; and it is agreed that, if any false statements are made in said application, this policy shall be void.

And the following:—

No agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at San Francisco. Any waiver or alteration by them must be in writing.

At the trial the plaintiff, in answer to the question, "What, if any, answer was made to this question in the application, 'Is the personal property incumbered? If so, in what manner and what amount?'" testified as follows:—

"A. I told him it was mortgaged to John P. Volmer, First National Bank of Lewiston, for \$1,000. Q. State the whole conversation at that time. A. And he says, 'Are you going to pay it?' I told him I was going to pay it off right away, and he said that did not make any material difference if I was going to pay it off right away, and he would write the word, 'No.'"

It was proven that at the time the insurance was applied for, on October 23, 1893, there was upon a portion of the personal property a mortgage for \$1,000. On October 27th the insured paid \$500 on account of the mortgage debt, and on November 20th made a further payment of \$300, leaving about \$300 still due on principal and interest at the time of the fire, which occurred on December 21, 1893. The insured testified, further, that the agent of the insurance company came to his place, and wanted to insure his property, and that, when he finally agreed to insure, the agent "made out an application and insured the property;" that the application was not read to him at the time; that he had dealings with no other person than the agent with reference to the insurance; and that the agent at the time claimed to represent the Phenix Insurance Company, of Brooklyn; and that the policy was sent to him by the agent. There is no evidence that the agent gave any information to the insured concerning the limitations of his agency or the nature thereof. It appeared,

upon his own testimony, that the agent had authority to write commercial risks for the Phenix Insurance Company in towns in Idaho, such as Moscow, Kendrick, Leland, and other places, but that he had no authority to write insurance on farm risks; and that he was required to forward all applications on farm risks for the company's inspection and acceptance. The jury returned a verdict for the plaintiff for \$1,800. Under the instructions of the court, they found by their verdict that the conversation which the plaintiff alleged was had between him and the agent occurred as by him detailed. On the submission of the case to the jury, the plaintiff in error requested the court to instruct the jury to return a verdict for the defendant. The request was denied, and an exception was allowed, and thereon is based the principal assignment of error on which the case is presented in this court.

The plaintiff in error cites the case of *Insurance Co. vs. Fletcher* (117 U. S., 519), and urges that, under its authority, we are compelled to reverse the judgment of the trial court. In that case the applicant for life insurance made his application in St. Louis to an agent of a New York insurance company. He made answers to the questions propounded to him by the agent, which, if correctly written down, would have made a material difference in the nature of the risk. The agent, without his knowledge, wrote down false answers, concealing the truth. The applicant signed the application without reading it, and the agent transmitted it to the company. Thereupon a policy was issued which contained the express condition that the answers in the application were a part of the policy, and that no statement made to the agent not contained in the application should be binding on the company. A copy of the answers, with these conditions conspicuously printed upon it, accompanied the policy. It was held that the policy was void. Mr. Justice Field, in delivering the opinion of the court, said:—

“It is conceded that the statements and representations contained in the answers, as written, of the assured, to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the face of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to

the home office. \* \* \* It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity, as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others."

The court proceeded to distinguish the case from *Insurance Co. vs. Wilkison* (13 Wall., 22), and from *Insurance Co. vs. Mahone* (21 Wall., 152), and said:—

"In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. \* \* \* Here the power of the agent was limited, and notice of such limitation given by being embodied in the application which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

It is contended by the defendant in error that the doctrine of the *Fletcher Case* has been modified by subsequent decisions of the supreme court, and we are referred to *Insurance Co. vs. Chamberlain* (132 U. S., 304), in support of that proposition. That was a case in its facts and principles essentially identical with the case now before the court. The applicant for insurance stated in his application, in answer to the question whether he had other insurance, that he had certain certificates of membership in co-operative societies. The agent informed him that he did not consider such certificates insurance, and gave his reasons for so stating, and wrote the answer "No" in the application. But the decision of the court involved no modification of the doctrine of the *Fletcher Case*. It was based expressly upon the statute of Iowa, in which state the contract of insurance had been made, providing that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing the policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." The court held that an agent procuring an application for life insurance in that state became, by force of the statute, the agent of the company, and that if he filled up the application, or made representations, or gave advice as to the character of the

answers to be given by the applicant, his acts in these respects were the acts of the insurer. There is no intimation in the opinion of what would have been the ruling of the court in the absence of a statute. In Idaho, unfortunately, there is no statute similar to that of Iowa. We find no other decision of the supreme court subsequent to the Fletcher Case which in any way modifies that case. But we are not disposed to apply the doctrine of that case further than to the state of facts under which the decision was rendered. The controlling fact in that case was that fraud had been perpetrated upon the insurance company by its agent, whether with or without the connivance of the assured. The fraud consisted in the concealment of facts by the agent, who wrote false answers to the questions which he propounded to the applicant. In the opinion it is said that, if the company had been aware of the true state of facts, the risk would probably not have been assumed. There is nothing in the record in the case now before us to show that the insurance company would have declined the risk if it had been aware of the fact that a portion of the property on which insurance was sought was under a temporary incumbrance, which was to be shortly paid off by the insured. Nor is there anything in the record to show that either the insured or the agent perpetrated fraud upon the insurance company. The applicant truthfully stated the facts to the agent, and the latter advised him concerning the force of those facts, and placed a construction upon them by writing the answer as he did in the printed application. The clause of the contract of insurance by the force of which it is contended that the misstatement contained in the application amounts to a breach of warranty is this: "This company will be bound by no statement made to or by the agent unless embodied in writing herein;" and the stipulation of the policy to the effect that any false statement in the application should render the policy void. It is not stated either in the policy or in the application or in the evidence that the agent was not the agent of the insurance company. The jury have found, in effect, that the insured stated the facts concerning the incumbrance on his property truthfully and in good faith, and that an answer different from that which he gave was written in the application by the agent, and assented to by the insured, in consequence of his trust and confidence in the superior knowledge and information of the agent. It appears also that the insured, in good faith, was proceeding to pay off, and had paid off, the greater portion of the incumbrance before the fire occurred, which was but two months after the date of the application. It would be a harsh doctrine, indeed, to hold that insurance companies shall have the opportunity of perpetrating such



wrong and injustice as would result from the application of the ruling in the Fletcher Case to the facts presented in the present case. It is well known that insurance is usually effected, especially upon farm property, by agents who travel through the country supplied with the printed blanks of the insurance companies for the purpose of taking applications, and forwarding them to their home offices. The applicant for insurance naturally relies upon the statements of him whose business it is to procure insurance, and the agent should not have it in his power, while obtaining premiums from the insured for the enrichment of his company, to absolve the latter from liability on its policies, provided he can, either honestly or otherwise, induce the applicant to adopt in his application such construction as the agent may persuade him to believe is proper to be placed upon the facts which he has honestly detailed.

The judgment will be affirmed, with costs to the defendant in error.

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## SUPREME COURT OF MISSISSIPPI.

SUPREME LODGE KNIGHTS OF PYTHIAS )

vs.

STEIN.\*

Where the charter of a benevolent order restricts the legislative power to the supreme lodge, a by-law against suicide passed by a subordinate administrative board of control is invalid, until sanctioned by the supreme lodge.

Where in such case the original certificate obtained before any such by-law had been passed was exchanged for another, the insured desiring an increase of insurance, and the new application contained a provision against suicide, and that the insured should be bound by the laws of the board of control, which had just passed the by-law against suicide.

*Held*, That such by-law was no part of the contract, and the suicide of insured did not affect the liability on the certificate.

NUGENT & McWILLIE, *for Appellant.*

MAYES & HARRIS and RUSH & GARDNER, *for Appellee.*

WHITFIELD, J.

We held in *Kramer vs. Supreme Lodge* and in *Hughes vs. Supreme Lodge*, at the last spring term of this court (no opinions filed), that the supreme lodge could not delegate to a subordinate managing committee—the board of control—the legislative power vested by the charter in the supreme lodge alone, approving Supreme Lodge

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\* Decision rendered, March 8, 1897.

vs. La Malta (Tenn. Sup., 31 S. W., 493), in that regard, to which case we also refer for the history of the organization and development of the order of the Knights of Pythias. The anti-suicide clause in this case was adopted by the board of control in Chicago, January 12 and 13, 1893; but it was never, before Stein's death, published in the official journal of the supreme lodge, or adopted, ratified, or enacted by the supreme lodge. It follows that the regulation against suicide, if considered as a by-law, is void, because the board of control, a mere ministerial committee, vested with administrative functions in relation to the endowment rank, had no power to pass a law like this, fundamental in its character, providing a new condition avoiding absolutely the benefit certificate of one who should commit suicide. But, assenting to this view, as already established by the two cases, *Kramer vs. Supreme Lodge* and *Hughes vs. Supreme Lodge*, it is insisted that, if the anti-suicide provision be void as a by-law, it is a valid element of a contract manifested by the application and the benefit certificate, and that, Stein having signed an application which bound him to the observance of all laws then in existence, or thereafter to be passed by the supreme lodge or the board of control, and this application containing this anti-suicide clause, he is bound by it, as an integral and inseparable element of an indivisible contract. To a proper understanding of the case in this view, it will be well to set out the facts of the case. In June, 1892, Stein, being then a Knight of Pythias, and as such knight entitled to insurance in the endowment rank, upon compliance with the provisions of the charter (Act Cong., May 5, 1870, as amended in 1882), and valid rules passed in accordance therewith, was admitted to the endowment rank, and received a benefit certificate for \$3,000. No anti-suicide clause was at that time in his application, or known to the order. The supreme lodge, at its seventeenth session, held in Kansas City, Mo., August 23 to September 3, 1892, adopted and promulgated the constitution of the Endowment Rank of Knights of Pythias of the World, under sections 5 and 6 of article 2, of which constitution this knight, Stein, was entitled to receive a benefit certificate of \$5,000 upon compliance with the provisions of the charter, and valid regulations passed in pursuance of it. No anti-suicide provision was in that constitution adopted by the supreme lodge, or even up to Stein's death, in August, 1893; but on January 12 and 13, 1893, the board of control—a mere managing committee, without authority—adopted such provision. On January 20, 1893,—seven or eight days only thereafter, and when this provision had not been published as required by article 14 of the constitution of the supreme lodge itself,—Stein applied for the increased insurance, and signed the

application herein, and received the benefit certificate herein for \$5,000, surrendering his previous certificate for \$3,000, the application and certificate having been prepared in accordance with this anti-suicide clause, adopted just seven or eight days before, illegally; and thereafter, in August, 1893, Stein committed suicide, the supreme lodge having never up to that date adopted the anti-suicide provision. These being the facts, the exact question on this branch of the case for decision is, what was the contract in this case? "The conclusion," says Mr. Bacon (volume 1, Ben. Soc., § 161), "from all the cases, is that the contract is found in the certificate, if one is issued, but is to be construed and governed by the charter and by-laws of the society and the statutes of the state of the domicile of the corporation." See, also, *id.*, §§ 48, 91a. The contracting parties here are Stein and the supreme lodge, not the board of control; and, so far as the supreme lodge is concerned, it had never assented to this anti-suicide clause up to the time of Stein's death. It is essential to a contract that both parties shall agree to the same thing. The case so much relied on by appellant—*McCoy vs. Association* (Wis.)—is not in point. The association is not the same, and in that case the anti-suicide provision was adopted by the association itself, in accordance with its charter, on January 15, 1890, McCoy having been actually notified twice before it was adopted, and not having died till some two years after its due adoption. So *Daughtry vs. Knights of Pythias* (La.) was a case where the by-law was conceded to have been validly enacted,—“approved by the supreme lodge,” says the court. In *Hoffmeyer vs. Muench* (1894), the charter of the order did not require the beneficiary to be one dependent upon the assured; but a local lodge of the order adopted a constitution, according to section 7 of which the beneficiary had to be one so dependent. The court held that section 7 was void in that view, saying, “The contract was made with the corporation, and not with the subordinate lodge, and it was not for the subordinate lodge to say what contracts the corporation should make;” citing *Bac. Ben. Soc.*, § 144. In *Indemnity Co. vs. Berry* (1 C. C. A., 561), the policy contained this anti-suicide provision when signed by Berry, and was the only policy he ever had. A statute of Missouri prohibited this defense, unless the assured contemplated suicide when he applied for the policy. Berry committed suicide, and the defense was this clause, the company conceding, however, that it was bound to pay back the premiums. The suit was on this policy, and the defense disallowed, as a by-law or as a contract. It will be noticed that here not even the premiums are offered to be returned, and the forfeiture of the \$3,000 as well as of the \$5,000 is insisted on, although section 7 of article 2 of the

constitution of the endowment rank required premiums paid to be refunded. To the same effect with the case just cited are *Ætna Life Ins. Co. vs. Florida* (16 C. C. A., 618), and *Hall vs. Union* (168 Pa. St., 377), in which the assured agreed in his application to be bound by all rules and regulations then existing or thereafter adopted by the union, and it afterwards adopted a regulation changing the amount the beneficiary was to receive from one-half to one-tenth of the amount. Though adopted by the union itself, it was held that it would not affect the policy issued before its adoption. See, generally, 1 Bac. Ben. Soc., passim. See, specially, *id.*, § 92, and *Wist vs. Lodge*, 22 Or., 271. The charter is as much a part of this contract as if written on its face. That charter prohibited any person but the supreme lodge from passing this regulation against suicide. That charter is the law of this contract, and the anti-suicide clause must be regarded as written out of the contract by the charter. The suits in the cases just cited were, just as here, on the policy with this clause in them, and they, properly analyzed, are a distinct holding that neither as a by-law nor as a contract can this provision be upheld. What was validly agreed on in accordance with the charter constitutes the contract in those cases and in this. The objection that this view destroys the board of control and the endowment rank is fanciful, not real. The board, as an organization, remains. All the administrative functions properly conferred on it remain. Our holding merely denies it what the charter denied it, —the power to pass laws, fundamental in their nature, governing the endowment rank, which was vested by the charter in the supreme lodge alone. It is easy for the supreme lodge to enact such provision, and when validly enacted by it there can be no objection to its enforcement. But it was clearly not in the power of this board of control—a mere ministerial administrative committee—to usurp to itself the legislative authority granted to the supreme lodge as the sole source of such authority, and insert this provision illegally in this application, and force it upon Stein, already a knight, and a member of the endowment rank. Affirmed.

# SUPREME COURT OF GEORGIA.

SHACKELFORD

vs.

SUPREME CONCLAVE KNIGHTS OF DAMON.\*

By-laws of an organization which expressly and exclusively relate to persons who become applicants for membership after the organization has been completed are not applicable to those who participate as charter members in forming the organization.

If a "benefit certificate," in the nature of a policy of insurance, was delivered by the corporation which issued it, the same being the grand conclave of a certain brotherhood, to an individual or his duly-authorized agent, no fraud or fraudulent concealment to obtain the delivery of such certificate having been practiced, and if then or afterwards the insured or the beneficiary paid or tendered all dues demandable up to that time, the insurer was bound by, and estopped from denying, recitals therein to the effect that the insured was a duly-initiated member of a subordinate conclave, and entitled as such to receive the certificate in question.

As the controlling question in the present case was whether or not the "benefit certificate" had ever in fact been delivered to one who was a duly-authorized agent of the insured, and who obtained possession of the certificate in good faith, and without fraud, the case ought to have been made to turn mainly upon the determination of this issue, and should have been submitted to the jury accordingly. The court therefore erred in presenting for their consideration various other questions relating to matters antedating the alleged delivery of the certificate, and which could not in any view properly affect the result.

If there was no lawful delivery of the certificate, there was no contract on the part of the defendant, and it was not liable. If there was a lawful delivery, the questions last above indicated were immaterial. At the next trial, the question of forfeiture after delivery, in case there was a delivery, can be passed upon and adjudicated.

W. B. FARLEY, P. F. SMITH, and M. G. BAYNE, *for Plaintiff in Error.*  
STEED & WIMBERLY and A. W. LANE, *for Defendant in Error.*

ATKINSON, J.

The plaintiff, as the beneficiary, brought an action against the defendant upon what is called a "benefit certificate," issued by the defendant, and which certificate was in the following words, to wit:—

No. 1,879. \$1,000.00. Benefit Certificate. Issued by Supreme Conclave Knights of Damon. This certificate is issued to Benjamin Franklin McDade, a first-degree member of Atlanta Conclave, No. 40, Knights of Damon, located at Atlanta, Ga., upon evidence received from said conclave that said person is a contributor to the benefit fund of this order, upon condition that the statements made by said person in the petition for this membership in said conclave, and the statements certified by said petitioner to the medical examiner, both of which are filed in supreme secretary's office, be made a part of this contract, and upon condition that the said member complies in

\* Decision rendered, April 6, 1896. Syllabus by the Court.

the future with the laws, rules, and regulations now governing the said conclave and fund, or that may hereafter be enacted by the supreme conclave to govern said conclave and fund. These conditions being complied with, the Supreme Conclave of the Knights of Damon hereby promises and binds itself to pay out of its benefit fund, to Geo. W. Shackelford, his brother-in-law, one thousand dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, or a sum not exceeding five hundred dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the permanent total disability of said member, and upon surrender of this certificate ; provided that said member is in good standing in this order at the time of said death or disability, and provided also that this certificate shall not have been surrendered by said member, and another certificate issued at the request of said member, in accordance with the laws of this order. In witness thereof, the Supreme Conclave of the Knights of Damon has hereunto affixed its seal, and caused this certificate to be signed by its supreme commander and supreme secretary, and recorded in the records thereof at Macou, Ga., this twenty-eighth day of September, A. D. 1893. W. B. Daniel, Supreme Commander. D. Q. Abbott, Supreme Secretary. [Seal of Supreme Conclave Knights of Damon. Organized 1891.]

Witnessed and delivered in our presence: W. H. Harrison, Commander. Jno. Cooper, Secretary. [Subordinate Conclave Seal. Atlanta Conclave, No. 40. F. F. O. K. of D. Ga.]

September, 1893.

Indorsed:—

Benefit Certificate No. 1,879. Amount \$1,000.00. Issued to B. F. McDade, Atlanta, Ga., Supreme Conclave Knights of Damon. Age, 45; degree, 1; Assmt., \$1.00.

Indorsed:—

Filed in office 13th day of October, 1894. J. W. Nisbet, Clerk.

It was shown that the person upon account of whose membership the same was issued had died, and the question was as to whether he was a member in good standing in the order at the time of his death. It appears that the subordinate conclave of which the deceased was a member was organized by a person who was recognized by the defendant as having full authority to organize and institute subordinate conclaves. A subordinate lodge or conclave was organized, into which, according to the contention of the plaintiff, the deceased was admitted as a charter member, and though there appears to have been some slight irregularities affecting his admission to the order, dues were regularly assessed against him as a member, and these dues, at the request of the deceased member, were paid by the plaintiff, he being the beneficiary. In due course of time, his certificate of membership was delivered to him, he having in the meantime passed the final examination as to his physical condition before the supreme medical examiner of the order. A number of by-laws were introduced in evidence, which, by their terms, referred

to the admission of members after the institution of a subordinate conclave; one, among others, requiring that the candidate for admission should take upon himself certain obligations, and a number of others which can have no application to charter members who participate in the institution of a conclave. Another of these regulations is that every conclave shall forward to the supreme secretary all applications for membership within 15 days from the applicant's admission, and with each application one dollar to pay for the "benefit certificate." Upon the trial of the case, the organizer of the conclave testified that the deceased member had been duly admitted as a charter member of the conclave, and that he, by virtue of his position as organizer, had required him to subscribe to all of the requisite obligations which were necessary to constitute him a member in good standing of the order. Upon the trial of the case, it was insisted upon the part of the defendant that the deceased was never a charter member of the organization, and was therefore not entitled to participate in its benefit funds. The court, in effect, charged the jury that, in order to entitle himself to the benefit guarantied by the certificate introduced, the plaintiff must show that the alleged deceased member had complied with all of the prerequisites expressed in the charter and by-laws, instructing the jury that a failure to comply with these preliminary requirements would forfeit his right to participate in the benefit fund. A great many questions are made in the present case which it is not necessary for us to consider. They will not likely arise upon another trial.

1. Without undertaking to enter into an extended discussion of the relative binding force upon its members of those rules and regulations of a secret organization, which affect its charter members, and those which affect the conduct of members admitted subsequent to the institution of the subordinate conclave, it may be broadly stated that where, as in the present case, a distinction is to be made between those formalities and duties required of charter members and those which apply to persons who are subsequently admitted into a conclave, the by-laws which relate to one class expressly ought not to be so construed as to extend to the other. In the institutions of the conclave in the first instance, there is necessarily less of formality, and less of ceremonial, than would properly be applied to members seeking admission into a regularly constituted conclave, and, therefore, undertaking to judge the rights of one class of persons by the rules established to control the conduct of the other class, a manifest injustice may be done.

2. Whether or not the deceased member in the present case was a member of the conclave into which he claims to have been initiated

as a charter member, we do not think is an open question. The "benefit certificate" upon which he brings his suit expressly declares:—

This certificate is issued to Benjamin Franklin McDade, a first-degree member of Atlanta Conclave, No. 40, Knights of Damon, located at Atlanta, Georgia.

The initial statement of this certificate, which was duly and properly issued by the officers having authority to do that act, recognizes the fact that he is a member. It will be presumed, then, that this recital is true, and the benefit society will be estopped to deny the membership of the person upon account of whose membership the certificate was issued. Among other things, the defendant contested the right of the plaintiff to recover, upon the ground that he had not, previous to the issuance of the certificate, been a contributor to the benefit fund of the order, and that no evidence of that fact had been submitted in his favor by the conclave of which he was a member. Following the statement above quoted is the statement: "That this certificate is issued upon evidence received from said conclave that said person is a contributor to the benefit fund of this order." So that upon that proposition the defendant is estopped by its statement under its own hand and seal. The only conditions upon which his beneficiary was to be denied the right to participate were the warranties by him that

The statements made by the member in his petition for membership in said conclave, and the statements certified by said petitioner to the medical examiner, both of which are filed in the secretary's office, to be made a part of this contract, and upon condition that the said member complies in the future with the laws, rules, and regulations now governing said conclave and fund, or that may hereafter be enacted by the supreme conclave to govern said conclave and fund.

There is no intimation in the evidence that any false statement was made by the applicant in his petition to the medical examiner. It is admitted by the certificate that both of these were filed in the supreme secretary's office, and the only contention is that this "benefit certificate," after its issue, had been illegally delivered to the beneficiary, the member not having paid or tendered his dues. The testimony upon this point seems to have been somewhat conflicting, but there was ample evidence from which the jury could have found, had the case been made to turn upon that point, that the benefit certificate, though actually received by the beneficiary, was by that act delivered to the member, it being shown that for this purpose the beneficiary was the agent of the member.

3. No fraud or fraudulent statement of any fact material to be known was practiced by the member, and he, having paid or tendered



all the dues that were demanded up to that time, was entitled to the certificate; and as the controlling question in the present case was whether or not the benefit certificate had ever, in fact, been delivered to the duly-authorized agent of the member, who obtained possession of the certificate in good faith and without fraud, the case ought to have been made to turn mainly upon the determination of that issue, and should have been submitted to the jury accordingly. Instructions which relate to questions antedating, and which, as we have seen, were concluded by the issue of the certificate, ought not to change or vary the rights of the member.

4. Of course, if there was no lawful delivery of the certificate, there was no contract on the part of the defendant, and it would not be liable. If there was a lawful delivery of this certificate to the member or his agent, and there had been upon the part of the member no breach of any of the duties imposed upon him by the laws of the order between the time the certificate was issued and the time of his death, he would be entitled to recovery.

Judgment reversed.

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## UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

COMMERCIAL TRAVELERS' MUT. ACC. ASSN. OF AMERICA

*vs.*

FULTON ET AL.\*

An accident policy provided that it should not cover injuries or death resulting from, or caused directly or indirectly, wholly or in part, from certain diseases not while effected by them.

*Held*, That the word "effected" could not be construed as intended for "affected," though that might be what was meant by the insurer.

*Held*, That there could be no recovery if death would not have resulted except for one of the diseases enumerated; and an instruction that the finding should be for the plaintiff if the accident was sufficient to have caused death in case of a diseased heart, though not sufficient to cause death if the heart was sound, was erroneous.

M. W. VAN AUKEN, *for Plaintiff in Error.*

CHARLES A. TALCOTT, *for Defendants in Error.*

Before Lacombe and Shipman, Circuit Judges.

LACOMBE, C. J.

The relevant parts of the policy, which is dated November 17, 1892, are as follows :—

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\* Decision rendered, Feb. 23, 1897.

"The Commercial Travelers' Mutual Accident Association of America, by this certificate of membership, in consideration of the membership fee and the warranties and agreements contained in his application for membership, hereby accepts Thomas K. Fulton, \* \* \* and hereby insures him, in the following manner, subject \* \* \* to all conditions hereinafter contained, against personal, bodily injuries affected during the continuance of membership and this insurance, through external, violent, and accidental means, to wit: (1) In the sum of \$25 per week against loss of time \* \* \* resulting from bodily injuries, effected through means as aforesaid, which shall, independently of all other causes, immediately, wholly, and continuously disable him. \* \* \* (2) Or if such injuries alone shall immediately sever, above the wrist or ankle, one hand and foot," etc., " \* \* \* the association will pay to the insured \* \* \* \$5,000. (3) Or if such injuries alone shall in like manner immediately sever either hand or foot," etc., " \* \* \* the association will pay to the insured \* \* \* \$2,500. (4) Any member of this association who, during the continuance of his membership, sustains, through external, violent, and accidental means, an injury, which injury alone, in the judgment of the medical examiners, causes total disability, \* \* \* the said member shall \* \* \* receive \$2,500. (5) Or if such injuries alone shall immediately and entirely destroy one eye," etc., " \* \* \* the association will pay \* \* \* \$1,000. (6) Or if death shall result from such injuries alone, and within three calendar months, the association will pay \$5,000 to his sisters, Harriet and Anna Fulton. \* \* \* The conditions under which this certificate is issued and accepted by the insured (member) are as follows: First, The insurance shall not extend to or cover disappearances, or injuries, whether fatal or disabling, of which there is no external, visible mark on the body of the insured; nor extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, vertigo, somnambulism or disease in any form, or while effected thereby; nor extend to cover injuries or death resulting from or caused by gas or poison," etc.

On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the sidewalk, waiting for a street car, suddenly fell. From the evidence the jury were entitled to infer that his fall was caused by an accidental slip upon snow or ice, and for the purposes of this appeal it must be assumed that the fall was the result of an accident. In falling he struck upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It then appeared that at the time of the accident the deceased was affected with a diseased condition of the aortic valves and calcification of both coronary arteries. Calcification is a deposit of lime salts in the walls of the tube, making it rigid and fragile, instead of elastic, as it is in health. There was dilation of the heart and

hypertrophy. It is unnecessary to go into further details, since the plaintiffs' own expert, who was present at the autopsy, testified that "the conditions which [he] found in the heart would indicate that the heart was diseased." There was much dispute upon the testimony as to what the autopsy disclosed as to the condition of the brain, but on this appeal it must be assumed that there was evidence of injury to the brain, resulting from the blows which left the marks found after his fall.

Before proceeding to discuss the points which are raised by exceptions of the plaintiff in error seasonably taken, it seems appropriate to call attention to a point of practice. Eleven of the exceptions to the charge of the judge, which have been assigned as error, and to which argument has been addressed in the brief, were not taken, as the record shows, until after the jury had retired in charge of a sworn bailiff. This practice has been expressly condemned by the supreme court in *Hickory vs. U. S.* (151 U. S., 316, 14 Sup. Ct., 334), and by this court (*Park Bros. & Co. vs. Bushnell*, 9 C. C. A., 140, 60 Fed., 583), for reasons which may be found therein set forth. If, as plaintiff in error suggested on the oral argument, this was by the express direction of the trial judge, who thus deprived plaintiff in error of the opportunity to take its exceptions at the proper time, that fact should have been set forth in the record, and we might afford proper relief. But, in the absence of anything to indicate such a departure from the well-settled practice, we must assume that this case is in that respect on all fours with *Park Bros. vs. Bushnell*, supra, and dispose of these 11 exceptions in the manner indicated in that case. Fortunately for plaintiff in error, the exceptions which were properly reserved sufficiently present the points it has argued in this court.

Inasmuch as it is conceded that Fulton was affected with a serious disease of the heart at the time of the accident, defendant contends that his beneficiaries were not entitled to recover, and that verdict should have been directed for defendant. It is insisted that the conditions of the policy were expressly designed to meet just such a case, and to avoid all controversy between medical experts as to the relative potency of external and internal conditions causing death; that it was designed to take the place of medical examinations into the physical condition of members, each member stipulating that if he was affected by a rotten heart, or Bright's disease, or an incipient cataract, or other disease which might be calculated to increase his risk of injury, or his risk of damage from injury, he would not call upon the association for relief. The language of the condition referred to is:—

The insurance under this contract shall not \* \* \* extend to or cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, vertigo, somnambulism or disease in any form, or while effected thereby.

The sentence is ungrammatical, and the last clause meaningless, as may be seen from the following analysis:—

Insurance under this contract shall not cover

A. Accidental injuries or death resulting from or caused, directly, or indirectly, wholly or in part, by 1, hernia; 2, fits; 3, vertigo; 4, somnambulism; 5, disease in any form.

B. Accidental injuries or death while effected by 1, hernia; 2 fits; 3, vertigo; 4, somnambulism; 5, disease in any form.

If the word "while" were given the meaning it sometimes has, viz., "when," the word "effected" would qualify the antecedent "accidental injuries or death," and the whole sentence would be grammatically accurate; but, if so construed, clause B would mean no more than clause A. To give to the clause the meaning for which defendant contends, it would be necessary to change the word "effected" to another word, with a different meaning, viz., "affected." It may very well be that it was the intention of the defendant to print the latter word in its forms of policy, but that does not change the situation. This is an action at law upon the contract as it was made and executed, not a suit in equity to reform the contract, fortified with evidence appropriate to such a prayer for relief, and we must take the contract as we find it. Upon familiar principles, all its ambiguities and obscurities are to be resolved against the draftsman.

Although no meaning more favorable to the defendant can be spelled out of the last clause, the residue of the sentence contains a perfectly plain, unambiguous, and explicit statement, in harmony with all the other provisions of the policy. The insurer is not to respond when death is caused directly or indirectly by disease, nor when it is caused in part by disease. In other words, when the accident (such as a fall) which causes the death was itself caused by some disease, or when an existing disease co-operates with the accidental injuries to cause the death, or when the accidental injuries are of such a character that they would not cause the death of a person in normal health, but do kill the insured, because an existing disease, unknown to the insurer, unknown perhaps to the insured, has put him into such an abnormal condition that he is unable to resist the effects of the injuries as he would if in normal health,—in none of these cases is the insurer liable. The true construction of a clause providing that a policy shall not cover "death or disability resulting wholly or in part, directly or indirectly, \* \* \* from

disease or bodily infirmity," is found admirably expressed in the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Association vs. Shryock*, 20 C. C. A., 5:—

"If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused the death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of the insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident."

Much has been said in argument upon the question of proximate and remote cause. It may be well to refer to some of the cases cited on the briefs, in order the better to appreciate, when the evidence in this record is discussed, that such question plays no part here. In *Insurance Co. vs. Melick* [also in the Court of Appeals for the Eighth Circuit] (12 C. C. A., 544), the condition excluded "death \* \* \* resulting wholly or partly \* \* \* from disease or bodily infirmity, \* \* \* intentional injuries (inflicted by the insured or any other person)." The insured accidentally shot himself in the foot. The wound resulted in tetanus or lockjaw, and on the eighteenth day after the accident he was found dead, with his throat cut and a scalpel in his hand; having also been in the embrace of tetanic spasm, causing intense agony, at the time of his death, the evidence leaving it an open question whether the spasm or the cut was the immediate cause of death. It was left to the jury to determine whether the accident was the approximate cause of the death. It will be noted that no independent disease had contributed in any way to the catastrophe. The spasm or the delirious impulse to end his tortures were both themselves caused solely by the accident. In *Freeman vs. Association* (156 Mass., 351), the policy covered where "accidental injuries alone \* \* \* shall have occasioned death," and did "not extend to any case \* \* \* in which death or disability occurs in consequence of disease, \* \* \* nor to any case except where the injury is the proximate cause of the disability or death." It was proved that the insured, Freeman, died of peritonitis localized in the region of the liver, and the evidence tended to show that it was induced by a fall. There was also evidence indicating that he had previously had peritonitis in the same part, and that the previous disease had produced effects which rendered him liable to a recurrence of it; but there was no evidence to show that he had peritonitis or any other disease at the time of the fall.

The court gives a careful and elaborate definition and discussion of "proximate cause" within the meaning of the policy. That definition and discussion, however, were in criticism and disapproval of a contention of the defendant that the jury should have been charged that defendant was not liable in case of death from disease, even if the disease is caused by an accident,—a very different hypothesis from the one at bar, where there is no suggestion that the disease which defendant insists co-operated to produce death was itself caused by the accident. When the Massachusetts court, however, deals with the other branch of the case, it approves of the charge under review, which instructed the jury as follows :—

"The question as to whether peritonitis, if that caused his death, is to be deemed a disease, within the meaning of this policy, and the proximate cause of death, within the meaning of this policy, so far as to prevent a recovery, depends upon the question whether or not, before the time of the fall and at the time of the fall, he had then the disease,—was then suffering with the disease. If he was, then, in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover."

And the charge in the Freeman Case then proceeds to deal with a case where the insured had had peritonitis, but had recovered, leaving him predisposed to contract such disease again, but not actually affected with the disease at the time of the accident. In the case now under review there is no dispute but what the insured was actually affected with disease prior to and at the time of the accident. The medical witnesses called for the defendant testified that in their opinion the injuries to the head were not fatal in their tendency, nor sufficient to cause death. On the other hand, plaintiffs' experts, or, rather, one of them, ascribed death to a hemorrhage of the brain caused by a blow on the head; the witness, on cross-examination, stating that in his opinion the injuries, as they were described by those who conducted the autopsy, might be sufficient to cause death; adding that he thought it "entirely possible that a healthy man would be killed by falling down and striking in the places where this man, as I am told, was struck." There was therefore a conflict of evidence as to whether the injuries to the head—injuries caused by the accident—were or were not such as to cause Fulton's death.

Defendant contends that the jury were not fully and fairly instructed as to the consideration to be given by them to the conceded heart disease, in view of the testimony of the medical experts. For the purposes of this appeal, the evidence of defendant's experts may be disregarded, and defendant's contention considered in the light

of the concessions made by plaintiffs' experts. Dr. Rigg took part in the autopsy as a representative of plaintiffs. He testified that he found "a diseased condition of the aortic valves, and calcification of the coronary arteries, \* \* \* one slightly; \* \* \* that there was a very small amount of dilation of the heart, \* \* \* and hypertrophy; that the conditions which he found in the heart would indicate that the heart was diseased,"—and added:—

"I should certainly regard the diseased condition of the heart as the secondary cause of this man's death, but not the determining cause. \* \* \* It would not take as much of a shock to cause death in a man whose heart was diseased as it would in the case of a man whose heart was in a healthy condition. \* \* \* If Mr. Fulton's had been in a perfectly healthy condition, I think he would have been better able to have withstood this shock. That is the reason that leads me to say that the unhealthy condition of the heart was the secondary cause. \* \* \* I don't think that the fall produced any change in the heart, other than withdrawing of the nerve force. As a result of that the circulation would be arrested. Because of the diseased condition of the heart, it would be arrested the more easily. The heart would be more easily affected. \* \* \* If this man's heart had been perfectly healthy, so far as I can determine, he might have withstood this fall."

And upon recross-examination he said:—

"To sum this up, I say, in my judgment, the primary cause of his death was the fall, and the secondary cause was the diseased condition of his heart."

The other medical expert called by plaintiffs, Dr. Ford, had never seen the deceased. He testified to opinions based upon the facts testified to by the other witnesses. He said:—

"I think that the injuries in this case might be sufficient to cause death. I am not positive it is sufficient. I would say that it is my opinion that death came from these injuries. \* \* \* And I should be very positive indeed. In coming to this conclusion, I consider the condition of the heart as found in the autopsy. My idea is that death was due to some lesion in the brain produced by the blow. I hadn't said anything about the heart. I will if you want me to. I think the man was much more likely to have died from a shock of that sort, because of his weakened circulation. And that weakened circulation enabled this violence to accomplish greater results than if the condition of the heart had not been a weakened one. I should say this condition of the heart made it more easy to kill the man. That is quite a different statement than that the condition of the heart assisted in causing death, or contributed to it.

I should say that a perfectly sound man, with a normal, healthy heart, would have possibly been killed by the blows such as there is evidence of in this autopsy. I do not say that every man would have been. \* \* \* I take into consideration, in determining the cause of this man's death, the condition of the heart. The condition of this man's heart was not the primary cause of his death, according to the account that has been read to me. I did not give an opinion that the sole cause of death was this blow. I have not been asked what other causes of death there might have been. I have not heard of any. I have not thought about it. There might have been a thousand other causes. I have heard of heart disease in connection with this case. I would not tell the jury that this organic disease of this man's heart had nothing to do with his death. I have not said so. It did have something to do with it. It made the method of killing easier. In that sense, I do not think it was one of the causes. I do not think that was the cause of death. I think he was killed easier because he had this weakened circulation than if he had been perfectly sound. Of course, I cannot say that, if he had not had this fall, that he would not have died at some time with heart disease. The general condition of the heart entered into the effect of death. Not as its causation, however, but as to the result of an injury [sic in record]. I don't think it is what is called a 'secondary cause.' That is the cause of the man's weakness, and his want of resistance, and, perhaps, the cause of his slipping up. He might have slipped more easily than if he was twenty years younger, or more healthy, but it was not the cause of death. My idea is that the immediate cause of death was this shock. If his condition had been perfectly healthy, that shock might not necessarily have caused death. In that sense, the condition of the heart was not a secondary cause. It was a condition which made him more easy to succumb to an injury, but it could not have caused the injury. I think the injury would have caused the death. This made him less able to resist the shock of the blow or injury, but it did not cause the injury, it did not form the initiative. The blow was the initiative, more or less, and, on account of the heart as it was, this blow had this effect. I do not think you can call it a 'cause' either second, third, or fourth. Without that condition the blow might have and it might not have caused."

It is, to say the least, a somewhat doubtful question whether, in this state of the proof, it was proper to send the case to the jury. Disjointed phrases may be pieced together so as apparently to sustain the proposition that Fulton was killed by the blow alone, without the efficient co-operation of any other cause. It is, of course,



easy to conceive of an accidental injury so manifestly destructive of life that the diseased condition of the individual would contribute in no wise to the catastrophe. But an examination of the extended quotations *supra*, and of the rest of the testimony, seems to indicate that what the experts meant was what the last witness has expressed, namely, that they reject the disease as a "cause" because it did not form the initiative, but that none of them are willing to assert, even as an opinion, that the heart disease had nothing to do with the death, while all concede that it made an injury, from which an individual in normal health might stand a fair chance of recovery, necessarily fatal. However, it is not now necessary to decide this question.

At the close of the charge defendant asked the court to instruct the jury:—

"That if the condition of the deceased's heart contributed to his death, as plaintiff's witness, Dr. Rigg, testified, plaintiff cannot recover."

To this the court replied:—

"I think I will charge that, however, with the qualification, as I have already said to the jury, that if the jury find that this blow was sufficient to cause the death of a man of his weight, age, and condition at that time, that their verdict may be for the plaintiffs, even though his condition at the time of the death might have made it more difficult for him to rally from the effects of this blow than a perfectly healthy man."

Exception was duly reserved. As qualified, this instruction, standing alone, allows the jury to find for the plaintiffs if they believe the blow was sufficient to cause the death of a man with a diseased heart (which was deceased's condition), although insufficient to kill one with a normally healthy heart, which is manifestly an erroneous instruction. The court had just charged, at defendant's request, that there could be no recovery "if the fall was caused by disease," or "if disease was a secondary cause of death," or "if disease was one of the causes of death," or "if disease contributed to his death." The next request might well have been refused on the ground that the subject of contributory cause had been sufficiently covered, and defendant contends with some force that the jury might fairly understand that the qualification added to it was applicable to the last four requests. Moreover, coming as the very last statement of the court to the jury, it was calculated to leave a stronger impress upon their minds than if it had formed a single sentence in the colloquial charge. An appellate court, however, should not be astute to reverse because, in the hurry of a trial, some single phrase of voluminous instructions to the jury may contain a misstatement as to the

law of the case, especially when it is uttered in ruling upon a dozen requests, which appear to have been presented to the judge only after the colloquium, instead of before he began to instruct, as they should have been. In such a case it must be collated with the rest of the charge, in order to see if, taken as a whole, the instructions may have been calculated to mislead. The very qualification complained of is itself qualified with the phrase, "as I have already said to the jury," which expressly referred them to the more detailed discussion of the subject which they had already listened to. If, therefore, when the charge is examined as a whole, it appears that the jury, if attentive, must have understood that there could be no verdict for the plaintiffs if the diseased condition of the heart directly or indirectly contributed to cause the death of Fulton; no recovery if, by reason of Fulton's diseased condition, the blow was fatal to him, although a normally healthy man would in all probability have rallied from its effects,—then the verdict should not be set aside, although the phrasing of this particular qualification be erroneous. The charge, as a whole, however, did not, in our opinion, explicitly direct the attention of the jury to the controlling issue in the case. The defendant requested the court to charge that the burden of proof was upon the plaintiffs to show "that the injuries resulting from the fall alone caused death." To this the court replied: "I do charge that. It must be the proximate cause of death." This is the keynote of the whole charge, and, taken as a whole, it evidently directed the attention of the jury to deciding the question what was the "proximate cause" of death. The natural result would be that, having reached the conclusion that the injuries were the "proximate cause," they would neglect to inquire whether there was any other cause of death, not proximate, but efficiently contributing. As was said before, under this policy, and upon the facts in proof, there was no question of proximate or remote cause, but only whether there were two co-operating causes, or only a sole cause. There are undoubtedly many passages in the charge which plainly indicate the correct rule that plaintiffs could not recover unless the jury were satisfied that the accidental injury was sufficient of itself to cause death to a healthy man; but upon the other hypothesis, which the evidence warranted, namely, that the fall produced a shock which called for responsive action from the heart, which it was too weak to give efficiently, the general effect of the charge failed, in our opinion, sufficiently to impress upon the jury that, if the disease thus contributed to cause death, plaintiffs could not recover. In other words, having reached the conclusion that the injury was the "active, efficient, procuring cause;" that the blow was, as plaintiffs

expert said, "the initiative,"—the jury, under the instructions given them, would be likely to trouble themselves with no further question as to any subsidiary cause. It will be sufficient to cite two passages from the charge. After setting forth the issues and the contract, the court began its statement of the "law as applicable to such a condition of affairs as exists here" by reading from the opinion in *Freeman vs. Association*, *supra*, which he informed the jury was "a clear statement of the law." The passage thus read and given to the jury in this case as the headlight to their deliberation is as follows:—

"The principal question \* \* \* is, what kind of cause is to be deemed *proximate*, within the meaning of the policy? Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim, '*Causa proxima non remota spectatur*,' is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the approximate cause. It means that the law will not go further back in the line of causation than to find the *active, efficient, procuring cause*, of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions. The law does not consider the cause or causes, beyond seeking the *efficient, predominant cause*, which, following it no further than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes."

The italicized portions illustrate the criticism above expressed. Subsequently in the charge, making a more specific application to the facts in this case, the court instructed the jury as follows:—

"The accident must be the *actual, immediate and proximate cause* of the death; and, if the proof convinces you that the accident caused Fulton's death; then the law is that the policy would not be avoided, even though it be possible that the man was suffering from some other disease, which, to a certain extent, might have rendered his system less able to throw off the effects of the blow than if he had been a younger and more healthy man."

Neither of these passages from the charge are covered by exceptions taken at the proper time, but the qualification to the request

above quoted is thus covered. Inasmuch as that qualification is manifestly erroneous, and the passages last above quoted show that the charge as a whole was not such as to warrant a holding that the erroneous qualification could have worked no injury to the defendant, the judgment must be reversed and the case remanded for a new trial.

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SUPREME COURT OF IOWA.

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ERB

vs.

GERMAN INS. CO.\* }

It is not a violation of the Iowa law for one to own a drug store, even though he himself be not a registered pharmacist.

An order for a month's rent given to a party to whom plaintiff had traded the property does not show that the occupant was not the tenant of plaintiff, at least as to the insured furniture and fixtures.

Neither of the above pleas by the insurance company are good. The policy must be paid.

BERRYHILL & HENRY, *for Appellant.*

EARLE & PROUTY, *for Appellee.*

DEEMER, J.

On the 13th day of August, 1893, defendant issued to plaintiff a policy of fire insurance covering furniture and fixtures consisting of counters, shelves, and prescription case contained in a two-story brick building, situate on lot 10, block 19, of the Milwaukee Land Company's addition to Coon Rapids, Iowa. On the 9th of September following, the property was destroyed by fire. This action was brought to recover the amount of the loss sustained. The defendant pleaded in defense that at the time the property was destroyed it was being used by a tenant of plaintiff for an unlawful use, contrary to a provision of the policy, which is as follows: "If the premises insured shall be used or occupied in whole or in part for an unlawful purpose, this policy shall cease and determine." The policy also contained the following: "Permission to be used by tenant." Defendant pleaded that at the time of the fire the property was being used by one Henry, who was not a tenant of plaintiff, and that for this reason the policy was of no force. The only testimony adduced upon the trial in support of these issues was, in substance,

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\* Decision rendered, October 20, 1896.

as follows: One Henry said that at the time of the fire he occupied a storeroom situated upon the lot described in the policy; that he had a contract with plaintiff for the use of certain furniture and fixtures therein; that Erb owned the building when he rented the building and fixtures, but that he traded it, about a month before the fire, to one Wilson, and that Erb gave Wilson an order on him (Henry) for the last month's rent; that he had a drug store in the building, and that he was not a registered pharmacist. The law which it is claimed this evidence shows was violated is as follows: "It shall be unlawful for any person not a registered pharmacist within the meaning of this act, to conduct any pharmacy, drug store, apothecary shop, or any store for the purpose of retailing, compounding or dispensing medicines or poisons for medicinal use." McClain's code, §2,523. It is manifest that the proof fails to show a violation of the law. There is no proof that Henry was conducting a pharmacy or drug store contrary to the statute. It is no crime for one to own a drug store, even though he may not be a registered pharmacist. He may have it conducted by those who are competent for such work, and thus fully meet all the requirements of the law. No violation of the law was shown, and the court very properly took this issue from the jury.

As to the other defense the evidence is also lacking. It shows that Henry was a tenant of plaintiff during the month in which the fire occurred, but that plaintiff gave to one Wilson, who it seems had traded for the property, or some of it, shortly before, an order on Henry for the last month's rent. There is nothing to show that Henry was not the plaintiff's tenant at the time of the fire, at least so far as the furniture and fixtures insured are concerned. The lower court correctly held that there was nothing to submit to the jury but the value of the property destroyed. Affirmed.

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## SUPREME JUDICIAL COURT OF MAINE.

EATON

vs.

ATLAS ACCIDENT INS. CO\* }

The plaintiff was thrown from a bicycle while riding on Sunday, and injured. He rode about six miles, to attend the funeral of his friend, and was injured when returning by another road, four miles longer than the direct road to his home. *Held*, That the act was not prohibited by Rev. St., c.

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\*Decision rendered, February 17, 1897. Official syllabus.

124, § 20, relating to the Lord's day, and did not avoid a clause of an accident policy which prevents recovery for an injury received "while or in consequence of violating any law."

As the plaintiff, after attending the funeral, returned home by a circuitous route, which increased the distance by several miles, *held*, that this was done as a recreation, and for health or pleasure, and brings the claim for compensation within the marginal clause of the policy which provides that, "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting), yachting, fishing, or gunning, indemnity will be paid at fifth-class rates, as given in the company's latest manual."

The same policy contained a clause "that, for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous," the insured should be entitled to receive only such amount as the company pays for such increased hazard. *Held*, That this clause relates to an occupation, employment, or business—a vocation, and not an avocation—occasional, exceptional, and outside of his usual and regular vocation.

W. P. THOMPSON and N. WARDWELL, *for Plaintiff*.

R. F. DUNTON, *for Defendants*.

STROUT, J.

Plaintiff was thrown from a bicycle while riding on Sunday, and injured. It is admitted that he was totally disabled from pursuing his vocation for four weeks, and that seasonable and sufficient notice was given the company. At the time of the injury, plaintiff held a policy of defendant company, insuring him at the rate of \$25 per week, not exceeding 52 weeks, against loss of time resulting from bodily injury which wholly disabled him from transacting any and all of the duties pertaining to his occupation, as stated, being that of a letter carrier. In the margin of the policy it was provided that

If the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting), yachting, fishing, or gunning, indemnity will be paid at fifth-class rates, as given in the company's latest manual.

It is admitted that, if the plaintiff's accident is within this clause upon the margin of the policy, the amount recoverable is only \$12.50 per week.

The defendants deny liability, under a provision in the policy that the contract shall not cover an injury received "while or in consequence of violating any law," and strenuously insist that the plaintiff's riding on Sunday was in violation of Rev. St., c. 124, § 20, relating to the Lord's day.

The plaintiff rode from his home about six miles, to attend the funeral of his friend, and returned by another road, about four miles greater distance than the direct road home. It has been held that riding to a funeral, or walking or riding for health and exercise, on the Lord's day, does not fall within the prohibition of the statute. It should not be construed to prohibit the doing of those things

necessary and suitable to health: *Sullivan vs. Railroad Co.*, 82 Me., 198. The defense upon this ground is without merit.

The defendants claim that, if liable at all, it is only for \$12.50 per week, that being the amount recoverable if plaintiff was amateur bicycling for recreation or pleasure, within the marginal clause of the policy. If the plaintiff had ridden to the funeral and returned by the direct route both ways, it might well be held as a work of necessity or charity, and not a riding for pleasure, within the marginal clause; nor would it fall within the agreement in the application, which was made part of the policy, "that, for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous," he should be entitled to receive only such amount as the company pays for such increased hazard. This provision relates to an occupation, employment, or business—a vocation, and not an avocation—occasional, exceptional, and outside his usual and regular vocation. But it appears that, after attending the funeral, plaintiff returned home by a circuitous route, which increased the distance by several miles. The conclusion is irresistible that this was done as a recreation, and for health or pleasure, and while not obnoxious to the Sunday statute, does bring the case within the marginal clause of the policy. The plaintiff's claim is therefore limited to \$12.50 per week for the four weeks of his disability.

The case discloses no ground for interest prior to the date of the writ. At the April term, 1895, defendants offered to be defaulted for \$51, but we are not furnished with the date of writ, and cannot determine whether the amount of the offer of default is equal to or less than the amount plaintiff is entitled to recover. This can be determined below, that proper judgment as to cost may be rendered.

Judgment for plaintiff for \$50 and interest from date of the writ.

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## SUPREME COURT OF UTAH.

MAYNARD

vs.

LOCOMOTIVE ENGINEERS' MUT. LIFE & ACC. INS. ASS'N.\* }

M. was a member of the defendant association, and received an injury in June, 1893, which resulted in the loss of the sight of his right eye. One of the objects of the association is to transact the business of life and accident insurance. M. brought suit to recover on two of its policies, basing his action on a by-law which provides that "any member, while engaged in

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\* Decision rendered, March 8, 1897. Syllabus by the Court.

any lawful vocation, receiving any bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This by-law was adopted on May 28, 1894, after M. received his injury. *Held*, That the by-law is not by its terms retroactive, and, considered by itself, does not include a case where the injury which caused the loss of eyesight occurred prior to its passage; there being no reference in the pleadings to any other by-law which would authorize the inference that the one in question was to apply to such a case. *Held*, further, that the finding of the court that another by-law was in existence, when there was no reference to it in the pleadings, was a finding of fact outside of any issue, and that such finding cannot be considered, although, if the by-law had been properly pleaded, it would have an important bearing in the determination of the case.

Where a fact is found outside of any issue, it is nugatory and of no effect, and cannot be considered as supporting the judgment.

A finding of fact on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer.

When the facts are found, it must affirmatively appear therefrom that they support the judgment, or else the judgment will be subject to attack on appeal.

RICHARDS & MACMILLAN and ARTHUR E. PRATT, *for Appellant*.

H. H. HENDERSON, *for Respondent*.

BARTCH, J.

The plaintiff was a member of the defendant corporation, and brought this action to recover the sum of \$3,000, on two certificates of membership, in the nature of insurance policies, each for \$1,500, for the permanent loss of the eyesight of his right eye, caused by an injury received in the pursuit of a lawful vocation. The cause was tried by the court without a jury, judgment entered in favor of the plaintiff, a new trial refused, and thereupon the defendant appealed.

The only assignment of error which we deem it necessary to consider in this case is the one to the effect that the judgment of the court is not supported by the findings of fact. The court found that the defendant was incorporated on March 1, 1894; that, for a period of twenty-five years prior to that time, it had existed as an unincorporated voluntary association; that when it became incorporated it took all the property and assumed all the liabilities of the voluntary association; that its object at all times has been to transact the business of life and accident insurance on the assessment plan, for the purpose of mutual protection and relief to its members, and the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of its members; that the plaintiff received the injury which caused the loss of his right eye in June, 1893; that the "loss of said right eye did not become permanent for about ten or twelve months after June, 1893;" and that the by-law of the association on which the plaintiff founded his cause of action was adopted and took effect on the 26th of May, 1894. That by-law, so far as material here, reads as follows:—



Any member, while engaged in any lawful vocation, receiving bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy.

This is not by its terms retroactive, but prospective merely, and, considered by itself, does not include and provide for a case like the one at bar, where the injury which caused the loss of eyesight occurred prior to its passage. In form, it is present and future, and does not refer or apply to past occurrences. Whether or not there are other by-laws of the association, adopted either before or after the plaintiff received his injury, which would show that the one under consideration was intended to have a retroactive effect, we are unable to determine, in the absence of reference in the complaint to any such by-laws. Nor is there anything in the abstract or transcript, which we can legitimately consider, that authorizes the inference that the by-law in question was intended to apply to cases where the injury was received before its adoption. It is true, the court found that previous to its incorporation the defendant had a by-law as follows: "Any member, while engaged in a lawful vocation, receiving bodily injuries which alone shall cause the amputation of a limb, whole hand or foot, or total and permanent loss of eyesight, he shall receive the full amount of his policy." This, however, is a fact found outside of any issue raised in the pleadings; for nowhere in the complaint or answer does there appear any reference to such a by-law, nor is its existence shown anywhere in the transcript or abstract, except in the findings of fact. A fact found outside of any issue cannot be considered as supporting the judgment, because facts not in issue need not be found, and, if found, the finding is nugatory and without effect. It may be that the voluntary association had at the time of the plaintiff's injury such a by-law as the one last above quoted, and, if such should be the fact, and the by-law had been properly pleaded, it would doubtless have an important bearing in the determination of this case; but the manner in which it appears in the record precludes its consideration for any purpose, and, therefore, we cannot read it, in connection with that of May 26, 1894, to ascertain whether the respondent has a right to recover. Under the pleadings as they appear in the record, the respondent's right to recover is based on the by-law of May 26, 1894, which, as we have seen, is not by its terms retroactive; and, the court having found that the injury was received prior to its passage, it is clear that such finding does not support the judgment. Nor does it avail the respondent that the court found that the loss of eyesight did not become permanent "for about ten or twelve months after June, 1893." Such finding leaves the fact as to the

date of the loss of sight in doubt, and this would become a material issue if it were to transpire that the date of injury was immaterial, because, if the loss of sight occurred ten months after June, 1893, it occurred before the passage of the by-law, and, if the loss occurred twelve months after that date, then it was after its passage. A finding on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer. The facts are found for the purpose of disposing of the issues, and, when found, it must affirmatively appear that they support the judgment, or else the judgment will be subject to attack on appeal: *Haynes, New Trials and App.*, § 242; *Railroad Co. vs. Reynolds*, 50 Cal., 90; *Harlan vs. Ely*, 55 Cal., 340; *Campbell vs. Buckman*, 49 Cal., 362; *Johnson vs. Squires*, 53 Cal., 37; *Elliott vs. Peck*, id., 85. While it is evident that the findings of fact do not support the judgment, and that it cannot stand, still we are not satisfied that the respondent cannot ultimately recover the amount of his policies, if the complaint be carefully revised by amendment so as to present the issues suggested by the record in a proper manner. The cause is therefore reversed and remanded, with directions to the court below to grant a new trial and permit the parties to amend their pleadings, if they so desire. Zane, C. J., and Miner, J., concur.

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## UNITED STATES CIRCUIT COURT OF APPEALS.

### EIGHTH CIRCUIT.

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UNION GUARANTY & TRUST CO. }

vs. }

ROBINSON.\*

An accident association executed a bond to the state with a guaranty company as surety, conditioned on the prompt payment of claims within the state. The association failing to pay a claim, action was brought against the surety by the claimant.

*Held*, As between the principal and surety, the method in which the former signs is of no consequence if it appears that the intention is to bind itself.

*Held*, That the bond was for the benefit of beneficiaries, though made to the state, and the former could bring suit for breach of condition.

*Held*, That judgment obtained against the association was prima facie evidence in an action against the surety.

*Held*, That the judgment with costs was the measure of damages against the surety.

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\* Decision rendered, March 1, 1897.

*Held*, That proof of the admission of an agent is not evidence of his authority, but such proof is harmless when the authority is sufficiently shown otherwise.

Statement of Case by LOCHREN, J.

This was an action at law brought by Minnie Robinson against the Union Guaranty & Trust Company upon a bond executed by the United States Mutual Accident Association as principal, and the Union Guaranty & Trust Company as surety. In accordance with the verdict of a jury, judgment was entered for plaintiff, and defendant brought this writ of error.

On May 30, 1891, the United States Mutual Accident Association of the City of New York, by its policy of that date, under its seal, and signed by Charles B. Peet, president, and James R. Pitcher, secretary, of said association, in consideration of the membership fee and the warranties and agreements contained in his application for membership, accepted Emile O. Moore, of Helena, in the state of Arkansas, and insured him against personal bodily injuries from external, violent, and accidental means, subject to conditions attached to said policy, at specified rates as to the described injuries; and in case of death from such injuries alone and within ninety days, said association agreed to pay \$5,000 to beneficiaries named in said policy. Said Emile O. Moore died at Helena, Ark., February 16, 1893, and the defendant in error here, claiming that she had been substituted as the beneficiary under said policy in case of the death of the assured, and that the assured came to his death by external, violent, and accidental means, commenced an action upon said policy against said United States Mutual Accident Association in the United States Circuit Court for the Eastern District of Missouri, in which action said association duly appeared and answered; and such proceedings were duly had therein that upon the trial of such action, and on the 20th day of May, 1895, the said Minnie Robinson duly recovered judgment in said circuit court against the United States Mutual Accident Association, of New York, aforesaid, for her damages, \$5,379.16, and costs, taxed at \$216.52. To enable the said United States Mutual Accident Association to transact any business in the state of Arkansas, and in compliance with the statutory enactment of that state, the said United States Mutual Accident Association, as principal, and the Union Guaranty & Trust Company, the plaintiff in error here, as surety, on the 4th day of June, 1893, executed their joint bond, whereby they became bound to the state of Arkansas in the sum of \$20,000, reciting that the said Mutual Accident Association proposed to transact the business of accident insurance in that state for one year from that date, and conditioned

that it should promptly pay all claims arising and accruing to any person or persons during said term by virtue of any policy issued by the company, when the same should become due. Said bond was approved and filed with the auditor of said state of Arkansas. The said Mutual Accident Association failing to pay said judgment, the defendant in error commenced this action against the plaintiff in error, as surety upon said bond; and upon the trial, and in accordance with the verdict of the jury, judgment was rendered in favor of the defendant in error for the amount of said former judgment interest, and costs.

JOHN McCLORE, JOHN W. BLACKWOOD, and JOHN E. WILLIAMS, *for Plaintiffs in Error.*

GEORGE H. SANDERS, *for Defendant in Error.*

LOCHREN, D. J., after stating the case as above, delivered the opinion of the court.

1. The certified copy of the bond sued upon was properly admitted in evidence: Sand. & H. Dig., Ark., § 2881.

2. The execution of the bond by the surety, the plaintiff in error, was not disputed; but it was claimed that the bond was not executed by the principal, the United States Mutual Accident Association, and was therefore incomplete and not binding upon the surety. The claim of the plaintiff in error is that it could only have been executed by the principal by signing its corporate name at the foot of the bond. This is not true. It makes no difference in what form an obligor signs a bond, provided it appears that the purpose was to bind himself: *Hinsaman vs. Hinsaman*, 7 Jones (N. C.), 510. Here the name of the principal, as well as that of the surety, was written in full in the body of the bond, and the seal of the principal was impressed opposite the attestation clause, between the obligatory part and the condition. At the close of the whole instrument it was signed: "Charles B. Peet, president; James R. Pitcher, secretary." Right under these the corporate name of the plaintiff in error was signed: "By E. B. Leigh, president; L. W. Coy, secretary,"—and the seal of the plaintiff in error is impressed opposite its signature. Each of these methods of execution is in customary use, and each is as binding as the other. That the principal followed in this case its customary method of executing sealed instruments is shown by comparison with its policy, which was executed in the same manner. It was not, like the instances cited by the plaintiff in error, a case where one signs a bond as surety, which is never signed by other parties named in the body of the bond, and therefore appears

on its face to be incomplete. Here the surety cannot claim that it expected the bond to be signed by the principal after being signed by the surety; for here the bond was signed by the principal before being signed by the surety, and the surety recognized such signing as sufficient by signing right below it.

3. The exemplification of the record of the judgment in favor of Minnie Robinson against the United States Mutual Accident Association was sufficient and properly certified.

4. Although the bond upon which the action was brought was, by its terms, made to the state of Arkansas, it was required and made for the use and benefit of the beneficiaries in the policies of insurance issued in that state, and any such beneficiary could maintain an action for breach of the condition of the bond. Such right of action in the beneficiary was expressly given by the act of March 26, 1887: Sand & H. Dig., § 4133. Some of the provisions of this act were changed by the later acts of March 6, 1891, and March 24, 1893: Sand. & H. Dig., § 4124. But the provision above referred to in the earlier act was left untouched, and still remains.

5. The testimony of the witness Sanders to the effect that Charles B. Peet was the president and James R. Pitcher the secretary of the United States Mutual Accident Association, based upon their admissions of such facts in written correspondence was incompetent; and its admission, against the objections of the plaintiff in error, was erroneous. The authority of an agent cannot be shown by proof of his admissions, and, besides, no foundation was laid to admit oral evidence of the contents of the writings, had the writings been competent. But the plaintiff in error was not prejudiced by the admission of this testimony, as the official character of Peet and Pitcher was abundantly proven by the policy of insurance, and by the recognition of their official character by the plaintiff in error in the execution with them of the bond sued upon.

6. The plaintiff below was not called upon to again establish on this trial her right to recover against the insurance company upon the policy. That right had been established by her judgment in her action against the insurance company; and such judgment against the principal upon the bond, not shown to have been collusive, was competent and sufficient evidence against the surety. In *City of Lowell vs. Parker* (10 Metc., Mass., 309), Chief Justice Shaw says:—

“But it is objected that the judgment was not admissible, because the sureties were not notified, and therefore it was *res inter alios*. But we think this objection cannot be supported, under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a

judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside; but otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proof."

This exposition of the law has been adopted without dissent by courts and text writers, and covers this case. Here there was no evidence tending to show collusion, or to in any way impeach such former judgment, or to disprove any of the matters determined by that judgment.

7. The court properly instructed the jury that under the evidence in the case the plaintiff below was entitled to recover from the defendant below the amount of the judgment aforesaid, which she had recovered against the United States Mutual Accident Association, including the costs and interest upon the same. This was the proper measure of the actual damages sustained by her because of the breach of the condition of said bond. There was no material error in the trial of the case, and the judgment is affirmed.

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## SUPREME COURT OF IOWA.

THEUNEN

vs.

IOWA MUT. BEN. ASS'N.\* }

The certificate of a benevolent society agreed to pay a specified sum at the end of the endowment period. But it further provided that in case the membership fell below a certain number at the time of maturity, the amount which a full assessment would bring should be payment in full.

*Held*, That this provision was not repugnant to the original promise, and was valid.

DAVISON & LANE and STRUBLE & STIGER, *for Appellant*.

BECKER & THEUNEN, *for Appellee*.

DEEMER, J.

The defendant is a mutual benefit society, doing business on the assessment plan. It has no stock, and is simply an association of persons who, according to the articles of incorporation and by-laws, agree that, upon the death of any, each of the survivors will con-

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\* Decision rendered, April 9, 1897.

tribute to a fund for the benefit of the widow and children of the deceased. Its articles of incorporation also provide that, in the event any member should continue his membership to a given date, each of the others would contribute by way of assessment a certain sum to a fund for the benefit of such member. On the 8th day of December, 1883, the defendant issued to plaintiff a certificate of membership by which the company, in consideration of the payment of dues and assessments, agreed to pay the wife of plaintiff the sum of \$3,000 upon the death of said Henry Theunen. The certificate also contained these provisions:—

If, however, the person named in this certificate continue a member, and be living, on the 18th day of December, 1894, then the full amount named herein shall become due and payable to the said Henry Theunen within ninety days after identification. This certificate is issued and accepted upon the following express conditions: First, If said member dies within five years from the date of this certificate, then the beneficiary entitled to the benefits hereunder shall receive, and this association agrees to pay, one-half the amount named in this certificate, and the same shall be in full satisfaction of all claims thereon against the association. If, however, said member dies after the expiration of five years from the date of this certificate, but before the same matures, as above specified, then the beneficiary shall receive the full amount. If, however, said member dies at any time when division A has less than one thousand two hundred members, the beneficiary herein entitled shall receive the net result of an assessment upon the members of division A, not exceeding, however, the amount to which he is entitled as above expressed.

The articles of incorporation were by express stipulation made a part of the certificate. These articles contained the following, among other, provisions:—

Art. 2. The object of this association shall be to guaranty to its members and designated beneficiaries, by means of benefit certificates issued for that purpose, certain sums of money, the members making mutual pledges and giving valid obligations to each other.

Art. 7. This association shall have two plans of operation for insuring the lives of persons. One plan shall be styled the "Endowment Plan," and known as "Division A," under which it will insure the lives of persons for a term of years, and, if they survive the term of years, pay the insured a sum of money as expressed in a certificate given each person insured.

Art. 8. Endowment Plan, Division A. Section 1.

Art. 9. To meet the payment of certificates in division A matured by death or termination of the term of insurance upon the life of the member therein named, each member shall pay, within 30 days of written or printed notice by the association, upon each one thousand dollars expressed in his certificate, an assignment, graded according to his age at the time of becoming a member, as expressed in the following table:

\*   \*   \*   \*   \*   \*   \*   \*

Art. 11, Sec. 5. The payment of matured certificates in this division A, are subject to the following conditions, to wit: Whenever the division has less than 1,200 members, a payment to the beneficiary or holder of the matured

certificates of the amount that a full assessment upon this division will bring, shall be a payment in full; but in no case shall the beneficiary or holder thereof receive more than the amount due on the certificate.

Plaintiff was a member of division A, and, having lived the allotted time, brought this action to recover the endowment named in the policy, to wit, \$3,000. The defendant answered, pleading the articles of incorporation above set out, and alleging that they had made an assessment upon all the members of division A, resulting in the accumulation of a fund amounting to \$23.65, which sum it tendered to plaintiff in satisfaction of his claim. Defendant also pleaded that the certificate of membership, in so far as it promised to pay \$3,000 unconditionally as an endowment, was without authority, *ultra vires*, and void. It further averred that no request or demand had been made upon it by plaintiff to make an assessment upon the members liable to contribute to his endowment, and it claims that the plaintiff has no cause of action, except to compel it to make such assessment. The plaintiff demurred to this answer on the ground (1) that the articles of incorporation were in direct conflict with the certificate of membership, and therefore void; (2) that the defense of *ultra vires* cannot be maintained, for the reason that the contract has been executed on the part of plaintiff; and (3) that the certificate in suit calls for the payment of a specific sum of money, and not for an assessment. It is from the ruling on this demurrer that the appeal is taken.

It is conceded by both parties that the articles of incorporation of the defendant company became a part of the contract between them, and that plaintiff is presumed to have had knowledge of their terms and conditions when he became a member of the company. With the certificate of membership, they constituted the contract between the insurer and the insured, and to all of these papers we must look in arriving at a correct solution of the case. Appellee says, however, that the conditions of the certificate of membership and articles of incorporation are in conflict, and that the contract should be construed in his favor, and as a promise to pay \$3,000 absolutely, and not the net result of an assessment upon members belonging to his division or class. He relies upon the rule that, where there is doubt or ambiguity as to the meaning of the contract, or where there are repugnant provisions, that construction should be adopted which is most favorable to the assured. It is said in argument that both the certificate and article 7 of the articles of incorporation contain an express promise to pay \$3,000, and that section 5 of article 11 is repugnant thereto, and therefore void. As the articles of incorporation are to be construed with the certificate of



membership, it is the same as if they had been written at length therein, and, if they had been so written, the contract would have been an express promise to pay \$3,000 upon the death of the assured, subject to the condition named in the certificate itself, which limited the amount in case his death occurred within five years of the issuance of the policy, and the further condition that there shall be 1,200 members at the time of his death. If there were not that many members, then the company was to pay the net result of an assessment upon the members of that division. There is also a promise to pay \$3,000 to the assured on the 18th day of December, 1894, "subject to the following conditions, to wit: Whenever the division has less than 1,200 members, a payment to the beneficiary or holder of the matured certificates of the amount that a full assessment upon the division will bring shall be a payment in full; but in no case shall the beneficiary or holder thereof receive more than the amount due on the certificate." There is no doubt or ambiguity in any of these provisions. True, the absolute promise is limited by what follows, but there is no obscurity or uncertainty as to what was intended. There is a promise to pay \$3,000 at the end of the endowment period, but this is limited by a further provision which is expressly stated to be a condition of the promise that there shall be 1,200 members at the time the policy matures.

The question resolves itself, then to this: Is a condition which limits the amount to be paid by an insurance company void because it is repugnant to the original promise? It has never been held to our knowledge that an insurance company may not limit the amount of its indemnity by proper conditions. True, these conditions, being made by the company itself, are construed most strongly against it, and so as not to defeat, without a plain necessity, the claim for indemnity. But it is also true that the different provisions of an insurance contract, like that of any other, must be so construed as to give effect to all. The rule as to rejecting repugnant provisions has application only where the contract contains two provisions which are inconsistent and contradictory. The stipulation and conditions of the contract in this case are not inconsistent or contradictory, except as any condition or limitation in a contract is repugnant. And we are not prepared to go to the extent of holding that all conditions or limitations upon an absolute promise to pay are void. With but few exceptions, the aim of the court in construing a contract of insurance is to treat it like any other obligation, and to arrive at the intent of the parties. These exceptions grow largely out of the fact that the insurer writes the contract at its leisure, and deliberately makes choice of the language it uses,

and for that reason the contract should be construed most strongly against the insurer. See *Bac. Ben. Soc.*, §§ 177-179; *May, Ins.*, §§ 172-175; *Wood, Ins.*, §§ 58-62; *Kratenstein vs. Assurance Co.* (N. Y. App.), *Zalesky vs. Insurance Co.* (decided at present term), *Goodwin vs. Society* (Iowa), and cases cited. We are quite clear that there is no such repugnancy between the different provisions of the contract in this case as to defeat the condition contained in section 5 of article 11 of the articles of incorporation of the defendant company, and it follows that the demurrer should have been overruled. Reversed.

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## SUPREME COURT OF OREGON.

CONTINENTAL INS. CO., OF NEW YORK,

vs.

RIGGEN ET AL.\*

The statute of Oregon of 1874, requiring a deposit by foreign companies of United States bonds, and to appoint a resident agent to accept service, was repealed by the laws of 1887, p. 118, providing that companies might do business on certain conditions.

When compliance had been made with the latter statute, failure to maintain a general office in the state in charge of a general agent, as required in laws of 1889, p. 64, does not render void a contract made with an agent to faithfully pay over premiums collected, nor a suit for foreclosure of a mortgage given as security for such payment.

### Statement of facts by BEAN, J.

This is a suit to foreclose a mortgage upon certain real estate in Multnomah County, executed and delivered to the plaintiff by the defendants as security for the payment of a balance due the plaintiff from defendants S. B. Rigger and one T. M. Rigger, former agent of the company, for premiums on fire-insurance business previously done in this state. The only defense is that the contract upon which the suit is brought is void because at the time of its execution the plaintiff was a fire-insurance company organized and existing under the laws of the state of New York, and carrying on business in this state without first having complied with the provisions of sections 3276 and 3580 of Hill's Code, by executing and recording a power of attorney, appointing a resident agent, and maintaining a head or general office in the state under the charge of

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\* Decision rendered, April 19, 1897.

a general agent. The court below held this defense insufficient, and, the defendants declining to answer or plead further, a decree was entered in favor of plaintiff, as prayed for in the complaint, from which the defendants bring this appeal.

R. R. DUNIWAY, *for Appellants.*

J. C. LEASURE, *for Respondent.*

BEAN, J. (after stating the facts.)

In 1864 the legislature passed an act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations, in which it was provided that, before doing business in the state, any of such corporations must deposit with the treasurer of the county in which its principal office or agency is maintained, the sum of \$50,000, in interest-bearing bonds of the United States, as security for persons transacting business with such corporation in the state, and, in addition thereto, must execute and acknowledge a power of attorney appointing a resident agent or attorney, with authority to accept service of process for the corporation, and upon whom service could be made, and cause the same to be recorded in each county where it had a resident agent: Gen. Laws 1864, p. 745. This act was subsequently amended in some matters not material to any question presented at this time, and, as so amended, is published as chapter 24 of the Miscellaneous Laws of the compilation of 1872 by Deady and Lane. In 1887 (Laws 1887, p. 118), the legislature passed an act entitled "An act to regulate and license insurance business in the state of Oregon," being chapter 50 of Hill's Annotated Laws; and the principal question on this appeal is whether the latter act repealed by implication the provisions of the former, requiring a foreign fire-insurance company, before transacting business in the state, to execute and record in each county where it has a resident agent a power of attorney appointing a resident and citizen of the state as its agent, upon whom service of summons may be made. Repeals by implication are never favored, and, when there are two acts upon the same subject, effect will be given to both, if possible; but when they are repugnant so that both cannot stand, the latter, without any repealing clause, will operate as a repeal of the former; and, even when they are not repugnant, if the new statute revises the whole subject-matter of the old, and is plainly intended as a substitute therefor, it will likewise operate as a repeal of the former, although it contains no express provision to that effect: Little vs. Cogswell (20 Or., 345, 25 Pac., 727), and authorities there cited. Now, it is manifest, from an examination of the act of 1887, that it was intended to and does revise the whole subject of fire-insurance

business in the state, and prescribes the terms and conditions upon which both domestic and foreign insurance companies may be permitted to do business here, and therefore, under the rule referred to, clearly operates as a repeal of the provisions of the former act upon the same subject, so far as it affects such companies. It appoints an insurance commissioner charged with the duty of seeing that the laws of the state respecting insurance companies are faithfully executed; prohibits any company, firm, or individual from transacting life, fire, or marine insurance in the state without a license from such commissioner; prescribes in detail the terms and conditions upon which foreign insurance companies may be admitted into the state, and upon which they shall be entitled to do business herein, among which is a provision that they shall file with the insurance commissioner a power of attorney authorizing a citizen and resident of the state to accept service of process in any proceeding in any of the courts of the state or of the United States therein, and upon whom service may be made; and by section 17 it is expressly declared that "the admission of an insurance company to do business in the state shall not be denied by the commissioner when it makes and tenders a full compliance with the provisions of this act." It is clear, therefore, that, when a foreign insurance company complies with the conditions precedent as prescribed in the act of 1887, it is entitled to a license to do business in the state, although it has not complied with the provisions of the former law on the subject, and hence such law must be regarded as repealed by implication. And when so licensed it is lawfully here, and may enforce its contracts in the courts of the state. It is admitted that at the time the note and mortgage in question were executed the plaintiff had fully complied with all the terms and conditions precedent to its right to do business in the state as prescribed in the act of 1887, and that it had been duly licensed by the insurance commissioner for that purpose, and hence it is no defense to this suit that it had not executed and recorded the power of attorney required by sections 8 and 9 of the act of 1864.

The other defense sought to be made is only deserving of a very brief notice. It is sufficient to say that the provision of section 3580 of Hill's Code, as amended in 1889 (*Laws 1889, p. 64*), that every foreign fire and marine insurance company doing business in this state shall have one head or general office in the state, under the charge of an officer known as its "general agent," to whom all other agents shall report not less frequently than once a week, etc., is not made a condition precedent to the right of such a corporation to do business in the state, and a failure to comply therewith will

not render the contract of a foreign insurance company doing business in this state under a license regularly issued by the insurance commissioner void and unenforceable in the courts of the state. A failure in this regard may perhaps be a sufficient ground for the revocation of a license, or for some proceeding by the state to prevent the delinquent company from doing business here, but it constitutes no defense in behalf of a private individual to an action brought against him on a contract made in this state between the company and himself. It follows that there is no error in the record, and the decree of the court below is affirmed.

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SUPREME COURT OF RHODE ISLAND.

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MILKMAN  
vs.  
UNITED MUT. INS CO.\* }

The policy stipulated that a sprinkler "now in use" should be maintained. The company accepted the premiums with knowledge of the fact that there was no sprinkler.  
*Held*, That this was a waiver.

J. JEROME HAHN, *for Plaintiff*.

DEXTER B. POTTER, *for Defendant*.

STINESS, J.

The defendant petitions for a new trial upon the grounds of erroneous rulings and of verdict against the evidence. A policy of insurance was issued by the defendant to the plaintiff, January 10, 1896, upon a stock of goods in a store, with a special provision in the policy "to maintain the automatic sprinkler equipments now in use, in full working order during the continuance of this policy." The principal questions which have been argued relate to the authority of the broker to insert this clause and the liability under it; but it is not necessary to consider these questions, because, assuming all that the defendant claimed in regard to the warranty, the plaintiff sets up the fact (which is not disputed) that the defendant accepted the premium on this policy after the fire, and after full knowledge of the fact that there were no sprinklers in the store. It is a general rule that the acceptance of a premium after a full knowledge of the violation of the condition of a policy is a waiver

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\* Decision rendered, March 31, 1897.

of any forfeiture from such violation: *May, Ins.*, § 362. The defendant concedes that this rule applies to provisions relating to non-payment of premiums, but denies its application to other causes of forfeiture, and also to the receipt of a premium after a loss. That the rule applies to all causes of forfeiture is evident from the following cases: *Osterloh vs. Insurance Co.*, 60 Wis., 126, where the alleged ground of forfeiture was alteration in buildings; *Story vs. Insurance Co.*, 37 La. Ann., 254, change of occupation increasing the risk; *Insurance Co. vs. Raddin*, 120 U. S., 183, change of habits, from temperate to intemperate; *Insurance Co. vs. Amerman*, 16 Ill. App., 528, change of employment, increasing risk; *Frost vs. Insurance Co.*, 5 Denio, 154, false warranty; *Insurance Co. vs. Rudwig*, 80 Ky., 223, removal beyond prescribed limits; *Schwarzbach vs. Protective Union*, 25 W. Va., 622, known disease. The defendant relies on *Insurance Co. vs. Shimp* (16 Ill. App., 248), which, in dicta, supports the defendant's position; but in that case the insurance company simply collected a note which had been given a year before, as part of the premium when the policy was issued, and which was treated as a part of the consideration of the policy, the same as though it had been cash paid at the start.

We see no sufficient reason for a distinction either in the cause of forfeiture or the time of the waiver. It is just as inconsistent for a company to take the premium after it knows of a breach of one condition, and then say that the policy is void, as it is to do so for breach of any other condition, and equally so after or before a loss. In either case the company virtually says: "We take your money, knowing all the facts, but you have no policy." We find no such distinction in cases. Mr. Justice Gray, in *Insurance Co. vs. Raddin*, *supra*, points out the dishonesty of such a position thus: "The question is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of a policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens." The Court of Appeals of New York, by Earl, J., in *Titus vs. Insurance Co.* (81 N. Y., 410), said: "It may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, the company recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or

incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such waiver need not be based upon any new agreement or an estoppel." In *Insurance Co. vs. Tomlinson* (125 Ind., 84), the premium was accepted after a loss, and the breach relied on was the nonpayment of premium in time. Of course, it was held to be a waiver, but the language of the court does not import a distinction on that ground. The court says: "We cannot perceive any solid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment, it affirmed the validity of the policy, and tacitly asserted that the policy was in force from the time it was executed." *Insurance Co. vs. Lansing* (15 Neb., 494) is to the same effect.

It is suggested in the defendant's brief that only a part of the premium was paid; but this is not the fact, as shown in the testimony. The entire premium due on this policy (\$22.50) is entered on the debit side of the agent's account with the company, although there is also an item of \$11.18 on the credit side, which is not explained.

It is also suggested that, under the terms of the policy, there cannot be a waiver of conditions by the act of any officer. We do not need to pass upon the effect of such a stipulation, since in this case the waiver is the act of the company. The company received the premium, and, although it did so through its secretary, still, if that is not the act of the company, then nothing is. Our opinion is that the alleged breach of warranty has been waived, and that the petition for a new trial must be denied.

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## SUPREME COURT OF RHODE ISLAND.

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MANTON }  
vs. }  
ROBINSON.\* }

An endowment policy was assigned as security for an indorsement of a demand note by the assignee. Subsequently it was assigned to another party subject to the prior assignment as security for note given to the second assignee. Neither assignment provided for the surrender or sale of the policy. Afterwards, on the request of the second assignee, the policy was surrendered by the first to the company, without notice to the assignor

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\* Decision rendered, March 18, 1896.

or demand made on him, and the proceeds were applied to liquidate the claims of the assignees.

*Held*, That the surrender was unauthorized and the first assignee was liable.

EDMUND S. HOPKINS, *for Complainant*.

RICHARD B. COMSTOCK and RATHBONE GARDNER, *for Respondent*.

MATTESON, C. J.

This is a bill for an account. The case shows the following facts: The complainant was the holder of a policy of insurance for \$10,000, issued on his life by the Mutual Life Insurance Company, of New York. The policy was a 20-year endowment, maturing January 1, 1886, the premiums on which were payable quarterly and in full during the first ten years of the policy. The last premium was due on October 1, 1876. On March 6, 1873, the complainant assigned the policy to John T. Mauran, formerly of Providence, deceased, as collateral security for his indorsement of Manton's note for \$3,000, payable in four months. On August 20, 1875, Mauran, having received other securities from Manton for other indebtedness, gave to Manton a receipt reciting that he held this policy as security for his indorsement of Manton's notes for \$3,000. On August 6, 1876, the complainant assigned the policy, subject to the prior assignment to Mauran, to Martin C. Stokes, defendant's intestate, as collateral security for a note for \$3,212.07 made by Manton, payable to the order of Stokes on demand. Neither of these assignments contained any provision authorizing a surrender or sale of the policy. The policy was delivered by Manton to Mauran at the time of its assignment to him, on March 6, 1873, and remained in his possession until it passed into the hands of his guardian. Manton continued to pay the premiums on the policy until April 1, 1876, and the three remaining premiums were paid by Mauran, though the complainant claims that one at least of these was subsequently repaid by him to Mauran. The note for the indorsement of which the assignment to Mauran was given was made prior to the assignment to Mauran, and, by an agreement between Manton and Mauran, was to be renewed until January 1, 1878. But the last renewal was made February 22, 1876, and the note given on that renewal became due June 25, 1876, after Manton had ceased to pay the premiums on the policy, and was taken up by Mauran. On July 9, 1878, Henry C. Cranston was appointed guardian of Mauran, and the policy and the overdue note came into his hands as guardian. Cranston, as guardian, in 1881, proposed to the company to surrender the policy for its cash value, but was met by the objection that notice of the assignment to Stokes had been given to the company, and the assignment to him entered on the books of the company, before the assignment to Mauran; and con-



sequently the company could not pay the value of the policy to him unless Stokes should release his claim or join in the receipt. Cranston applied to Stokes to sign the receipt, which Stokes did. The full surrender value of the policy, \$8,079.50, was thereupon, to wit, on May 18, 1881, paid to Cranston, as guardian, who, after deducting from it the premiums paid by Mauran, amounting, with interest, to \$772.35, paid to Stokes \$3,771.43 of the residue on account of the note held by him, and retained for himself, as guardian, on account of the note taken up by Mauran, \$3,535.72. No demand by Stokes for the payment of the note held by him had been made on Manton prior to the surrender of the policy. Nor was any notice given to Manton, either by Cranston as guardian or by Stokes, of an intention to surrender the policy, and Manton was not apprised of the surrender until about six months later, when he heard of it from the company.

The surrender of the policy to the company for its cash value was equivalent to a sale of it to the company. Without raising any objection to it on any other ground, we are of the opinion that the action was unauthorized, because no notice of an intention to surrender was given to Manton by either Cranston or Stokes, so that he might have a reasonable opportunity to redeem the policy; and, further, so far as Stokes was concerned, Manton was in no default, no demand on him for the payment of Stokes's note having been made: *Dewey vs. Bowman*, 8 Cal., 145; *Robinson vs. Hurley*, 11 Iowa, 410.

This suit is against the administrator on the estate of Stokes alone, and the point is taken that the bill ought not to be maintained, because Stokes, in signing the receipt, did nothing more than he might have been compelled to do by Cranston as guardian, since the assignment to Stokes was subject to the prior assignment to Mauran. We do not think the point is tenable. It is by no means clear that the court would have felt warranted in decreeing a surrender of the policy, for at the time of the surrender all the premiums had been paid, so that it was in fact a paid-up policy, having less than five years to run. Neither of the assignments authorized a surrender or sale of the policy, and it was adequate security for the premiums which Mauran had paid, and for the indebtedness for which it was pledged: *Whitaker vs. Gas Co.*, 16 W. Va., 717. But, however this might be, Manton would have been a necessary party to any suit undertaken by Cranston as guardian to enforce his claim against the policy; and the court, whatever its decree, would have protected the rights of Manton. We are of the opinion that the complainant is entitled to an account.

## COURT OF APPEALS OF NEW YORK.

FOLEY ET AL.

vs.

MANUFACTURERS &amp; BUILDERS' FIRE INS. CO., OF NEW YORK.\* }

The owner of the land on which is a building in course of construction by a contractor, who is to furnish work and materials and is to be paid only when the work is completed, is also the owner of the building, and has an insurable interest to the full value of the building.

FRANK HISCOCK, *for Appellant.*W. P. GOODELLE, *for Respondents.*

ANDREWS, C. J.

The sole question in this case is whether the plaintiffs had an insurable interest equal to the full value of the incomplete buildings in course of construction on their lot when the fire occurred. It is the contention on the part of the defendant that as the houses were being constructed under a contract by which the contractors were to furnish the materials and build the houses (above the foundations), and to complete them by a time specified, which had not expired at the time of the fire, for a specified sum to be paid within ten days after their completion, the plaintiffs had no interest to protect in the structures while in their incomplete state, since their destruction by fire would be the loss of the contractors, and not of the owners, whose obligation to build and complete the houses, as the condition of payment, would continue after as before the fire. It may be admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or materials supplied up to the time of the fire: *Tompkins vs. Dudley*, 25 N. Y., 272. The contention of the defendant rests upon a misconception of the insurer's contract, and as to the insurable interest of the plaintiffs in the structures. The defendant, by its contract, undertook to insure the plaintiffs against loss by fire, not exceeding the sum specified, to the "described property," the loss or damage to be ascertained "according to the actual cash value" of the property at the time of the fire. The parties by this contract made the value of the property insured, within the limit, the measure of the insurer's liability. It is an undoubted principle in fire insurance that there must be an insurable interest in the insured, or an insurable interest

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\* Decision rendered, March 2, 1897.

which he represents in the subject of insurance, existing at the time of the happening of the event insured against, to enable him to maintain an action on a fire policy. This flows from the nature of the contract of fire insurance, which is a contract of indemnity; and, where there is no interest, there is no room for indemnity. The plaintiffs had an interest in the subject of insurance, both at the inception of the contract and at the time of the fire. They owned the land upon which the structures were being erected. They themselves had constructed the foundations of the buildings, and, in describing the property insured, the foundations were specifically named. They were in possession of the premises, and the ownership of the fee of the land on which the contractors were erecting the buildings carried with it the ownership of the structures as they progressed, which, according to the general rule of law, became part of the realty by annexation. It is not claimed, nor could it upon the evidence be claimed, that there was any intention either on the part of the owners or the contractors to sever the ownership of the structures from the ownership of the land while the work was in progress, or that the contractors should retain title to the materials put into the buildings until their completion. The defendant is compelled to admit that the loss sued for is within the exact terms of the policy. It is conceded that the recovery does not exceed the property loss occasioned by the fire, and, if counsel can be deemed to have denied that the legal ownership of the structures was in the owners of the land at the time of the fire, the denial is very indistinct, and certainly is not justified by the facts or the law. The defense comes to this: That as the plaintiffs, by their contract with third persons, have imposed upon them the risk and expense of furnishing complete structures, and have assumed no liability until the structures are completed, they had no insurable interest, and have sustained no loss. But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern. When the policy was issued, it could not be known whether the contractors would perform their contract. If they abandoned it, the owners would derive such advantage as would accrue from the partial construction of the buildings prior to such abandonment. It is possible that, if the defendant is compelled to pay the policy, the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however this may be, the owners had an insurable interest to the whole value of the buildings on their land; and the defendants neither can compel the plaintiffs to put the loss on the contractors nor can they resort

to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.

The fact that improvements on land may have cost the owner nothing, or that, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of an insurer, in the absence of any exemption in the policy. See *Clover vs. Insurance Co.*, 101 N. Y., 277; *Kernochan vs. Insurance Co.*, 17 N. Y., 428; *Riggs vs. Insurance Co.*, 125 N. Y., 7; *Trust Co. vs. Boardman*, 149 Mass., 158. The judgment should be affirmed. All concur, except Martin and Vann, JJ., not sitting. Judgment affirmed.

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## SUPREME COURT OF KANSAS.

GERMAN INS. CO., OF FREEPORT, ILL.,

vs.

FIRST NAT. BANK OF BOONVILLE, N. Y.\*

A foreign insurance company which maintains an agency in this state, in charge of agents having general authority to receive premiums, fill out, countersign, and issue policies of insurance, furnished them by the company for that purpose, is subject to the jurisdiction of the courts of this state, and service on the chief officer of the agency is service on the company.

Actions against foreign insurance companies maintaining agencies in this state are not limited to suits on policies of insurance, but the courts have jurisdiction to enforce other contracts as well.

In an action against a foreign insurance company to charge it on its liability as a stockholder in an insolvent domestic corporation, service of summons may be made on the chief officer of an agency in the county where the action is brought, and jurisdiction thereby obtained to render a personal judgment against the defendant.

*JETMORE & JETMORE, for Plaintiff in Error.*

*ROSSINGTON, SMITH & DALLAS and CLIFFORD HISTED, for Defendant in Error.*

ALLEN, J.

The First National Bank of Boonville, N. Y., obtained a judgment in the Circuit Court of Shawnee County against the Western Investment Loan & Trust Company, a Kansas corporation, for \$2,300. Execution having been issued on the judgment, and returned unsatisfied, this action was brought against the German Insurance Company, of Freeport, Ill., to charge it as a stockholder of the loan

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\* Decision rendered, April 10, 1897. Syllabus by the Court.

and trust company. It was alleged in the petition that the insurance company had duly subscribed for fifty shares of stock, of the par value of \$50 each, on which it had paid \$2,000; that there remained unpaid \$500 on the subscription; and that the defendant was liable in the further sum of \$2,500 under its statutory liability. A summons was issued and served on Joseph Groll and J. S. McKittrick, partners, as Groll & McKittrick, managing agents of the defendant, and chief officers of its agency at Topeka. The defendant appeared specially, and moved to set aside the summons and service thereof on various grounds. The motion was overruled. The defendant made no further appearance in the case, and judgment was thereupon rendered in favor of the plaintiff for \$2,500 and costs.

It is contended that the court had no jurisdiction over the defendant, and that the service on Groll & McKittrick was void. Section 69 of the Code of Civil Procedure reads: "Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." It is contended that Groll & McKittrick were not chief officers of an agency, within the meaning of the statute, but that they were mere soliciting agents. Section 53 of the Code provides: "If said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose." It is urged that suits against a foreign insurance company can only be maintained on insurance contracts under these provisions of the statute; that both the parties to this action are foreign corporations; that the plaintiff's cause of action is not based on any contract of insurance entered into in this state; and that our courts can acquire no jurisdiction over the defendant without service of process on one of its principal officers. The old theory that a corporation resides only in the state of its creation no longer obtains. It is now held that a corporation is present in any place where it transacts its business, for the purpose of conferring jurisdiction on the courts, and that service of process may be made on its agents through whom, as its instruments, its business is transacted. The intangible corporation is held to be present wherever its business is carried on, whether it be in the state where its charter was obtained, or in any other sovereignty: *St. Clair vs. Cox*, 106 U. S., 350. Groll & McKittrick represented the insurance company, as its agents, at Topeka, with authority "to receive applications for insurance, moneys for premiums, to countersign, issue, and renew policies of insurance signed by the president, and attested by the secretary." They were furnished blank policies, signed by

the president and secretary, which they were authorized to fill out to receive the premiums thereon, and, when countersigned and delivered, they became valid and binding on the company. Such an agency, under the prior decisions of this court, is a general agency: *Insurance Co. vs. McLanathan*, 11 Kan., 533; *Insurance Co. vs. Hogue*, 41 Kan., 524, 21 Pac., 641; *Insurance Co. vs. Munger*, 49 Kan., 178, 30 Pac., 120. Unquestionably, the insurance company was transacting business in Kansas, and the persons served were in charge of its office, and were the chief officers of the agency. It is sought to draw a distinction between actions on policies of insurance and on other contracts; and, as a basis for the distinction, section 53, of the Code of Civil Procedure, which authorizes an action to be brought in any county where the cause of action arose, and section 41 of chapter 50a of the General Statutes of 1889, which provides for service of process on the superintendent of insurance, are cited. In the case of *Insurance Co. vs. Mortimer* (52 Kan., 784, 35 Pac., 807), it was held that the different methods of service on insurance companies are cumulative, and that service may be made on the chief officer of the agency in an action on a policy of insurance.

The contention that the courts of this state are limited in jurisdiction to actions on policies of insurance is not sound. Issuing such policies and paying losses thereon is by no means the only business an insurance company may lawfully transact. It may lawfully invest its money, employ agents, and contract debts and obligations of various kinds. There is certainly no valid reason why our courts have less power to enforce the payment of one obligation than another. Nor is it essential that the contract sought to be enforced should have been entered into in this state. The company resided here, as well as in the state of Illinois, for the purpose of transacting the business for which it was created, and is as much subject to our laws and the jurisdiction of our courts as any other corporation carrying on business here.

The judgment is affirmed.

COURT OF APPEALS OF KANSAS.

NORTHERN DEPARTMENT, E. D.

DWELLING-HOUSE INS. CO. }

vs. }

KANSAS LOAN & TRUST CO.\* }

Where an insurance policy contains the provision "that when a policy is issued upon the interest of a mortgagee the assured must first exhaust the primary security before he can recover the amount of insurance," and another clause, providing "no suit or action against this company upon this policy shall be sustainable in any court of law or equity unless commenced within six months after the loss or damage shall occur," such provisions being inconsistent, the ordinary statute of limitation would be applicable to such cases.

The mortgage clause sued on is an independent contract. The mortgagee was not bound to bring suit within six months limited by the conditions of the policy, because the provision requiring the primary security to be first exhausted is inconsistent with such limitation, and the six-months' limitation was not intended to apply. The mortgagee was not bound to make proof of loss. The policy imposed that duty upon the owner, and the mortgage clause freed the mortgagee from the consequences of the owner's neglect.

FYKE, YATES & FYKE, *for Plaintiff in Error.*

FULLER & WHITCOMB, *for Defendant in Error.*

McELROY, J.

This was an action brought by the Kansas Loan & Trust Company against the Dwelling-House Insurance Company to recover for the loss by fire under a mortgage clause attached to a policy of insurance issued by said insurance company to one J. M. Aldridge for \$350 on a frame dwelling house. The loss was made payable for assured's account to the Kansas Loan & Trust Company, trustee, or its successors in trust, as their interest may appear. The case was tried before the court without a jury, and the court found the issues in favor of the plaintiff and against the defendant, and rendered judgment in favor of plaintiff for the sum of \$372.81. Motion for new trial filed and overruled, and the case properly presented to this court for review. The issues raised by the pleadings and presented to this court are: First. Can the mortgagee recover on the mortgage clause under the policy sued on, in the absence of any showing that proofs of loss were made? Second. Is the mortgagee debarred from maintaining his action by the contract obligation in the policy to sue within six months after loss?

It is conceded in this case that the policy and mortgage clause were executed by the plaintiff in error, and the premium paid by

\* Decision rendered, April 30, 1897. Syllabus by the Court.

the mortgagor; that the debt of the mortgagee was more than the amount of the insurance, and that there was no fraud in the transaction, so far as the mortgage company was concerned; that the building was destroyed by fire during the term of the policy, and its value was the amount of the policy. The above facts would be ample to entitle the mortgagee to recover only for the restrictions and conditions incorporated into the insurance policy. The property insured was destroyed by fire on October 19, 1891. The petition was filed June 2, 1892. Among the conditions of the policy we find the following:—

No suit or action against this company upon this policy shall be sustainable in any court at law or equity unless commenced within six months after the loss or damage shall occur.

When a policy is issued upon the interest of the mortgagee or other creditor, or is held as collateral security to a mortgage or any other debt or demand, the assured shall not be entitled to demand or recover any part of the amount insured until he, she or they shall have enforced or collected such portion of the debt as can be collected out of the primary security to which this policy is collateral.

Here are two of the conditions of the policy as above stated, which would wholly destroy the insurance to give effect to both. One provides that the mortgage company shall foreclose its mortgage, or exhaust the primary security before commencing its action, which, under our law, would take more than six months, before it would be entitled to commence its action against the insurance company. The other clause provides that it must commence its action within six months, or that such delay will release the insurance company from its liability under the policy. We cannot believe that the intention of the parties was to pay money for insurance upon such contract as would be impossible of enforcement. It is apparent from these conditions and stipulations that it was the intention of the parties to this insurance that the six-months' clause should not be binding upon the mortgagee. We are of the opinion that the six-months' limitation contained in the policy, and the provision in regard to proofs of loss, are not binding upon the mortgagee. The mortgage clause provides:—

It is hereby agreed that this insurance, as to the interest of said trustee only therein, shall not be invalidated by any change of ownership of the property, or by any act or neglect of the grantors in the mortgage or trust deed, or by the owners of the property insured, or by reason of the premises being unoccupied, or that occupation for purposes more hazardous than are permitted by this policy.

And it is provided in the policy:—

All persons having a claim under this policy shall forthwith give written notice of the loss or damage within thirty days; furnish proofs thereof, signed



and sworn to by the claimants, which shall state the time and origin and circumstances of the fire; the title and cash value of all incumbrances upon, and interest of the claimant in, the insured property; the amount of loss or damage; other insurance, if any, and a copy of the written parts of all policies; the changes of the title, internal or external hazard, use, occupation, and possession; what additional insurance or incumbrance has been made, if any, during the time of the insurance; how and for what purpose the building or buildings were occupied at the time of the fire.

In the case of *Insurance Co. vs. Coverdale* (48 Kan., 446), where the effect of a mortgage clause was under discussion by the court, Horton, C. J., said: "The mortgage clause \* \* \* created an independent and a new contract, which removes the mortgagees beyond the control or effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest, separate from the owner, embraced in another and different contract." We think the intent of the mortgage clause was to make the policy operate as an insurance of the mortgagors and mortgagees separately, and to give the mortgagees the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owners, making the mortgagees responsible only for their own acts. It will scarcely be claimed that the mortgagee would be in a condition to make the proof required under the policy. It would be necessary for him to state "the time, origin, and circumstances of the fire, the amount of loss or damage, other insurance, changes of title, internal or external hazard, use, occupation, and possession, additional insurance and additional incumbrances, during the time of the insurance." These are matters as easily known to the insurance company as to the mortgagee. They are matters within the knowledge of the mortgagor; and it would be as easy for the insurance company to obtain such information as for the mortgage company, while, as between the mortgagor and insurance company, they would be a very reasonable requirement. The policy reads:—

If this loss is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured.

The amount of insurance is to be determined by the policy itself, but this must necessarily be done by the terms of the mortgage clause in respect thereto. There are no limitations attached to the contract with the mortgagee, and it is to be construed by its own terms. The object of the mortgage clause is to give the mortgagee protection in case of loss, and to free him from any act or neglect of the owner of the property. One of the conditions of the policy is:—

That this insurance, as to the interest of trustee only therein, shall not be invalidated by any change of ownership of the property, or by any act or neglect of the grantors in the mortgage.

The mortgagee is not a mere assignee of the policy, bound to receive the loss standing as agent of the owner, but he (the mortgagee) is secured by a separate contract. It is provided by the policy in this case

That when a policy is issued upon the interest of a mortgagee, the assured must first exhaust the primary security before he can recover the amount of insurance.

If the terms of the policy are binding upon the mortgagee, we have one clause providing he shall sue within six months after the loss occurs, and another that he must first exhaust the primary security; in other words, foreclose his mortgage. Appraisement of the real estate was waived by the mortgagors, and by no reasonable probability could the mortgagee have foreclosed the mortgage within the six months. It seems that the insurance company, if suit was commenced within six months, could rely upon the condition that the primary security should first be exhausted, and thus defeat the action of plaintiff. If suit was not commenced until after six months, the insurance company could rely upon the six-months' limitation, and thus defeat the action. These provisions being inconsistent, we think the ordinary statute of limitation would apply in this case. It does not seem to us that the six months' limitation can be held to apply to the mortgagee, where another provision of the policy is especially made, applicable to such mortgagee, requiring of him an act which would preclude his suing on the policy within six months: *May, Ins. (3d Ed.)*, 487.

Our conclusion in this case is that the judgment of the lower court should be affirmed, for the reasons: First. This mortgage clause is an independent contract. Second. This mortgagee was not bound to bring suit within the six months limited by the conditions of the policy, because the provision requiring the primary security to be first exhausted is inconsistent with such limitation, and the six-months' limitation was not intended to apply to the mortgagee. Third. The mortgagee was not bound to make proofs of loss. The policy imposed that duty upon the owner, and the mortgage clause freed the mortgagee from the consequences of the owner's neglect.

The judgment will be affirmed. All the judges concurring.

## SUPREME COURT OF IOWA.

MURDY

vs.

SKYLES ET UX.\*

The certificate of a benevolent society stipulated that \$1,500 should be paid to a member in the event of his total disability, or to his wife in the event of his death. The member was injured and received the money, which was given to be deposited by his wife in the bank in her own name. The money was garnisheed by a physician for medical attendance on the husband on an action brought against the husband and wife.

*Held*, That the certificate was a contract of insurance, and the wife could not claim to be entitled to the money exempt to her husband.

*Held*, That the claim for medical attendance was a family expense for which husband and wife were jointly and severally liable.

*Held*, That the case did not come under the statute exempting the avails of policies paid to the surviving widow.

*Held*, That an agreement by the member to pay the physician out of the proceeds was legal and would defeat any exemption, and, where the action was on a note given by the member, such oral agreement may be shown by parol.

T. B. SNYDER and J. D. M. HAMILTON, *for Appellant*.

CRAIG & HARRINGTON, *for Appellees*.

DEEMER, J.

Plaintiff, who is a physician and surgeon, commenced this action against the defendants, who are husband and wife, to recover compensation for medical services rendered the husband, claiming that said services were a family expense chargeable upon the property of both husband and wife. In aid of his suit, he sued out a writ of attachment and caused the German Savings Bank to be garnisheed. The bank, in answer to the process, stated that it was indebted to defendant Anna Skyles in the sum of about \$400. The defendant F. P. Skyles in his answer admitted that he employed plaintiff to examine him on two occasions as a prerequisite to obtaining aid from an organization known as the "Brotherhood of Locomotive Firemen," and admits an indebtedness of \$10. And the defendants jointly pleaded a counterclaim for damages upon the attachment bond given by plaintiff, based upon allegations that the attachment was wrongfully sued out, and the money in the hands of the bank was exempt as the avails of a certain policy of insurance issued to F. P. Skyles. The plaintiff, in reply, denied the allegations of the counterclaim, and further pleaded that he and defendant, F. P.

\* Decision rendered, April 9, 1897.

Skyles, made an arrangement or agreement by which plaintiff's bill should be paid out of the indemnity or insurance money. Thereafter defendants filed a motion to dissolve the attachment and discharge the garnishee on the ground that the money held by the bank was exempt from seizure under attachment or execution. This motion was supported by an affidavit to the effect that F. P. Skyles was injured in a railway wreck, and that for the disability incurred he drew from the Brotherhood of Locomotive Firemen \$1,500, which was deposited in the bank by his wife, who, he says, was the beneficiary under the policy. The affidavit also recites that Skyles was totally disabled, and that the money paid him was all he had to live on. Attached to this motion was a copy of the certificate of membership or policy of insurance issued by the Brotherhood of Locomotive Firemen, which, so far as material, reads as follows:—

This certificate, issued by the Grand Lodge of the Brotherhood of Locomotive Firemen, witnesseth: That Brother F. P. Skyles, a member of Nauvoo Lodge, No. 391, of said order, located at Fort Madison, Iowa, is entitled to all the rights, privileges, and benefits of membership, and to participate in the beneficiary department to the amount of fifteen hundred dollars, which amount, in the event of his total disability, shall be paid to him, or, in the event of his death, to Anna F. Skyles, his wife, whose residence is Fort Madison, Iowa. This certificate is issued on condition that said F. P. Skyles shall comply with all the laws, rules, and regulations of the order while a member of the same; otherwise, this certificate shall be canceled and become null and void.

This motion was submitted in connection with the pleadings in the case, and was by the court sustained. The appeal is from the ruling on this motion.

The questions presented involve a construction of section 1182 of the Code, which is as follows:—

A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts.

This section was amended by the 24th General Assembly as follows:—

And the avails of all policies of insurance on the life of any individual, payable to his surviving widow, shall be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured; provided that in any case the total exemption for the benefit of any one person under the provisions of this section shall not exceed the sum of \$5,000.

Appellee claims that, under the facts shown, the avails of the certificate which we have just set out are exempt under this statute and the amendment thereto. The certificate issued to defendant, F. P. Skyles, gave him membership in an organization which prom-

ised to pay him, in the event of his total disability, the sum of \$1,500, or, in the event of his death, a like sum to his wife. The record does not clearly disclose the character of the organization which issued the certificate, but, from the allegations in the pleadings and the proofs offered, we must presume that it is an insurance company, and that it agreed to pay indemnity to the persons named in the event of the death or total disablement of the assured. It is, then, to all intents and purposes a policy of insurance on the life of Skyles, and it is also a contract of indemnity in which the assurer agrees to pay a certain sum in the event of the total disability of F. P. Skyles. Appellant's counsel say that it is a contract of accident insurance, but there is nothing in the record which so shows, and we must treat it as an ordinary contract of insurance against death and total disability, from whatever cause. Payment under the policy, however, is to be made upon two separate and distinct contingencies,—one the death of the assured, and the other his total disablement; in the former case to the wife of the assured, and in the latter to the assured himself. Appellant contends that, as the payment was made upon the latter contingency, the statute in question does not apply, for the reason that it was not made upon a life-insurance policy. In view of what follows, we do not find it necessary to consider the question. The statute says, in effect, that a life-insurance policy shall inure to the separate use of the wife and children of the assured, independent of his debts. Now, we have frequently held that section 1182, before its amendment, did not exempt the avails of a policy of insurance from the debts of the beneficiary, when such beneficiary is a person other than the assured: *Murray vs. Wells*, 53 Iowa, 256; *Smedley vs. Felt*, 43 Iowa, 607. The amendment to the statute was to meet these decisions, but, as we shall hereafter see, does not apply to the facts of this case. If by any process of construction it could be held that the money was exempt to the assured, yet it does not follow that the motion was correctly sustained. The facts are that the money was deposited by the defendant Anna Skyles, the garnishee answered that it was indebted to her and not to the assured, and the defendants pleaded that the money was and is the property of the wife. F. P. Skyles is not, therefore, claiming the property as exempt to him, and it is well settled that his wife can not claim the money as exempt to her husband under the facts disclosed by this record. The right is purely personal, and can not, ordinarily, be transmitted by sale or gift: *Thomp. Homest. & Ex.*, § 870.

But, if it be conceded that the wife can claim the exemption for her husband, the question yet remains, can she claim it as exempt

from debts of her own? This action was brought against both the husband and the wife to recover the amount of a claim for medical services rendered the husband. Now, we have held that such a claim is a family expense, for which the husband and wife are jointly and severally liable: *Smedley vs. Felt*, 41 Iowa, 588, 43 Iowa, 607; *Schrader vs. Hoover*, 80 Iowa, 243. Unless, then, there is some statute which exempts the funds in her hands, it should be subjected to whatever judgment plaintiff may recover against her. We have already seen that the statute, as it stood before the amendment was made, did not exempt the funds in the hands of the wife from her individual debts. We come, then, to a consideration of the amendment to the statute. This, as we have seen, exempts the avails of all life-insurance policies payable to the surviving widow from all debts of the beneficiary contracted prior to the death of the assured. To meet the requirements of this statute, it must be shown that the assured is dead, that the widow was the beneficiary, and that the debts were contracted prior to the death of the assured. None of these matters are established in this case. On the contrary, it appears that the assured is still alive, that he and not his wife was the beneficiary, and that the money was actually paid to the assured. It needs no argument to show that the case does not fall either within the language or intent of this amendment. It is said, however, that plaintiff's action is upon a note executed by F. P. Skyles alone, and that the rule we have announced should not obtain. This argument is based upon a misconstruction of the petition. It clearly recites a cause of action against both defendants for services rendered the husband, and the note is but incidentally mentioned. The action is not upon the note.

One other point in the case is conclusive against appellees. It is alleged in the reply that at the time defendant Skyles employed the plaintiff, he (Skyles) agreed to pay plaintiff the amount of his claim out of the avails of the insurance policy. Such an agreement, if made, is legal under the statute, and operates to defeat exemption. Appellee says, in answer to the claim, that, as the agreement was oral, it cannot be proven, for the reason that the contract between the parties was in writing. This alleged contract is an ordinary negotiable note for the sum of \$200, signed by F. P. Skyles, executed some time after the original contract, and made payable to J. C. Brewster. It appears, however, that the payee named was simply a trustee, and that the note was really for the benefit of and belonged to appellant. We have already seen that the action is not upon the note; hence the appellee, in the contention he makes, is relying

upon a rule of evidence rather than of pleading. This rule is the familiar one that parol evidence is not admissible to vary, change, or modify the terms of a written contract. The question then arises, would such evidence violate this rule? We do not think it would. Evidence as to such an agreement would not vary, change, or modify a single word of the note. The two contracts might co-exist, and neither would infringe upon the other. It is well settled that a contract may rest partly in writing and partly in parol, and that in such cases extrinsic evidence is admissible to establish that part which is not in writing. It is clear, we think, that the court was in error in refusing to give force and effect to the alleged agreement with reference to the disposition of the avails of the policy.

Another reason why the appellees' contention is not sound is found in the fact that F. P. Skyles pleaded that the note for \$200 was obtained through fraud and duress, and was for that reason void and of no effect.

The district court was in error in sustaining the defendant's motion to dissolve the attachment, and its order and judgment is reversed.

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## SUPREME JUDICIAL COURT OF MAINE.

JONES

*vs.*

GRANITE STATE FIRE INS. CO.\*

The decision in the case of *White vs. Insurance Co.* (83 Me., 279, again reported in 85 Me., 97) does not deny that the general burden of proof lies on an insurance company to prove that an insurance risk is increased by the vacancy or nonoccupancy of dwelling houses, but only that such burden may be aided by the common and natural presumption to that effect; and that, in a case utterly devoid of any evidence as to the situation or circumstances, such presumption would be sufficient to sustain the burden which the statutory provision casts upon the company.

The presumption belongs to the class of mixed presumptions of law and fact, or of presumptions of fact which are sanctioned by the law, because they are in consonance with reason and experience, and because from their importance and frequency of occurrence they have attracted the attention of the law and received its commendation; in principle, like the presumption that all bills and notes are given or indorsed for value, or the presumption which prevails in favor of innocence, or sanity, or against fraud, and other presumptions that might be enumerated.

While this presumption has the effect of *prima facie* proof—until counteracted by evidence—when any evidence is adduced on either or both sides, then the burden of proof is upon the insurance company, aided as it may

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\* Decision rendered, Feb. 25, 1897. Official syllabus.

or may not be by the presumption, to make out the proposition it undertakes to maintain; and if the proofs stand in equilibrio on the proposition, then the company fails.

In this case the house destroyed by fire had been both vacant and unoccupied for more than a year; was situated in the outskirts of Ellsworth, in a secluded and isolated location back from the road, without any near neighbors, at a distance so great from the centre of the city as not likely to receive any protection from its fire department; and there was quite a tempting opportunity for evil-minded persons to visit the premises without being seen either coming or going. The fire broke out at midnight in the ell where laborers had been working during the day. Had the house been occupied at the time the fire might not have occurred, or might have in its early inception been prevented.

*Held*, That on these facts, and such others as the evidence discloses, an action against the insurance company cannot be maintained.

A. W. KING, *for Plaintiff*.

L. C. CORNISH, *for Defendant*.

PETERS, C. J.

The contention in this case is whether the risks of an insurance on the house in question were or not materially increased by its nonoccupancy, the terms of the policy (which must have been well understood by the insured) declaring the policy to be void for such cause when not consented to by the insurance company. The facts are not in dispute.

An insurance of \$500 was obtained by the plaintiff December 7, 1892, on his two-story frame building and ell, the property having been estimated at the time as worth \$1,750. The insurance came within the denomination of a "farm risk." The buildings became vacant and unoccupied in March, 1894, and continued so, without the consent or knowledge of the company, for fourteen months, when, May 4, 1895, the same were totally destroyed by fire.

The house was situated on a large and finely-cultivated farm, having a frontage of nearly half a mile on a country road, being Main St. extended, running past it in a northerly and southerly direction. The farm extends easterly two miles to the easterly boundary of the city of Ellsworth, the easterly section of the same consisting variously of field, pasture, and woodland. The uncultivated portion of it is traversed by the Maine Central Railroad, which runs northerly and southerly across it. The house, sixty years old and more, and in rather an indifferent state of repair, was located about twenty rods back from the road, and two barns that were not burned (nor insured, that we are aware of) are still standing on the premises about twenty rods east of the location of the house. The farm on which the house stood is really in the outskirts of the city of Ellsworth, in quite a secluded and isolated situation, being four-fifths of a mile from the Maine Central Railroad station, which is itself quite out of the central part of the city. There were at the time of



the fire a few neighbors scattered along the road, on both the north and south sides of the plaintiff's land, living in small, ordinary houses, but not in close proximity to it; the nearest on the other side being eighty-five rods distant from the house. The city had an imperfect and inadequate fire system, but unavailable for the protection of such buildings as these situated two-thirds of a mile away. The fire department attempted to offer relief, but failed to do so. The counsel for the plaintiff regards the fact as important that there is a running brook not far distant from the buildings, but neither firemen nor neighbors had any means by which its waters could be used to extinguish the fire.

The fire was first discovered in the ell and shed attached to the main house, at two o'clock in the night, and soon resulted in a total loss. The premises were well cared for by the owner and his hired man in the daytime, on account of his barns of hay and stock of cattle kept there, but neither owner nor laborer stayed on or near the premises during the night. It was customary for some one at work on the farm to visit the buildings daily or oftener, and on the afternoon preceding the fire the owner was about the house overseeing the work of his men, who were engaged in repairing the stone foundation under the ell. He closed the house at about seven o'clock and went home, seeing no signs of fire or of anything unusual about the premises.

We feel constrained to declare, in view of all the facts respecting the condition and situation of the property, that its exposure to the risks of fire was seriously increased because of the vacancy of the unoccupied buildings. Whether the fire was caused either by accident or design, had there been some person living in the house at the time the chances are that it might have been discovered in season to control it, or that it never would have occurred. The reasoning of the court in *Lancy vs. Insurance Co.* (82 Me., 492), is applicable in this case, although of more forcible application in that case than in this.

It is doubtful if the meaning of the court, in its interpretation of the statute which casts the burden of proof on insurance companies to show in case of loss of unoccupied houses that the nonoccupancy materially increased the risk, as enunciated by the court in *White vs. Insurance Co.* (83 Me., 279—the case again reported in 85 Me., 97), was correctly understood in the present case at the argument. The court does not deny that the burden of proving that fact rests on the insurance company, but decides that such burden, in a case devoid of any proof of the attendant circumstances, may be sufficiently sustained in the first instance by the natural presumption to

that effect, which is based upon the observation and experience of intelligent men generally. In most courts the opinions of witnesses or the experience of companies on this point cannot be testified to, for the reason that it is the common knowledge of mankind generally rather than the peculiar knowledge of specialists and experts. The court does not suppose that the legislature intended to deprive the insurance company of the aid of this common and natural presumption in support of the burden of proof, which, perhaps rather illogically, rests upon it.

It is not pretended that the general burden of proof shifts from the insurer to the insured; and if, after all the facts on both sides are presented, the case in its proofs stands in equilibrio, then the company does not prevail, and the issue must be determined against the company. The principle is illustrated in the case of a suit on a piece of commercial paper, where the general burden is on the plaintiff to prove value for the defendant's promise, and that burden does not change in any stage of the evidence in the case, although it is sustained, until weakened by other evidence, by the presumption of value which attaches to commercial paper: *Small vs. Clewley*, 62 Me., 135.

Mr. Best, in his valuable work on Evidence, says that presumptions or presumptive evidence is as original as is direct evidence, and that the presumption of a fact is as good as any other proof of such fact when the presumption is legitimate. As illustrations of the principle that presumptions stand for proof until rebutted by evidence, the author remarks in this way: "Although the law presumes all bills of exchange and promissory notes to have been given and indorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence. \* \* \* To this class also belong the well-known presumptions in favor of innocence, and sanity, and against fraud, etc.; the presumption that legal acts have been performed with the solemnities required by law, and that every person performs the duties or obligations which the law casts upon him:" Best, Ev., \*426.

The presumption which in this case is strong enough to stand as prima facie proof, until contradicted by evidence, is denominated a presumption of fact sanctioned by the law, or a mixed presumption of law and fact. The law authorizes its adoption because it is in consonance with reason and experience, and because from its importance and frequency of occurrence it has attracted the attention of the law and received its commendation.

The fact that any property is not in the possession or under the close supervision of its owner naturally produces a belief that it is

exposed to more than usual risks, such risks being more or less, according to circumstances. Insurance companies invoke the benefit of this sort of presumption, and we think they are entitled to it in aid of the burden of proof which the statute imposes on them. At the same time, any construction of the statute has but little, if any, pertinency in a consideration of the facts disclosed in the present case. Judgment for defendant.

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### COURT OF APPEALS OF KENTUCKY.

CITIZENS' INS. CO., OF PITTSBURG, )  
vs. )  
BLAND.\*

An answer which simply alleges that the loss had not been fixed by appraisers, but fails to state that the defendant asked for their appointment, or to show any difference of opinion as to amount of loss calling for their appointment, is bad on demurrer.

It is proper for a jury to find interest from date of filing suit.

Proof of loss may be waived by parol. Where all the invoices called for and which could be procured were furnished, there is no reason why other methods of proving loss should not be received.

J. T. SIMON, *for Appellant.*

DENNING & HOLMES and HANSON KENNEDY, *for Appellee.*

GUFFY, J.

This suit was instituted by the appellee against the appellant to recover \$800, the insurance due, as alleged, upon a policy of fire insurance issued by appellant to appellee insuring him against loss or damage by fire to his stock of general merchandise in Mt. Olivet, Ky. A total loss of the entire stock was claimed. The appellant filed an answer containing eight paragraphs. The material part of the first paragraph is a denial of any waiver of the production of proof of loss as and within the time provided for by the policy. The second paragraph alleges in substance that the plaintiff fraudulently and falsely made affidavit that his loss was \$2,425, and on that account his right to recover was barred. The third paragraph in substance charges that plaintiff failed to use due diligence to save the goods from the fire. The fourth paragraph seeks to defeat plaintiff's claim because the loss had not been fixed by appraisers as provided in the policy. In the fifth paragraph it is alleged that

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\* Decision rendered, March 24, 1897.

plaintiff failed to furnish bills, books, etc., of goods bought and other facts, as required. The sixth paragraph is in effect in all material parts the same as No. 4. The seventh paragraph relies upon plaintiff's failure to comply with the stipulations of the policy. The eighth paragraph denies that the appellant's true name is as stated in the petition. After issue joined, a trial resulted in a verdict and judgment in favor of appellee for \$800, with interest from 11th September, 1890, the date of filing the petition, and, appellant's motion for new trial having been overruled, it prosecutes this appeal.

Several motions were made by appellant, and overruled by the court, which need not be discussed. The following are the grounds for new trial: (1) Because the court erred in overruling the defendant's motion to quash the return on the summons herein. (2) The court erred in sustaining the demurrer to the defendant's answer herein, to wit, paragraphs Nos. 4 and 6. (3) The court erred in overruling defendant's motion for a peremptory instruction to find for defendant. (4) Because the court erred in giving instruction No. 1 at the plaintiff's instance, and over defendant's objection and exception. (5) Because the court erred in refusing to give instructions Nos. 1, 2, 4, and 5, asked by defendant, and to which ruling defendant excepted. (6) Because the court erred in giving instruction No. 2 as modified, to wit, so modified as to allow interest. (7) Because the court erred in overruling the defendant's motion for judgment for it notwithstanding the verdict of the jury herein. (8) Because the court erred in admitting incompetent evidence to the prejudice of the defendant, and over its objections and exceptions. (9) Because the court erred in refusing competent testimony offered by defendant. (10) Because the verdict of the jury is contrary to the law of the case. (11) Because the verdict of the jury is contrary to evidence of the case. (12) Because of other and numerous errors complained of and excepted to by defendant during the trial. (13) Because the jury erred in finding interest on the amount. (14) Because the court erred in sustaining plaintiff's motion to strike out paragraph No. 8 of its answer.

The demurrer to paragraphs 4 and 6 was properly sustained because it was not alleged that appellant asked for the appointment of appraisers, nor did they show a specific or any difference of opinion as to the amount of the loss. The motion for a peremptory instruction was properly overruled; the evidence and pleadings entitled the plaintiff to have a jury pass upon the facts. We have carefully considered the instructions given and those asked by appellant and refused by the court, and find no error to the prejudice

of the substantial rights of the appellant. Nor do we perceive any error to appellant's prejudice in the admission or rejection of testimony. It was proper to allow the jury to find interest upon the amount due, from the date of filing suit. The court did not err in sustaining the motion to strike out paragraph 8 of the answer. We deem it unnecessary to notice all the other grounds for new trial relied on. It must be conceded that the evidence as to a waiver of formal proof of loss is conflicting, yet it was the province of the jury to weigh the evidence, and they had a right to believe the evidence of plaintiff and find accordingly. It seems to be earnestly contended by appellant that no waiver of the presentation of the preliminary proof could be made in parol, and that, if there had been a verbal waiver of such proof, the waiver would be invalid. It seems to us that the law is settled otherwise: *Insurance Co. vs. Wigginton*, 89 Ky., 331; 7 Am. & Eng. Enc. Law, p. 1054; *Insurance Co. vs. Spiers*, 87 Ky., 285-289. There was proof conducing to show that appellee produced all the bills that he was at first required to, or, at least, all that he could reasonably produce, and also procured all the other bills that he reasonably could produce that were demanded at the meeting in Cincinnati. The proof as to the amount of loss was ample to sustain the amount of the verdict. The vital question in the case, if plaintiff was entitled to recover at all, was how much did the loss amount to. If it could be proved by means other than a resort to certified bills, invoiced, etc., we see no reason why such proof should not be received and acted upon. It was the duty of appellee to furnish such bills, etc., as he reasonably could, and there is proof conducing to show that he did do so. The proof does not show that appellee could have reasonably saved the goods from destruction. Manifestly his first duty was to care for his sick wife and baby, and it does not appear that, after that duty was performed, there was any chance to get into the store.

Judgment affirmed.

## SUPREME COURT OF MISSISSIPPI.

LOWRY ET AL.

vs.

INSURANCE CO. OF NORTH AMERICA.\* }

The policy, taken out by the mortgagor, was payable to mortgagee as interest might appear.

*Held*, That where the mortgage debt exceeded the amount of the policy and the value of the property, the mortgagee might sue in his own name alone.

F. V. BRAHAN and J. W. FEWELL, *for Appellants*.

MILLER & BASKIN, *for Appellee*.

WHITFIELD, J.

The precise question presented by this record is this: Where the owner of real and personal property mortgages it to a lender of money for a loan, and then insures the said property in his own name, the contract of insurance providing that the loss shall be payable to such mortgagee as his interest may appear, and the amount of the mortgage debt exceeds both the whole amount of such insurance and the whole value of said property, can the mortgagee in such case, the property being destroyed by fire, maintain an action at law, in his own name alone, on such policy? That he can is clear on principle, and thoroughly established by the decided weight of authority. See, as putting the matter at rest, the authorities cited in the exhaustive note to *Chipman vs. Carroll* (Kan. Sup.), 25 Lawy. Rep. Ann., 305; *Motley vs. Insurance Co.*, 50 Am. Dec., 591; *Maxcy vs. Insurance Co.*, 54 Minn., 272; 2 Wood, Ins., p. 112; 2 May, Ins. (3d Ed.), p. 1014, § 449; *Ostr., Ins.*, p. 602, § 282; *Pitney vs. Insurance Co.*, 65 N. Y., 6. And compare *Insurance Co. vs. Stein*, 72 Miss., at page 950.

Cases cited by learned counsel for appellee are not in point except *Williamson vs. Insurance Co.*, 86 Wis., 393. This case cites *Hodgson vs. Insurance Co.* (86 Wis., 323), but in that case the mortgage debt "was considerably less than the amount of insurance." It also cites *Chandos vs. Insurance Co.* (84 Wis., 184), the unsoundness of which case is demonstrated in the note to it in 19 Lawy. Rep. Ann., 321, where "the peculiar mistakes" of the opinion in that case are severely criticised. It also cites 2 Wood, Ins., p. 1122, when that author, on page 1124, expressly says: "But, when the interest of the payee covers the whole loss, he may sue in his own name." It

\* Decision rendered, March 23, 1897.

also cites *Martin vs. Insurance Co.*, 38 N. J. Law, 140. But as is shown in note, 25 Lawy. Rep. Ann., 308, that case holds that either mortgagor or mortgagee may sue. *Insurance Cos. vs. Felrath* (77 Ala., 194) is a case where the insurance was for \$1,550, and the mortgage for \$1,080; and the opinion goes on the ground that to allow the mortgagee to sue in such case alone would be to "split one contract into two causes of action," and that the provision in such case is a mere appointment of a payee of part of the money. But this very case is cited in 2 May, Ins., p. 1014, § 449, note 7, where it is shown that the holding was because the mortgage debt was less than the amount of the insurance. It is also distinguished in the note, 25 Lawy. Rep. Ann., 308, though it should be there stated, not that "the mortgage did not cover all the property insured," but that the mortgage debt was less than the amount of the insurance. But, finally, the court, in *Felrath's Case* (77 Ala., 199), itself says: "In some of these cases [holding that the mortgagee can sue alone] the appointee's claim equaled or exceeded the whole sum insured, which, of course, involved no splitting up of the cause of action. This distinguishes such cases from this." Another case cited by learned counsel for appellee is *Grosvenor vs. Insurance Co.* (decided in 1858), 17 N. Y., 391. This case overrules two earlier cases, and three judges dissented; and, besides, it is distinguished in *Pitney vs. Insurance Co.*, *supra*, on the ground that in *Grosvenor's Case* the policy did not have the clause "as the mortgagee's interest may appear." It is in clear conflict with this last case. Indeed, some courts hold that in a case like the one before us the mortgagor cannot maintain an action when it does not appear that the mortgage debt is still unpaid (*Insurance Co. vs. Coverdale*, 48 Kan., 446, 29 Pac., 682); and Mr. May so lays down the law (2 May, Ins. [3d Ed.], p. 1014, § 449); as does the Supreme Court of Minnesota (*Maxcy's Case*, 54 Minn., at page 276). See, also, *Phenix Ins. Co. vs. Omaha Loan & Trust Co.* (Neb.) As to this we decide nothing now. A large part of the argument of counsel for appellee in their brief is a mere adoption of the opinion of Judge Orton in *Hammel vs. Insurance Co.* (50 Wis., 240), cited in *Ostr., Ins.*, pp. 597, 598; but, unfortunately for counsel, it is the dissenting opinion.

The judgment is reversed; the demurrer overruled; and the cause remanded.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ATTLEBOROUGH SAVINGS BANK }

vs. }

SECURITY INS. CO.\*

The policy, payable to mortgagees as interest might appear, provided that no act of any other person should defeat his rights in case it was not liable to the mortgagor; but that when liable to the mortgagee the company might elect to pay the full amount of the mortgage and receive an assignment of the mortgage in case of a transfer of the property by the mortgagor in violation of the policy. Afterwards the mortgagee took additional mortgages on the property from the owner.

*Held*, That the mortgagee could only recover the amount of the original mortgage, and if demanded must be able to subrogate the company to the original mortgage, and, whereby a release of part of the mortgaged property this was impossible, there could be no recovery.

LESSER, FALL & FALL, *for Plaintiff*.

CRAPO, CLIFFORD & CLIFFORD, *for Defendant*.

LATHROP, J.

This is an action on a policy of insurance against loss by fire, in the Massachusetts standard form, issued to Emma A. Briggs, and "payable, in case of loss, to Attleborough Savings Bank, mortgagee, as its interest shall appear." Among other things, the policy provides that it shall be void if, without the assent of the company, the property shall be sold, and further that,

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and, whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor or owner, and this company shall elect, by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the company interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

When the policy was issued the plaintiff held a mortgage on the property insured for \$1,500. At the date of the loss there was due on the mortgage \$1,500, less the interest which had been paid. After the policy was issued the plaintiff took a second and a third mortgage on the property, from the same owner, for \$1,000 and \$500, respectively. The defendant had no notice of these subsequent

\* Decision rendered, March 6, 1897.



mortgages until after the loss. At the time of the loss there was due on all three mortgages an amount exceeding \$2,000. Before the loss the owner of the property sold it, without notice to the defendant, the deed reciting that the premises conveyed were subject to three mortgages to the Attleborough Savings Bank. On December 28, 1894, the plaintiff, without notice to the defendant, released from all three mortgages a part of the mortgaged property. On January 8, 1895, the defendant tendered to the plaintiff the sum of \$1,500, and demanded an assignment of the first mortgage and the note for \$1,500 which it secured. The plaintiff rejected the tender. The mortgagor having forfeited her insurance by a conveyance without notice to or the consent of the defendant, the question is as to the plaintiff's right under the policy. The plaintiff contends that, as at the time of the loss it held three mortgages on the property greater in amount than the sum insured, it is entitled to recover \$2,000, which is the amount of the policy. The defendant contends that the interest of the plaintiff was insured only to the amount due at the time of the loss under the first mortgage, and that the plaintiff, having refused to assign said mortgage and mortgage note, and having put it out of its power to subrogate the defendant to its rights under the first mortgage, can recover nothing. We are of opinion that the defendant's contention is correct. The chief reliance of the plaintiff in its argument is on the language of the clause by which the policy is made payable to the plaintiff. But the words, "as its interest shall appear," have reference to the amount which may be due the mortgagee on the mortgage debt which is originally brought to the attention of the insurer. It was not intended to include additional claims, but was intended to provide for a diminution of the interest of the mortgagee by the reduction, by payment or otherwise, of the amount of the debt. In *Palmer Sav. Bank vs. Insurance Co. of North America* (166 Mass., 189), while the question now before the court was not determined, the law in relation to policies insuring the interest of the mortgagee was much considered. It is there said that at first the policy was usually issued to the mortgagor in the common form, and was then assigned to the mortgagee, to the extent of his interest, the insurance company assenting to the assignment; that afterwards the provisions for the benefit of the mortgagee were inserted in the body of the policy, but that such policies, unless there were stipulations to the contrary, were avoided, as against the mortgagee, by any act of the mortgagor which avoided the policy as to him; and that the present form was adopted in order to give the mortgagee a better security, but that the effect was the same as if the mortgagor

had taken out the insurance in his own name, and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment, and had promised the mortgagee that no act of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. But whether the clause is to be considered as an assignment by the mortgagor of an insurance upon his interest, or as a contract made with the insured, by which, in a certain contingency, it promises to pay to the mortgagee an amount to be determined, it seems to us clear that the nature of the interest and the extent of the risk must be made known at the time when the contract is made, in order that the premium may be measured thereby. While the insurance company cannot be compelled to pay more than the face of the policy, yet, to obtain the advantages of subrogation, if the plaintiff's contention is correct, it may be compelled to pay several times that amount. The clause in regard to subrogation is inserted as of value to the company, and must be taken into consideration in measuring the risk assumed and the consideration paid therefor; but if this amount cannot be determined when the contract is made, and may be so great as to make the subrogation clause worthless, it ceases to be one of the elements of the contract. We are therefore of opinion that the plaintiff's interest under the subsequent mortgages was not covered by the insurance, and that as it was not willing to assign its first mortgage and note, and in fact could not do so, the justice who tried the case in the court below rightly found for the defendant. According to the terms of the report, the order must be, judgment for the defendant.

## LOWER COURT DECISIONS.

### EFFECT OF DOWER RIGHT ON TITLE.

#### *Appellate Court of Indiana.*

#### OHIO FARMERS' INSURANCE CO.

vs.

#### WILSON H. BEVIS.\*

The insured represented in the application that he was absolute owner of the real estate, and the policy provided that if he was not the sole owner in fee simple it should be void. The insured held under a conveyance in which the wife of the grantor did not join.

*Held*, That the wife had no present interest, her interest must be after acquired and was dependent on her survival.

*Held*, That the policy was not avoided by the statement as to ownership.

HENLEY, J.

Appellee began this action in the lower court upon a fire policy issued to him by appellant. A demurrer to the complaint was overruled and the appellant answered in five paragraphs. The first, second and third paragraphs were demurred to and sustained. There was a trial by the court, and judgment for appellee. The only question argued by counsel for appellant arises upon the ruling of the lower court on the demurrer to the first, second and third paragraphs of answer. The facts involved in this cause are that appellee was the owner of 200 acres of land, upon which he lived, and upon which was the property insured by appellant. The title the appellee held in the real estate, upon which the insured building was situated, was acquired by purchase. The grantor was a married man, whose wife was living and under no legal disabilities, and did not join in the conveyance of the real estate to appellee. The assured made written application, over his own signature, for this policy of insurance. There was a question propounded in the application regarding the title to the real estate, and the question and answer of appellee thereto were as follows: "Question. Are you the absolute owner of this real estate? Answer. Yes." The policy of insurance also contains the following condition, printed on the face thereof: "Or if this assured is not the sole owner in fee simple of the realty upon which this insured building is situate, and having legal and equitable title thereto, then and in such case this policy

\* Decision rendered, April 28, 1897.

shall be void." Appellee sustained a loss under said policy of insurance. Counsel for appellant assume that the assured was not the absolute owner of the realty upon which the insured property was located, and that he was not the sole owner of the fee simple of the realty upon which the insured building was located, at the time the application for insurance was made and the policy issued, and therefore he cannot recover. The answers to which the demurrer was sustained each raise this question, and this is, in fact, the only question for decision in this cause.

Policies of fire insurance always contain a great many special provisions, setting out what risks are assumed by the company, and defining in careful and explicit terms the conditions upon which the insurers shall be liable in case of loss to the assured thereunder. These conditions, relating to other insurance, the title of the insured, assignment of the policy, change of interest, use and occupation, vacancy, erection and occupation of neighboring buildings, and many other conditions, having been held valid and binding upon the assured to such an extent that a misrepresentation of the facts by the assured at the time of the issuing of the policy, or a violation of the conditions imposed in the policy after the same is issued, are held sufficient to render the policy void, unless the insurer had waived in some way the right to enforce the condition. The assured having been required in this case to answer certain questions in an application for the insurance regarding his ownership of the real estate upon which the insured building stood, and these questions and answers having been made a part of the contract of insurance, became warranties, and, if false, vitiate the policy. There can be no question of the appellee's insurable interest in this case, as it is not denied that the appellee was the owner of the property insured, and that in the event of its loss he would have been the sole loser thereby. If a husband, owning the fee simple title to real estate, conveys the same, his wife not joining in the deed, the grantee at least acquires a perfect and absolute title in fee simple to two-thirds of the real estate conveyed, which no contingency or condition or state of facts growing out of the conveyance can affect. To the other one-third of the real estate the grantee acquires a fee simple title subject to be defeated if the wife of the grantor survives her husband. See Rev. Stat., 1881, Sec. 2491; Rev. St., 1894, Sec. 2652. The estate owned by a wife in lands conveyed by her husband in a conveyance in which she did not join is an estate in the land itself, and not a mere incumbrance resting upon it: *Tanguey vs. O'Connell*, 132 Ind., 62; *Bever vs. North*, 107 Ind., 544. But until the death of the husband the wife has no claim, legal or equitable,

upon the real estate so conveyed, and if she does not survive her husband, her estate therein is determined. The grantee of the husband owes no duty to the wife, who did not join in the conveyance. He is not subject to an action for waste, and is, so long as the grantor lives, the absolute owner of the real estate so conveyed. It is also the law, that in matters of this kind, if the answers of the assured to the questions put to him are full and clear, as he understands them and as he has a right to understand them, it is sufficient: 11 Am. & Eng. Enc. Law, p. 304. The courts have, in a great number of decisions, refused to declare forfeitures, except in the clearest cases. They must not be favored, and should never be enforced unless the failure to so enforce them would cause an injury to the parties not clearly contemplated by them in the contract: *Insurance Co. vs. Wallace*, 93 Ind., 7; *Insurance Co. vs. Hazlett*, 105 Ind., 212; *Insurance Co. vs. Deming*, 123 Ind., 384; *Bowless vs. Insurance Co.*, 133 Ind., 106. As was said by Elliott, J., in the case of *Bowless vs. Insurance Co.* (133 Ind., 106): "It is not to be forgotten that the insurance company is here seeking the benefit of a harsh rule, and insisting that the court declare a forfeiture, although it retains the benefit conferred upon it by the contract it asks the court to declare forfeited. Courts, as has been again and again decided, refuse to declare forfeitures except in very clear cases." It was only necessary for the assured to answer the questions concerning his title in the negative or the affirmative. He was not compelled to abstract it for the benefit of the company, and if his answer, conveying the meaning that his title was absolute, was correct, and no facts in relation thereto are shown by the insured which would materially increase the hazard, or cause a greater premium to be charged for the insurance, we cannot see that the insurer is harmed thereby. If appellee had held simply a life estate, or if the land was incumbered and he answered that it was not, we can readily see why the courts would enforce a forfeiture of that kind. The title held by the appellee to one-third of the real estate herein is similar to that held by a childless second wife in the lands of her deceased husband (the deceased husband having children alive by a former wife) prior to the enactment of the statute of 1889, which reduced her title to a life estate in such event. Under the statute prior to the amendment of 1889, the courts held that the widow had a fee simple title to the real estate, and could not be enjoined from committing waste thereon, and while she lived the children of a former wife had no interest in real estate descended to her, present, in remainder, or in reversion. It is only in the event that they outlived the widow that they acquired any interest. In this case the wife of the grantor has no

interest, present, in remainder, or in reversion. Her interest must be after acquired, and depends altogether and solely upon the condition that she outlive her husband. We are clearly of the opinion that the appellee had, at the time of the issuing of the policy, an absolute title in fee simple to the real estate, and hence the policy is not void by the statement in the application or the condition of the contract which he accepted. Judgment affirmed.

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LIABILITY IN CASE OF CREDIT INSURANCE.

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*Court of Appeals for the Parish of Orleans and State of Louisiana.*

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IMPERIAL MANUFACTURING CO. (Limited),

*vs.*

AMERICAN CREDIT INDEMNITY CO., OF NEW ORLEANS.\*

The insurer should, within a reasonable delay, give notice of the insufficiency of proof, so as to afford a chance for correction, and this principle applies as well to indemnity insurance companies as any other kind.

Under a claim for indemnity insurance the indemnified must, by satisfactory evidence, establish his loss within the terms of the policy.

No printed clause in a policy can destroy the effect of the date of the policy as written therein.

Judgment affirmed.

DART & KERNAN, *Attorneys for Plaintiff.*

J. J. McLoughlin, *Attorney for Defendant.*

DUFOUR, J.

This suit involves the construction of bonds of indemnity against loss resulting from the insolvency of debtors.

In consideration of the payment of a premium, the defendant company guarantied the plaintiff against such loss to the extent of \$8,500 over and above the annual net loss first to be borne by plaintiff on total gross sales of merchandise amounting to \$160,000. The credit was to be extended to such debtors only as shall have specific ratings in the latest published book and report of Dun's, and the latest published book of Bradstreet's agencies. Certain terms and conditions printed or written by the company on the back of the bond are recognized as part of the contract. It is conceded that the losses arising from bad debts amount to \$5,077.20; deduction for salvage and the loss to be borne by plaintiff under the agreement reduces the possible maximum liability of defendant to the sum of

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\* Decree pronounced February 8, 1897. Reported by W. O. Hart, of the New Orleans Bar.

\$1,152.22. It is also conceded that plaintiff can recover only losses in excess of \$3,709.83.

Defendant contends that twelve claims aggregating \$1,706.35 are either not covered by the contract or were not properly proved under its requirements, and should, therefore, be rejected. It would follow that the loss, within the meaning of the contract, would fall below the sum at which defendant's liability begins.

The controversy is thus narrowed to the question of the liability of the company for the twelve claims, and its determination necessitates an examination of the contract, as expressed in the bonds, in order that the reciprocal rights and obligations of the contracting parties may be ascertained.

Clause 4 declares that

Proof of loss must be made by the indemnified to the American Credit Indemnity Company, at its office in St. Louis, upon the blanks furnished and in the manner prescribed by said company, within twenty days after knowledge of the insolvency of any debtor shall have been received by the indemnified or his or their agent, otherwise said claim shall be barred.

One of the bonds adds that

Upon receipt of such proof of loss the company shall adjust promptly and give due notice of the allowance or rejection of the claim.

Both bonds state that no claim for loss can be proven after expiration of the bond.

Under the first bond

When the indemnified shall have proven a net loss in excess of the net loss named, the company will adjust and settle for such excessive loss, provided that such settlement shall not be made until the expiration of the terms of this bond, unless the indemnified prior to that date shall have made gross sales equal to the sum of \$160,000.

The second bond prescribes a somewhat different method and says:—

Final proof of loss shall be forwarded to the central office of this company upon the blanks furnished and in the manner prescribed by the company, within twenty days after the expiration of this bond, and the amount due by this company, under such final proof of loss, shall be payable within sixty days after adjustment.

The blanks furnished by the company for proofs of loss under clause 4 of both bonds give appropriate headings for date, name and location of debtor, date and nature of failure, amount of goods sold and whether an open account or closed by note or acceptance. They also inquire if the indemnified has obtained security or offer of settlement, recovered any part of the debt or the goods sold, or taken any legal steps in the matter.

The notice returned by the indemnity company on receipt of the proof of loss is in one of the two following forms:—

Your notice of loss on ....(name).... of ....(place).... has been received and filed,

or

Your notice of loss on ....(name).... of ....(place).... has been received.

We acknowledge receipt of all notices of loss, whether covered by the bond or not.

The final proof of loss<sup>4</sup> is tabulated under headings for the name and location of the debtors, the date that notice of loss was mailed to the company, the amount of claim at date of insolvency, the amount paid on claim since date of insolvency, and the amount secured to the creditor by indorsement, legal process or otherwise. The statements therein made are sworn to by the indemnified; his affidavit further establishes the total amount of the gross sales during the period covered by the bond.

The proper method of ascertaining the intention of the parties is by examination of the whole instrument, and a comparison of its various parts. If there be ambiguity the doubt must be resolved against the obligor who drew up the instrument; if it be susceptible of two interpretations, that must be adopted which will give full and fair effect to the agreement.

We consider that the only proof of loss of claims intended by the contract is the one mentioned in clause 4. As the final proof of loss described in clause 12 (second bond) must be made within twenty days after expiration of the bond, it is clear that this cannot mean proofs of loss of claims, because it is already declared in clause 8 that these cannot be made after the expiration of the bond. The headings of the blanks for final proof afford conclusive confirmation of the view by merely containing a reference to proofs already made. That document was evidently intended mainly to show the total amount of gross sales during the existence of the bond and the amounts that may have been received from the debtors since the report originally made to the company. Another purpose for which it seems to have been intended was to change the method and time of settlement by fixing the limit at sixty days after adjustment, whereas, under the first bond the company agreed to adjust and settle the net loss proved as soon as the gross sales exceeded \$160,000, without awaiting the expiration of the term of the bond.

It would seem that under clause 4 the company would have the right to object to proof on the part of the indemnified as coming too late, if made more than twenty days after knowledge of the insolvency. It would also seem from clause 8 (9 in first bond) that no claim for loss can be proven after the expiration of the bond. Under the construction suggested by defendant it finds itself in a position to exact that proof be made before the expiration of twenty days



after knowledge (or, as Magill, the adjuster, puts it, "after hearing") by the indemnified of the insolvency without corresponding obligation on its part to accept or reject the same within any specified time. Thus the company may allow the indemnified to believe that the proof tendered and received without objection is sufficient, and then after expiration of the bond, when it is too late under its terms to make further proof, refuse payment on the ground of insufficiency.

The good faith and fair dealing which should abide in all contracts forbid the adoption of any rule of construction as unfair and inequitable as this.

Defendant is a corporation organized under, and presumably with reference to, the laws of Louisiana. The purpose of its creation was to insure against loss resulting from insolvency. Insolvency is a fact which arises whenever the whole property or credits of a party are not, at a fair appraisement, equal in amount to the debts due by him. It is inability to pay one's debts and is provable like any other fact. The provisions of the bond that attachments, assignments, the absconding of debtors, deeds of trust or execution returned nulla bona are recognized as failures and as constituting insolvency, are not, in our judgment, meant to be exclusive modes of proof. They are merely declarations that the existence of any of those conditions is sufficient to dispense with further proof. The correctness of this view is verified by the subsequent clause that in other cases, not recognized as establishing insolvency, the indemnified may offer legal or satisfactory proof.

Defendant's error arises from failure to recognize the distinction between the evidence of a thing and the thing itself.

The purpose of the notice of insolvency given by the indemnified is to enable the company to investigate the alleged loss; no hardship can possibly result from the requirement that it notify the indemnified to make further proof, if, after investigation, it deems the proof tendered insufficient.

We may readily imagine a case where the indemnified may hear or be informed of the insolvency of a debtor and yet not have time to obtain judgment and return of nulla bono within twenty days. Yet under defendant's theory, whichever course plaintiff may elect he must lose the claim, either because he gave notice within time without proof of unsatisfied execution, or because the proof of unsatisfied execution was furnished after the twenty days.

It may be added that the company has itself adopted the construction suggested by us as the proper one, for we find in the document marked "E" (in large red letter) kept for its own use, headings as follows:—

Date proof of loss; date proof of loss received; report wanted; returned proof of loss; reason returned; resubmitted by bondholder; claim O. K.?"

There could certainly be no reason for the use of the above slip if defendant considered that failure to make proper proof originally released it under the contract, and was absolutely destructive of plaintiff's right to recover.

Further confirmation is found in the fact that defendant allowed four losses occurring under the first bond to be proved under the renewal on condition that plaintiff should take judgment and issue execution. This was tantamount to saying to him: "Your proof is insufficient. I insist upon it being more complete, and when you have done what I have the right to insist on I shall pay your loss."

What the company did in that instance it should do in all.

In the absence of specific decisions on this branch of the law of insurance, we may safely look for guidance to the general principles applicable to other classes of insurance: 9 Encyc. Law, 66.

Innumeral adjudications make the proposition elementary, that the insurer should within reasonable delay give notice of insufficiency of proof, so as to afford a chance for correction before it is too late, or else he will not be allowed to urge the insufficiency as a defense.

We, therefore, conclude that it was the duty of the company to notify plaintiff if it deemed the proof insufficient, and that it cannot now be allowed to invoke such a defense.

But we do not consider that the indemnified is relieved by defendant's conduct of the necessity of making proof. The parties should be restored to the relative positions they occupied when the proofs tendered were received with objection; the indemnified must by satisfactory evidence establish a loss within the terms of the policy, and the company may now insist on the production of such proof, and may also resist payment on any legal ground.

The evidence shows that notice of every loss was given to the company as soon as information of failure reached plaintiff, and that no objection was made to them on the ground of insufficiency. The final proof was made after expiration of the bond, and the company sent Mr. Magill, its agent, to make an adjustment. The first bond expired March 31, 1893; the second, or renewal, though entered into and premium paid on June 16, was, by agreement dated on and made operative from April 1, 1893. No printed clause in the bond can destroy the effect of the date written as marking the inception of the obligation.

## MISCELLANY.

Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### WAIVER OF ARBITRATION.

In the case of *Smith vs. California Ins. Co.*, decided by the Supreme Judicial Court of Maine, January 25, 1895, the following official syllabus was furnished, the verdict in the lower court having been set aside in a previous hearing before this court:—

Exceptions to the admission or exclusion of testimony cannot be considered by the law court unless enough of the case be stated to show whether the exceptions are material or not.

In the trial of an action to recover for a loss sustained under a fire-insurance policy which contains an arbitration clause, in this case valid and binding on the parties because the insurance was effected by a Massachusetts policy on goods situated in that commonwealth when insured as well as when destroyed by fire, it could not properly be ruled, as a matter of law, that the agreement of arbitration was waived in this state by the company, for the reason that it gave no notice until the expiration of about nine months after the proof of loss was made, but about eight months before this action was brought, that it should insist upon a settlement of the amount of loss under the terms of such arbitration clause.

The sending of a case involving the settlement of the amount and value of a stock of goods to an auditor for the determination of those questions in an action upon a fire-insurance policy, although acquiesced in by both parties, deprives neither party of his right to rely upon any other questions arising in the case.

### PREMATURE ACTION.

In the case of *First National Bank of Baton Rouge vs. Dakota F. & M. Ins. Co.*, decided by the Supreme Court of South Dakota, Dec. 27, 1894, the court furnished the following syllabus:—

In an action on an insurance policy, by the terms of which a loss is not payable until 60 days after notice and proofs of loss are made by the assured and received by the company, a complaint that states that such notice and proofs were made immediately after the fire, but neither states nor shows upon its face that 60 days thereafter had elapsed before the commencement of the suit, fails to state a cause of action.

### BENEVOLENT SOCIETY.—PRESUMPTION OF RESOURCES.

In the case of *Grindle vs. York Mutual Aid Association*, decided by the Supreme Judicial Court of Maine, January 22d, 1895, the following official syllabus was furnished:—

In the trial of an action against a life-insurance company organized on the assessment plan, brought by a person entitled to a benefit in consequence of the death of a member of such company, the burden is not on the plaintiff, in order to sustain his action on the policy or certificate of insurance, to show

that the company is in possession of funds sufficient to pay his claim; it appearing that the company is required by its charter and by-laws to assess its members on the occurrence of the death of any one of them, and to keep on hand an emergency fund, collected from annual dues, and also a general reserved fund, to be derived by the company from several various sources,—facts which raise a presumption of sufficient resources or funds.

#### ENDOWMENTS IN CASE OF BENEVOLENT SOCIETIES.

The right of benevolent societies to grant endowment insurances was passed on, by the Supreme Court of Michigan, in the case of *Walker vs. Giddings*, decided Dec. 22, 1894. The society was incorporated to secure to the family or heirs of the member a sum payable on his death, or a sum payable weekly, or monthly, in case of disability, to be raised by assessment of members. It was held that the society had no authority to grant endowment insurances. A subsequent act defining fraternal associations and how they may be organized, provides that those already legitimately doing business "may continue such business" on compliance with certain requirements. It was held that this did not authorize the issue of endowment contracts. Where the constitution of such a society provided that it might issue endowment or life certificates not exceeding a certain sum payable in one hundred months or on total disability or death, and that when there was a sufficient amount in a specified fund, the lowest serial number of such certificates might be paid and retired; it was held that the sum provided to be paid by such certificates was an endowment fund. It is an amount to be paid at the arrival of a certain and fixed period.

#### CONTRACT TO INSURE CONSTRUED.

In the case of *Commercial Fire Insurance Co. vs. Morris et al.*, decided by the Supreme Court of Alabama, Jan. 30, 1895, the action was brought for breach of contract to renew a policy. It was held that such contract was not within the statute of frauds; that in such action it was necessary to allege breach of agreement, and a complaint merely alleging the contract and averring loss is subject to demurrer; and that in order to render such contract binding, the subject-matter, time, rate and amount insured must be agreed on and the mere fact of previous dealing between the parties in the absence of any reference to the same when contracting does not show an adoption of the previous conditions, but the original policy is admissible to show the terms of the agreement. It was further held that the contract could not be proved by the subsequent declarations of the agents, but that prior dealings of the insured with him were admissible to show a waiver of premium. It is further held that a person dealing with the general agent is not bound by private instructions to such agent of which he had no knowledge.

#### OTHER INSURANCE IN CASE OF TORNADO POLICY.

The cyclone which ravaged Charleston, S. C., and its vicinity in 1893, was the cause of a suit construing cyclone policies in the case of the *Phenix Ins. Co., of Brooklyn, vs. Wilcox & Gibbs Guano Co.*, decided by the U. S. Circuit Court of Appeals, Fourth Circuit, Feb. 5, 1895. Written on the face of the policy were the provisions subject to "coinsurance clause" also subject to "freshet clause," a printed slip above the latter excepted the policy from damage by freshet, but no slip was above the coinsurance clause. The policy provided that it should be liable only to such proportion of the loss as its amount bore to the whole amount of insurance at the time of fire in case of

other insurance. The loss by wind was total. It was claimed on the part of the company that a slip had been originally or should have been attached to the policy so limiting its liability. The policy was a renewal. The original contained a printed slip entitled "average or coinsurance clause" limiting the liability in case of fire to the proportion which the amount insured bore to the value of the property, and the agent testified that it was his intention to have pasted a similar slip on the renewal, changing the word fire to loss under an agreement with the representative of the insured; the latter denied any such agreement. It was held that in case of doubt the contract must be construed most strongly against the company: also that the words "subject to coinsurance clause" had no definite meaning, and if the policy was incomplete the jury were entitled to ascertain what was left out which if inserted would have explained or varied the terms of the policy. It was also held that evidence as to the intention of the agent was incompetent in an action at law, and that if a slip containing the word "fire" had been attached it would have had no significance in case of loss by wind.

#### ASSESSMENT IN CASE OF BENEVOLENT SOCIETY.

In the case of *Garretson vs. Equitable Mutual Life & Endowment Association*, decided by the Supreme Court of Iowa, Jan. 23, 1895, the by-laws provided that assessments for losses should be levied by the directors, and the certificate provided that a failure to pay the annual dues when due should work forfeiture. The by-laws also provided that a notice of the amount of such dues should be given thirty days before they became due. It was held that the directors could not delegate the power of assessing to the president; that in the absence of notice of annual dues, nonpayment did not result in forfeiture. The society agreed with a member who had forfeited her rights to accept a note in part and cash in part in settlement of the unpaid dues and to reinstate on being furnished with a satisfactory certificate of health. The society refused to accept a certificate sent, and demanded a re-examination. A subsequent proposition was made by the member which was declined. The money in the form of a postal order was cashed by mistake of an employe and retained by the society, as was also the note, but no effort was made to collect the latter and no further assessments were demanded or paid by the member. It was held that the society had not waived its requirement of a satisfactory certificate.

#### AGENT INTERESTED IN POLICY.

In the case of *Greenwood Ice & Coal Co. vs. Georgia Home Ins. Co.*, decided by the Supreme Court of Mississippi, Jan. 14th, 1895, it appeared that the policy was issued by an agent to a corporation of which he was a stockholder and vice-president. It was held that he occupied antagonistic positions, and the policy was void. It was further held that where in such case a written offer to arbitrate the loss was made by the adjuster in ignorance of the relationship of the agent, but was afterwards promptly withdrawn upon learning of the fact, this was not a waiver of the right of the company to deny liability.

#### NOTICE OF ASSESSMENT.

In the case of *Mills vs. Home Benefit Life Association*, decided by Supreme Court of California, Dec. 26th, 1894, notice of assessment was required to be sent to the insured. The secretary of the society testified that it was

customary to send such notice along with a health certificate, but did not testify positively that it was sent. The wife of insured testified that it was customary for her to receive all such papers, but that she did not receive this one. It was held that a finding that such notice had not been mailed would not be disturbed, and that where the forfeiture was waived by such failure to mail, the fact that it was due to a mistake of an employee would not affect the case.

#### TITLE OF FIRM TO BENEVOLENT FUNDS.

In the case of *Adams vs. Grand Lodge of A. O. U. W. et al.*, decided by the Supreme Court of California, Dec. 31st, 1894, it appeared that the certificate of a benevolent society had been made payable to a member of a firm which was a creditor of the insured and was intended for the benefit of the firm. The member having died before the insured, it was held that the firm was entitled to the proceeds as against the heirs of such deceased member. It was further held that where the constitution provided that an application to change the beneficiary should be filed within thirty days of its date, the issue of a certificate subsequent to that time is a waiver of the provision by the society.

#### IRON-SAFE CLAUSE—INCREASE OF RISK THROUGH ADDITION.

In the case of *Mitchel vs. Mississippi Home Ins. Co.*, decided by the Supreme Court of Mississippi, Jan. 21, 1895, it was held that where the policy covered stock, fixtures and furniture, a plea that the insured failed to keep books in an iron safe as required failed to state a complete defense and was on that account demurrable. Where the company knew that the insured had no such safe and intended to keep the books in the place where they were actually kept, a failure to keep the books in such safe or in another stipulated place was not ground for forfeiture. It appeared that an addition had been made to the building, bringing it a few feet nearer to an adjacent building, but there was no evidence of the distance between the two. *Held*, That this was not evidence of an increase of risk.

#### CONSTRUCTION OF SCALING AGREEMENT.

The scaling agreement of the Charter Oak Life Ins. Co., which passed into the hands of a receiver some years ago, was the subject of construction in the decision rendered by the Supreme Court of Errors of Connecticut, in Feb. 1895. It was held that a provision in the policy that deferred premiums and unpaid premium notes should be deducted from the amount of the claim was an extinguishment pro tanto of such an amount. Also that an agreement with the insured and the beneficiary by the company for a scaling for reduction of the amount insured was binding on an assignee. Also that such premium notes in case of scaling were offsets within the meaning of a stipulation in a suit that the contested claim should be subject to offsets. Where in such case it was made a stipulation in connection with the scaling, that it should be void in case of an appointment of receivers because of a failure of the plan, and the plan was successfully carried out, but afterwards a receiver was appointed, the subsequent appointment would not invalidate the agreement.

#### ATTACHMENT OF APPLICATION TO POLICY.

In the case of *Lennox vs. Greenwich Ins. Co.*, decided by the Supreme Court of Pennsylvania, Jan. 7, 1895, it was held that the Pennsylvania Act

requiring policies referring to the application to have copies of such application attached applies only where the application is in writing.

#### WAIVER OF REMOVAL IN STANDARD POLICY.

The standard policy of Massachusetts requires that consent to the removal of property insured shall be printed or written. It was held by the Supreme Judicial Court of that state, in the case of *Parker et al. vs. Rochester German Ins. Co.*, decided Jan. 1st, 1895, that an authorized agent cannot waive the policy provision by giving verbal consent to such removal.

#### BENEFICIARY IN CASE OF BENEVOLENT SOCIETY.

In the case of *Renner et al. vs. Supreme Lodge of Bohemian Slavonian Benefit Society*, decided by the Supreme Court of Wisconsin, Feb. 5, 1896, the charter stipulated that the purpose of the society was to assist and give pecuniary aid to the widows and orphans of its deceased members, and that a member might designate to whom benefits should be paid in case of death. It was held that a step-daughter of a member could be properly designated as his beneficiary.

#### INCUMBRANCE AND TITLE.

In the case of *Capital City Ins. Co. vs. Autrey*, decided by the Supreme Court of Alabama, Jan. 9th, 1895, the application represented that there was no lien nor mortgage on the property. It was held that a judgment waiving exemptions was a lien within the meaning of the application. The insurance was on hay, in which it appeared that other parties were entitled to share upon condition of harvesting it for market. This was held to be a violation of the representation in the application that the ownership was absolute, unqualified, and undivided in the insured.

#### RIGHTS OF ADMINISTRATORS.

In the case of *N. Y. Life Ins. Co. vs. Smith*, decided by the U. S. Circuit Court of Appeals, Ninth Circuit, Jan. 21, 1895, it was held in an action of law by the administratrix on a life policy in her possession that a claimant under an alleged assignment is not always a necessary party to a suit. Such administratrix when appointed in the state where the policy is, is entitled to recover as against an administrator appointed in another state even though the insured resided in that state at the time of death.

#### WAIVER OF OTHER INSURANCE BY AGENT.

In the case of *Hartford Fire Insurance Company vs. Small*, decided by the U. S. Circuit Court of Appeals, Fifth Circuit, Jan. 15th, 1895, it was held that where the policy provides that no officer or agent can waive its conditions except by written endorsement, such provision is a part of the contract, which should be enforced by the courts in the absence of sufficient reason to the contrary. It was further held that waiver of a provision against other insurance can only be inferred when it appears from the evidence that the minds of the parties clearly met as to the waiver.

#### FAILURE TO FURNISH INVOICES.

In the case of *Ward vs. National Fire Ins. Co.*, decided by the Supreme Court of Washington, Dec. 26th, 1894, the policy provided that the insured should furnish, as a part of the proofs of loss, the invoices of goods received,

or certified copies thereof, if the originals had been lost. It was held that failure to comply would defeat recovery in the absence of proof of waiver or inability to comply. Where the insured testified that he considered the production of such copies unnecessary and had made no efforts to secure them, he knowing that some at least could have been obtained, a non-suit is justified.

#### **SURRENDER OF BENEFIT CERTIFICATE IN CASE OF INSANITY.**

In the case of *Wells vs. Covenant Mutual Benefit Association of Illinois*, decided by the Supreme Court of Missouri, Feb. 12, 1895, a member of a benevolent society had surrendered his certificate receiving a consideration therefor when it was claimed that he was insane. It was held that in a suit brought by the beneficiary, where it appeared that such member was not under guardianship at the time of the surrender, that the complaint must allege willingness to pay assessments that were due and refund the consideration which had been paid to the insured, and the omission of such allegation could not be cured by a verdict nor by any stipulation of the parties as to the issues.

#### **LIEN ON DEPOSIT OF BENEFIT SOCIETY.**

In the case of *Kruger vs. Life & Annuity Association*, where a plaintiff claimed a lien on the deposit of the Association with the state treasurer under the California Act of 1891, an action which makes the treasurer a defendant party is not an action against the state.

#### **FALSE ANSWERS AS TO HEALTH.**

In the case of *Spring vs. Chautauqua Mutual Life Association*, decided by the Supreme Court of New York, Fifth Department, June 2, 1891, it was held that instructions that if insured answered falsely any of the questions in the application as to health, then the policy was void by its terms, and the plaintiff could not recover, were properly refused as not stating whether the answers were material to the case.

#### **RIGHTS OF TENANT AND REMAINDER MAN.**

In the case of *Addis et al. vs. Addis*, decided by the Supreme Court of New York, Third Department, in an opinion filed May 21, 1891, it was held that where the life tenant of a house by courtesy with remainder to his children had built the house and insured it as sole owner, the life tenant was not obligated to rebuild or insure for the benefit of the remainder men, and that the latter had no claim upon the insurance money.

#### **ACCIDENT IN CASE OF INTENTIONAL INJURY.**

The insured under an accident policy died as the result of a blow struck by a person whom he attempted to blackmail. It was held in the case of *Richards vs. Travelers Ins. Co.*, decided by the Supreme Court of California, May 21, 1891, that death was due to accidental means within the meaning of the policy, and where in such case the claimant fails to establish by positive proof that the death itself was not designed, it was not error to charge that if the death was caused by the blow it would not prevent recovery if the party inflicting the blow did not mean to kill.

#### **WAIVER OF PROOFS OF LOSS.**

In the case of *Ins. Co. of Nor. America vs. Caruthers et al.*, decided by the Supreme Court of Mississippi, Feb. 11, 1895, the insured and company agreed



in writing that the special agent should examine the facts without detriment to or waiver of any of the rights of either party to the contract, and that the company should not be held to have waived any of the terms of its contract by any act of such agent. It was held that evidence of waiver of proofs of loss by a prior denial of liability on the part of agent was inadmissible.

#### TIMELY NOTICE AND PROOFS OF LOSS.

In the case of *Quinlan vs. Providence Washington Ins. Co.*, decided by the Supreme Court of New York, Fourth Department, in July 1891, the policy provided for immediate notice and that proofs should be furnished within sixty days after the fire. It was held that where such notice was not given until thirty-three days after the fire, and proofs were not submitted until nearly seven months after, there could be no recovery in the the absence of any evidence of waiver.

#### RIGHT OF ACTION BY MUTUAL POLICYHOLDER.

In the case of *Warner vs. Schoharie & Schenectady County Farmers Mutual Fire Ins. Co.*, decided by the Supreme Court of New York, Third Department, June 11, 1891, the policy in a mutual fire company provided for the ascertainment of the amount of loss by a committee and that, upon failure to agree on the amount so ascertained, the insured might appeal to the county judge who should appoint appraisers to make a final award. It was held that the insured had no right of action until such appeal had been made to the county judge.

#### GOOD STANDING IN BENEVOLENT SOCIETY.

The applicant for membership in a benevolent society agreed to comply with the rules or submit to the penalties of the order. It was a condition of his certificate that he should be in good standing at the time of death. Seven months previous to his death, he was suspended for misconduct and failed to appear when notified of proceedings against him. No farther dues were charged to or paid by him. It was held by the U. S. Circuit Court of Appeals, Fifth Circuit, in a decision rendered Feb. 12, 1895, in the case of *Supreme Lodge Knights of Pythias of the World vs. Wilson* that there could be no recovery on the certificate as the member had ceased to be in good standing.

#### ACTIVE MEMBERSHIP IN BENEVOLENT SOCIETY.

In the case of *Neville vs. Detroit Fire Association*, decided by the Supreme Court of Michigan, Feb. 12, 1895, the by-laws of a firemen's benevolent society provided that a member retired after twenty-five years service should continue an active member of the association on paying the requisite dues and assessments, and on the death of any active or retired member an assessment should be levied on each surviving member and paid to the beneficiary named by the deceased. It was held that where a fireman had been retired on account of injury without having completed twenty-five years of service his beneficiary is entitled to the sum resulting from the assessment provided for.

#### CANCELLATION AND ELECTION OF INSURED.

In the case of *Biermeister & Spicer vs. City of London Fire Ins. Co.*, decided by the Supreme Court of New York, Third Department, in an opinion

filed July 11, 1891, it appeared that one of several policies being about to expire a party applied to the agent for the substitution of a new policy in one of the other insurers, to include that amount which was declined, but the agent agreed to issue a policy in another company in place of the one expiring. The new policy was accepted by the insured on the day of the fire and immediately afterward he was notified of the circumstances under which it was issued. In the adjustment both the cancelled and issued policies were included with the consent of insured. It was held that having permitted the original policy to be included in the adjustment they could not also claim under the substituted policy.

#### TITLE—DETACHED BUILDING.

Where the company was notified through its assistant secretary that the land on which the building stood belonged to the city, this was sufficient notice of the title, which was a waiver of a condition requiring the interest of the insured to be in fee, according to a decision of the Supreme Court of New York, Second Department, in the case of *Baldwin vs. Citizens Ins. Co.*, decided July 2d, 1891. It was further held that where the policy provided that the property should be detached not less than 100 feet from other buildings, and the jury found that it was not so detached, but that the risk was not increased, the insured was not prevented from recovering by the provision. It was further held that a waiver of a policy provision for a written endorsement thereon could be established by parol evidence.

#### WAIVER OF ASSESSMENT—RETALIATORY LAW CONSTRUED.

In the case of *Griess et al. vs. Massachusetts Benefit Association*, decided by the Supreme Court of New York, Fifth Department, in an opinion filed June 2, 1891, it was held that where the money for an assessment had been received and retained, it was a waiver of the claim that the assessment had been paid too late, and the policy was forfeited. It was further held that the retaliatory law of New York imposing obligations on corporations of other states similar to those imposed on New York companies by such states did not relate to the powers of such companies and did not restrict a corporation from another state from insuring parties beyond a specified age because similar corporations in such other state were compelled to so limit their insurances.

#### SURRENDER OF ACCIDENT POLICY.

In the case of *Martins vs. Manufacturers' Accident Indemnity Co.*, decided by the Supreme Court of New York, Fourth Department, in an opinion filed July 7, 1891, the insured under an accident policy consented to accept \$25 in "full settlement and final satisfaction of any and all claims" on account of the injury, and gave a receipt for the money, retaining the policy. He subsequently received another injury from which he died. There was evidence that the agent had said that the first settlement was for the weekly indemnity, and that nothing was said about canceling the policy. It was held that no intent to cancel was shown, and that the words "hereby surrendered" in the receipt were without consideration and void. It was further held that as the policy was payable to the wife of insured, and under the by-laws the claim was to be paid out of the fund held for the benefit of members or their beneficiaries, a surrender of the policy by the insured could not affect her rights.

## VOLUNTARY EXPOSURE IN CASE OF ACCIDENT.

In the case of *Williams vs. U. S. Mutual Accident Association*, decided by the Supreme Court of New York, Third Department, May 21, 1891, it appeared that the insured had shortly before warned parties against an approaching train. The engineer testified that insured stepped on the track and could have crossed before being reached by the engine, but stopped and squatted on the track until he was struck and killed. There was evidence that, while the insured was financially embarrassed, his habits were good; he was mentally sound and was negotiating for a position at a good salary. It was held that the case was properly for the jury, and a verdict for plaintiff would not be disturbed. It was further held that an attempt to rescue parties from supposed danger is not a voluntary exposure to unnecessary danger.

## OTHER INSURANCE.—EVIDENCE IN CASE OF LETTER.

In the case of *Home Ins. Co. vs. Marple*, decided by the Appellate Court of Indiana, May 13, 1891, it was held that failure to cancel or return unearned premium on the part of the company after learning of other insurance is a waiver of forfeiture, and that, where the adjuster after learning of such insurance causes the insured to procure bills and other documents relating to the adjustment of the loss, it is a question for a jury whether forfeiture has been waived. Where the insured in such case claimed to have written a letter to the company notifying it of such other insurance, which the company denies having received, an instruction that evidence of mailing the letter correctly addressed and stamped is a prima facie proof of its receipt is error calling for reversal. A declaration made by the writer while writing that he was writing such a letter is not admissible to prove that it was sent.

## INSURABLE INTEREST IN THE CASE OF VALUED MARINE POLICY.

In the case of *Bowring vs. Providence Washington Ins. Co.*, decided by the District Court of New York, May 29, 1891, marine policies were issued on the hull and boiler of a steamship, the vessel being valued at \$100,000. Afterwards additional policies were taken out by the managing owners for the joint benefit of all owners on advances made by them on the vessel. It was held in case of a total loss that the managing owners had an equitable lien on the vessel and an insurable interest in respect to their advances, which was a different subject-matter from the policies on the vessel itself, and that the amount of such advances could not be offset by the underwriters on the vessel on the ground that the insurance exceeded the agreed value of the vessel where it appeared that the actual value of ship was at least equal to the entire amount of insurance.

## FRAUDULENT ARBITRATION.

In the case of *Glover vs. Rochester-German Ins. Co.*, decided by the Supreme Court of Washington, Feb. 12, 1895, there was evidence that prior to any arrangement for an appraisal, the company had taken measures to secure an arbitration, and that the party so selected exerted a constant influence over the other arbitrator and the umpire, declaring that he was working for the companies and intended looking after their interests, and every interference would add to the cost, and it further appeared that the award was grossly inadequate and that the insured declined to be bound by the award before the latter was signed. It was held that the appraisal should be set aside. It

was further held that, by consenting to arbitrate, the company waived the policy provision that in case of dispute payment should be made sixty days after proofs were submitted, as this provision was for the benefit of insured, and that insured was entitled to interest from the date of liability.

#### BUILDERS CERTIFICATE.

In the case of *Summerfield vs. Phoenix Assn. Co.*, decided by the U. S. Circuit Court, W. D. of Va., Dec. 21, 1894, the policy required proofs of loss to be furnished within thirty days, and also in case of a building, that there should be attached to such proofs a duly verified certificate of a builder as to the cash value of the building immediately before the fire. It was held that an itemized estimate of the cost of replacing the building, signed by a responsible firm of builders, and attached to the proofs of loss more than thirty days after the fire was sufficient compliance with the requirement. The policy also provided that carpenters working in the building altering and repairing the premises would vitiate it. It was held that the removal of two small pieces of stair rail by a carpenter, occupying but a brief space of time on the day preceding the fire, was not a violation of the provision where there appeared to be no connection between such work and the fire.

#### SUBROGATION AND INSURABLE INTEREST IN CASE OF REVENUE STAMPS.

The owner of insured revenue stamps which had been burned before using sought after receiving his insurance money to recover from the government for the use of the insurer under a statute providing for repayment in case of such lost stamps. It was held in the case of *United States vs. American Tobacco Co.*, decided by the Supreme Court of the United States, April 12, 1897, that payment by the insurer was in such case no bar to recovery. A requirement by the Commissioner of Internal Revenue that the claimant should swear that he had not received any reimbursement was sufficiently complied with by an oath that it had not been received from the government. The owner had an insurable interest although the government was obligated to reimburse. While the government had a right to elect whether to refund in money or to replace with other stamps, such right of election ceased after refusal to do either and the bringing of suit.

## UNITED STATES CIRCUIT COURT.

DISTRICT OF KANSAS.—FIRST DIVISION.

METROPOLITAN LIFE INS. CO., *Complainant,**vs.*WEBB McNALL, AS SUPERINTENDENT OF INSURANCE  
OF THE STATE OF KANSAS, *Defendant.\**

A Federal Court may interpose by injunction to prevent the illegal or wrongful administration of a state law by an officer of such state where the aggrieved party is a citizen of another state.

The Insurance Superintendent of Kansas notified a company of another state, duly authorized, that certain death claims must be settled if it desired to remain. The company replied that it should contest them in the courts, and the superintendent thereupon revoked its authority, assigning its refusal as the cause.

*Held*, That the superintendent had no power under the laws of Kansas to arbitrarily revoke its authority for such a cause, and may properly be enjoined from so doing.

Statement of the Case by the Editor of the Insurance Law Journal.

The Metropolitan Life Ins. Co., of New York, doing business in the state of Kansas, under a certificate of authority duly issued, was notified by the Insurance Superintendent of that state that if it desired to continue business there it had better adjust the claims on two life policies whose validity it disputed because of fraudulent representations in the application regarding health. The company replied, setting forth the grounds of its refusal, and announcing its determination to resist payment in the courts if necessary in the interest of the public. Thereupon the superintendent notified the company that he had revoked its license to do business, and published an official notice of such revocation in the public press. This suit was brought for the purpose of restraining the superintendent by injunction from revoking the license.

ALBERT H. HORTON and D. R. HITE, *for Complainant.*

DAVID OVERMYER, DAVID MARTIN, and A. B. QUINTON, *for Defendant.*

FOSTER, J.

The defendant challenges the jurisdiction of the court in this: That the bill charges the wrongful acts of the defendant to have been done as Superintendent of Insurance, and purely in his official capacity, and seeks by mandatory injunction of this court to compel said officer to reissue the certificate of authority, and is in reality a

\* Opinion filed, June 29, 1897.

proceeding against the state of Kansas. It will be observed that the restraining order heretofore issued is the ordinary injunction. It will be further observed that the bill charges that the defendant's acts were wrongful and malicious, and without authority of law, and illegal and void.

It is earnestly contended by counsel for the defendant that this court has no jurisdiction, and in support of this contention counsel relies largely upon *in re Ayres*, 123 U. S., 443.

In the case of *Reagan vs. Farmers' Loan & Trust Co.* (154 U. S., 362), which was long subsequent to the *Ayres Case*, the supreme court had occasion to review at great length this question, and there laid down the doctrine that the court had jurisdiction, and that it was not in violation of the eleventh amendment of the Federal constitution to proceed by injunction against an officer of the state seeking to enforce the provisions of an unconstitutional act of the legislature, and the order in that case enjoined the defendants in their official capacity as state officers. The court in said case (p. 390) uses the following language: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. \* \* \* They may go beyond the powers thereby conferred, and when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

In *Cunningham vs. Macon & Brunswick Railroad* (109 U. S., 446, 452), it was said: "In these cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

In *re Ayres*, *supra* (p. 500), the court quotes, with approval, the doctrine established in *Allen vs. B. & O. Rld. Co.* (114 U. S., 811), *Poindexter vs. Greenhow* (114 U. S., 270), and says: "The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually responsible."

"A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act, and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. \* \* \* It is necessary, therefore, for such

a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent and warrant for his act. This, the defendant in the present case undertook to do."

And in the Poindexter Case cited, the court uses this language: "The case, then, of the plaintiff below, is reduced to this: He had paid the tax demanded of him by a lawful tender; the defendant had no authority of law thereafter to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, and with force and arms, seized, taken, and detained the personal property of another." See, also, *United States vs. Lee*, 106 U. S., 196.

So it will be seen that, so far as the case at bar is concerned, there is nothing in the Ayres Case that justifies the contention of the defendant that the state of Kansas is in reality the defendant in this action. The complainant has predicated its case on the want of legal authority of the defendant under the laws of Kansas to do the act complained of. The Superintendent of Insurance seeks to justify his action under the statutes of the state, but in the words of the supreme court, "The court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

The defendant insists that under the laws of Kansas, he not only has authority to arbitrarily refuse permission to insurance companies to do business in the state, but also to revoke such licenses without giving any cause therefor. The complainant contends that there is no law of the state authorizing the defendant to revoke its certificate for the reasons given by him. It further contends that if the state has given such authority it is repugnant to the Constitution of the United States.

The case chiefly relied on by defendant is *Insurance Co. vs. Wilder* (40 Kan., 561), and it becomes necessary to briefly examine that case and see what were the facts and just what was decided by the court. It appears from the record that one D. W. Wilder, then being Superintendent of Insurance of the state, arbitrarily refused to issue a permit to said insurance company, though solvent, responsible and law-abiding, to continue its business in the state; whether it was mere caprice of the superintendent, or a desire for notoriety, or even a baser motive, does not appear. The court decided that the defendant's duties in granting authority to insurance companies were not entirely of a ministerial nature, but were largely discretionary, and could not be controlled or directed by the writ of mandamus. It is not to be inferred, however, that the court meant to

decide that there was no limit to discretionary power, nor was there involved in that case the power of the superintendent to revoke a certificate of authority already issued. It is not my purpose to detract from that decision, but it is safe to say that no court will be likely to enlarge or extend by implication the doctrine therein enunciated.

In the case at bar, the superintendent had exercised his discretionary powers, and had found the company entitled to a certificate to do business in the state, and had issued authority for the period of a year, received the fees (\$100) therefor, and subsequently collected other fees and charges from the company, none of which sums of money have been returned or tendered to the company. The defendant shortly afterward revoked or attempted to revoke the certificate, alleging as a cause that the company refused to pay its losses. The complainant asserted that the claim of loss was fraudulent and illegal, and desired to contest it in the courts. Thereupon the defendant, without investigating the facts, laid down the ultimatum that the company should pay the claim or quit doing business in the state; the company refusing to yield, the defendant revoked its authority to do business in the state, and further ordered that it "ceased soliciting business, receiving premiums and issuing policies after this date in this state."

Reverting again to the proposition before stated: Has the Superintendent of Insurance, under the statutes of Kansas, the authority to arbitrarily and without cause revoke and cancel the certificate of the complainant to transact business in the state? The cause assigned for the act of the defendant is no cause recognized by law. The complainant has the legal right to resort to the courts for the settlement of controversies between it and its policyholders, and to say that it must either forego its legal rights in that respect, and submit to pay all claims made against it or quit business in the state, is arbitrary, unreasonable, and dictatorial.

Is there anything, express or implied, in the statutes of Kansas indicating any such intent of the legislature, or giving any authority to the superintendent to dictate such terms?

In the case of *Insurance Co. vs. Wilder*, supra, the court uses this language: "One of the principal objects of the act creating the insurance department, and the office of superintendent, is the protection of the insured by excluding from the state such companies as are unsound and irresponsible. To accomplish this, large powers and considerable discretion must necessarily be lodged with some one."



Again, the court says: "The superintendent has no right to discriminate in favor of one company and against another of the same character and standing, nor to arbitrarily and capriciously exclude any company from the state. He is expected to honestly investigate and determine under the rules furnished for his guidance, whether the conditions and requirements of the legislature have been complied with."

In reference to the authority of the Superintendent of Insurance to revoke the authority granted to companies to do business within the state, § 2, I. G. S., p. 971 (Par. 3324) provides as follows: "Whenever it shall appear to the Superintendent of Insurance from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company, partnership or association, not organized under the laws of this state, are in an unsound condition, he shall revoke the authority granted to such company to do business in this state, and cause a notice thereof to be published in at least one newspaper published in the city of Topeka; and after the publication of such notice it shall not be lawful for the agents of such company to procure any new applications for insurance, or issue any new policies."

Section 17 of the act provides what fees and moneys shall be paid by foreign insurance companies to entitle them to licenses to transact business within the state, and it is provided by the last clause of said section as follows: "In case of neglect or refusal by any such company to pay said sum, the Superintendent of Insurance shall revoke the authority or license granted such company."

Sec. 80 (Par. 3404), G. S., 1889, reads as follows: "Whenever any insurance company, incorporated under the laws of any other state or country, shall become liable to pay any loss to any person in this state, and shall neglect or refuse for three months after final judgment to pay the same, and all costs of suit incurred in prosecuting the claim of the insured to judgment, the said company may be perpetually enjoined from doing any business in this state until said claim and costs shall be fully paid."

The Act of 1889 (chap. 159) contains the following provisions concerning the issuance and revocation of certificates of authority: "Provided, however, that the Superintendent of Insurance shall have no power or authority to refuse an insurance company a certificate of authority to do business in the state, if such company is solvent and has fully complied with the laws of the state; and provided further that such Superintendent of Insurance shall have no authority to revoke or suspend the certificate of authority of any association or corporation transacting insurance business, if such

association or corporation is solvent and complies with all the laws of the state. And, also, it is further provided that in all actions brought against the Superintendent of Insurance to compel him, by mandamus or otherwise, to issue certificate of authority to any association or corporation desiring to transact insurance business in this state, and in all cases brought against the Superintendent of Insurance to restrain or enjoin him from revoking or suspending the certificate of authority of any association or corporation transacting insurance business in this state, such action or actions must be commenced and maintained in the county where the office of the Superintendent of Insurance is located and carried on."

These are the only provisions found in the statutes of Kansas touching the authority of the Superintendent of Insurance to revoke certificates granted to insurance companies to do business in the state, and so far from giving the authority assumed by the defendant in this case, it clearly appears that his action is beyond any express or implied sanction of the law; indeed, Section 80, above quoted, indicates clearly that the legislature intended that insurance companies should have the right to contest claims against them in the courts, and it provides that unless judgments so obtained against them shall be paid within the period of three months, that they shall be prevented from transacting any further business within the state—not by revocation of their license, but by judicial process.

The complainant contends that the Act of 1889, which was passed subsequent to the decision of the Wilder Case, has materially restricted the powers of the Superintendent of Insurance. That act is entitled: "An Act relating to insurance, and amendatory of section 24 of chapter 132, Laws of 1895," etc. Here are two clauses named in the title: The first, an act relating to insurance; the second, amendatory of another act. Section 1 is chiefly given to amending the law of 1885, concerning mutual fire-insurance companies, but there are three provisions inserted in the section. These provisos, in terms, limit and restrict the powers of the Superintendent of Insurance, not to mutual fire-insurance companies alone, but to all insurance companies. Note the general terms of the second and third provisos before quoted. The Superintendent of Insurance shall have no authority to revoke or suspend the certificate of any association or corporation transacting business if such corporation is solvent and complies with the laws of the state. The third proviso requires any association or corporation bringing suit to compel the superintendent to issue certificates, or to enjoin him from revoking them, to bring the suit in the county where he keeps his office, which is the county where this suit is brought.

Now, can it be said that the legislature intended that all these regulations and privileges should apply to mutual fire-insurance companies alone, while the great mass of the insurance business was transacted by other companies? The title of the act is sufficiently broad, and the terms of the provisos sufficiently general to include any and all insurance companies, and it is evident to me such was the legislative intent.

In reference to the authority of this court to grant the relief under the last proviso of the act, it was expressly decided in the Reagan Case (see pp. 391-2) that under a similar statute of the state of Texas, the Federal courts have equal jurisdiction with the court of the state if complainant was a citizen of another state.

If the statutes of Kansas would bear the construction contended for by defendant, giving him authority to revoke the certificates of authority of insurance companies, because they refused to give up their rights to resort to the courts for redress and settlement of disputed claims, the question arises: Could the state impose such terms on the companies? It must be admitted that the state of Kansas has the right to exclude foreign corporations entirely from doing business in the state and it may impose any terms not objectionable to the Constitution or laws of the United States on any such corporations, as a condition to their doing business in the state: *Insurance Co. vs. French*, 18 How., 404; *Paul vs. Virginia*, 8 Wall., 168; *Insurance Co. vs. Morse*, 20 Wall., 456; *Doyle vs. Insurance Co.*, 94 U. S., 535; *Barron vs. Burnside*, 121 U. S., 199.

The defendant relies upon the Doyle Case to sustain his contention. In that case, the laws of Wisconsin in terms required the defendant to do the act complained of, to wit, revoke the license of the insurance company, and the company had signed and filed its consent to the law as a condition to receiving permission to do business in the state, which consent was that it would not remove its suits from the state to the Federal courts. This decision sustaining the law was made by a divided court, but in the later case of *Barron vs. Burnside* (121 U. S., 199), the court affirmed the Morse Case, which held such a stipulation invalid and explained and limited the Doyle Case.

The court, speaking of the rule established in the Morse Case, says (p. 538): "This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights."

The temporary injunction will be granted.

## SUPREME COURT OF INDIANA.

MARTHA A. CARMIEEN ET AL. }

vs. }

JACOB B. CORNELL ET AL.\* }

Allegations that plaintiffs are members of a mutual company, holding policies specified, and are contributing to its funds, and interested in the funds so collected by the society, are sufficient to show that they are members entitled to bring action to restrain an unlawful assessment and payment of a claim. It is not necessary to specify all the steps taken to become members nor the amount of contributions.

Such members have a right to enjoin the society from assessing and paying a fraudulent claim, where the officers have refused their request to resist the payment and insist on recognizing the validity of the claim.

MONKS, J.

Appellants brought this action as policyholders in a mutual life insurance company organized under the laws of this state, to enjoin said company from making an assessment upon its members, including appellees, and paying to appellants the amount of two policies upon the life of one Mitchell; said appellants having no insurable interest in his life, and said policy having been issued without his knowledge or consent: Sections 4902, Rev. St., 1894 (Acts 1883, p. 203, § 6). A demurrer to the amended complaint for want of facts was overruled. Answers in two paragraphs were filed, the first paragraph being a general denial, and the second a plea in abatement. Appellees' demurrer to the plea in abatement was sustained. A trial of the cause by the court resulted in finding and judgment in favor of appellees. The errors assigned and not waived called in question the action of the court in overruling the demurrer to the complaint and in sustaining the demurrer to the plea in abatement. It is urged by appellants, against the sufficiency of the complaint, that the same wholly fails to show any interest of appellees in said insurance company; that the averment that appellees are the holders of certain policies in the said company is but a mere conclusion. The part of the complaint concerning appellees' interest in said company is as follows: "That plaintiff, Jacob B. Cornell, is the holder of policy No. 3611, issued by the defendant company to him on March 1, 1890, insuring said Jacob B. Cornell for the benefit of his estate, which policy is now in full force, and the plaintiff, John W. Cornell, is the holder of policy

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\* Decision rendered, May 29, 1897.

No. 570c, issued by the defendant company to him on March 1, 1890, insuring the life of said John W. Cornell in sum of \$1,000 for the benefit of his estate, which policy is now in full force. That Jacob B. Cornell and John W. Cornell are now, and have been since March, 1890, members of the said defendant society, contributing to its funds for the purpose of paying the expenses and death losses by assessments made against them by the proper officers of said defendant society." It is further alleged, in substance, that the defendant company has accumulated and is accumulating from assessments collected by it from its members a fund for the benefit of all policyholders, from which policies are paid at the death of the holders to the beneficiaries who are entitled to the same, and from which earnings dividends are distributed to the policyholders, and added to their policies, and that said defendant company is a mutual company organized under the laws of this state, and its funds belong to its members who have legal policies in said company; and that plaintiffs are interested in, and part owners of, the funds of said company. We think these allegations are sufficient to show that appellees were members of said company, and had such interest as entitled them to bring this action. It was not necessary to set forth all the steps taken by appellees to become members of said company, nor to state the amount of the membership fees or assessments paid by them. Appellants cite *Elsey vs. Association* (142 Mass., 224), to sustain the proposition that a member of an assessment assurance company cannot maintain a suit to enjoin the company from paying a policy to a person who claims to be a beneficiary thereunder. In the case cited the company was organized under a statute which provides that such association may "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in the by-laws for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and to be forthwith paid to the person or persons entitled thereto." In said case one Whitmore, in his application for membership, designated his wife, Addie E. Whitmore, as the person to whom the benefit was to be paid upon his death. Afterwards he attempted to change the designation from his wife to his mother, Abigail Whitmore. The action was brought by one Elsey, a member of said association, and Addie E. Whitmore, the wife, was joined with him as co-plaintiff to enjoin the payment to Abigail Whitmore, the mother; and the court held that the assignment to the mother was invalid, and the original designation of the wife remained in force. The court also said that the plaintiff (Elsey) had no interest in the fund, and could not maintain the bill. It was conceded that

either the wife or the mother was entitled to the money. The controversy, therefore, was between them; and Elsey, as the court held, had no interest in the question, and was not a proper party. Elsey had no interest in the controversy for the further reason that under said statute the person designated by a member receives the money paid in by such member, and has no interest in any other money or funds, and no member has any interest or concern in what is paid in by any other member. The court said concerning this statute: "Said chapter authorizes an association of a peculiar character. Its object is to enable a man to lay aside a portion of his income or property, in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other persons dependent upon him. But the provisions of the general laws relating to life-insurance companies do not apply to this association. The fund held by it is not attachable by creditors of the member, and, by clear implication of the statute, after he has set it aside he loses the absolute control over it which he has over his other property. He cannot assign it, and divert it from the class of beneficiaries described in the statute, and direct its disposition to other persons outside of that class." It is clear that this can give no support to appellant's contention.

It is next insisted by appellants that the statements in the complaint that "the said society is about to lay assessments upon its members, including plaintiffs, for the purpose of paying said claim, and will do so unless restrained by this court, is not sufficient to call for interposition of the strong arm of equity." The following allegations in the complaint are also to be considered in determining this question: "The company has accepted the proofs of loss and claim made by the holder of said policy as being valid against said company, when, in truth and in fact, said policy is a fraudulent claim, and never at any time had a legal existence, by reason of fraud in procuring the same to be written, as heretofore set forth. That the defendant society, by its managing officers, who are in possession of its funds, and intrusted with the management of its affairs, is about to pay from the funds of said society the amount of said policy to the defendant policyholder, although said managing officers well know that said policy is fraudulent and was never legally issued, and is not, and never has been, a valid claim against said society. That the said managing officers of said society and the said defendant policyholders have agreed that said claim is a valid claim, and that the same shall be paid by said managing officers without defense. That the said managing officers of the said society, for the purpose of assisting the defendant policyholder in

obtaining the money of said society upon said fraudulent claim, have refused these plaintiffs to decline said claim and to contest the same, although requested by the plaintiffs so to do; and the said managing officers will not now or at any future time, as plaintiffs charge and believe, make any defense whatever against said claim. That, if the defendant policyholders herein should institute an action at law against said society for the purpose of recovering upon said policy, the said managing officers of said society, in violation of their duties to these plaintiffs, would permit a judgment to be taken against said society by default, or without making the defense against said policy which equitably exists." These allegations show that appellees had no adequate remedy at law, and were entitled to injunctive relief: Section 1162, Rev. St., 1894 (sec. 1148, R. S., 1881); *Camp vs. Kendricks*, 130 Ind., 545. In the latter case cited, the court said: "The remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by pecuniary damages which a jury may assess." Appellees each had separate and independent policies in said insurance company, but the object of the suit was to enforce a common interest, and they, therefore, had the right to join as plaintiffs in bringing this action: *Bank vs. Sarlls*, 129 Ind., 201; *Town of Sullivan vs. Phillips*, 110 Ind., 320; *Tate vs. Railroad Co.*, 10 Ind., 174, and cases cited; *Kipper vs. Glancy*, 2 Blackf'd, 356; *Ruffing vs. Tilton*, 12 Ind., 259; *Strong vs. School Twp.*, 79 Ind., 208; *Field vs. Halzman*, 93 Ind., 205; *Thorton Pr. Code*, p. 24; Notes 9, 12, 15. Under our code of procedure an answer in abatement cannot be pleaded with an answer in bar, but must precede it, and the issue must be tried first and separately: (Section 368, Rev. St., 1894, sec. 365, R. S., 1881), *Field vs. Malone*, 102 Ind., 251; *Glidden vs. Henry*, 104 Ind., 278.

The answer in abatement was filed with the general denial, an answer in bar, and was subject to be stricken out on motion. The error, therefore, if any, in sustaining a demurrer thereto was harmless: *Watts vs. Sweeney*, 127 Ind., 116. Finding no available error in the record, the judgment is affirmed.

## SUPREME COURT OF MINNESOTA.

GARDNER	}
vs.	
FIDELITY MUT. LIFE ASS'N.	
WARNER	
vs.	
SAME.*	

Rulings of the court below on the trial together of these actions, upon objections made to certain offers to introduce testimony of the same general character, considered and disposed of.

*Held*, That the rulings were correct.

JAMES E. TRASK (H. J. Horn, of counsel), *for Appellants*.

WARNER, RICHARDSON & LAWRENCE, *for Respondent*.

COLLINS, J.

These actions were by consent tried to a jury together, but as separate cases, and at the conclusion of the evidence the court directed, and the jury returned, a verdict in each case for defendant. On appeals from orders denying motions for new trials, they were argued and submitted together. The defendant is a mutual benefit association, organized under the laws of the state of Pennsylvania, on the mutual assessment plan. The action in which Mrs. Gardner is plaintiff is upon a certificate of date December 8, 1893, whereby the life of Clarence B. Gardner—who was plaintiff's unmarried son—was insured for the sum of \$2,500, and in which plaintiff was designated as beneficiary. The other action, Warner being plaintiff, is upon a certificate of date January 11, 1894, insuring the lives of the plaintiff, Warner, and said Clarence B. Gardner for the sum of \$5,000, payable to the survivor upon the death of either. At the time of the issuance of this certificate, Warner and Gardner were copartners in business, and so remained until some time in June, 1894. Gardner died in September of the same year, and proofs thereof were duly made and filed with the association. It refused to pay, and these actions were brought.

The complaint in the Gardner case was in the usual form, but in the Warner case it was averred, in addition to the usual allegations, that on the 16th of August, 1894, the defendant association obtained

\* Decision rendered, Jan. 18, 1897. Syllabus by the Court.



from Warner and Gardner an assignment of the joint certificate by means of false and fraudulent representations and undue influence. Stated as concisely as possible, the defense interposed by the answers was that on August 10, 1894, the beneficiary named in the certificate for \$2,500 had been duly changed by a surrender of the certificate itself, on the request made by the insured, and the issuing of a new certificate to him, in which Warner was named as beneficiary, and that immediately afterwards, for a valuable and adequate consideration, and at the express solicitation and request of the insured, Gardner, and the beneficiary, Warner, said new certificate was duly surrendered to the association and canceled. It was also alleged that, at the same time and under the same circumstances, the joint certificate for \$5,000 was duly surrendered to and canceled by the association. There was another allegation to the effect that all payments made to defendant on account of these certificates were made by the insured, and by no other person. In the Warner case the answer denied that false or fraudulent representations had been made, or undue influence used, to procure possession of the \$5,000 certificate. The reply in each case denied that either certificate had been surrendered to or canceled by the association. It was alleged, in the Gardner case, that through false and fraudulent representations and undue influence the association had induced the insured to apply for a change of beneficiaries and the substitution of Warner for his mother, and that such change was made on account thereof; and it was also alleged that subsequently, and by means of false and fraudulent representations and undue influence, Warner, the substituted beneficiary, and Gardner, the insured, were induced to make, and that defendant procured, an assignment to it of the new certificate for \$2,500 without consideration.

On the issues thus made the trial was had, and from the evidence it conclusively appeared that, at the express request of the insured, the \$2,500 certificate had been received by the association, and, in form, a new one had been substituted, and delivered to him, in which Warner had been designated as the beneficiary. It also conclusively appeared that, soon afterwards, Warner and Gardner went before a notary public, made oath to certain affidavits, signed and acknowledged an assignment to the association of each certificate, and handed them to one Pleins, to be delivered to the assignee. Soon afterwards Pleins appeared at the office of Gardner and Warner with a draft upon the association for \$1,500, made by its authorized agent, and payable to the order of Gardner. The latter indorsed the draft, and requested Pleins to obtain the money thereon. Pleins went to a bank, deposited the draft to his own credit,

paid \$50 upon Gardner's note then held by the bank, and took a certified check for \$1,100, payable to the order of Gardner and Warner. He returned to the office, gave this check to Gardner, and told him of the \$50 payment. It was agreed that Pleins was to retain the balance, \$350, for his own services in obtaining the money from the association. Both certificates in which Warner was beneficiary were then in the safe in the office. Warner took them out, and handed them to Pleins, to be delivered to defendant association. From Warner's evidence at the trial it is beyond question that he was an active participant in the whole transaction. It was not shown what had become of the certified check, but the money to cash the same had been set apart out of Plein's funds by the bank officials, and had not been called for when the cases were tried. The testimony was undisputed that, at the request of both Gardner and Warner, Pleins went to Pennsylvania as their accredited agent, and for the purpose of inducing the association to make a cash settlement upon the certificates, in view of the alleged fact that Gardner's health had failed, that he was without means, and that his purpose was, if the settlement could be made, to go South, in the expectation that he might recover; that the officers of the association at first declined to act upon the proposition, but finally, and with reluctance, and not until they had made a thorough examination as to the alleged failure in health, and the good faith of both insured and beneficiary, they consented to take the assignments and pay over the money. Even then they required the representations of Gardner and Warner to be made under oath, and they were contained in the affidavits we have referred to. It was also beyond dispute that, at the time of the transaction, and for some months previous, Pleins was and had been in the employ of the association as a soliciting agent. The "settled case" on which the motions for new trials were founded, and which has been brought before us on this appeal, does not purport to contain all of the evidence received at the trial below, and therefore we are compelled to treat it as a bill of exceptions only. The final ruling, when the court ordered that a verdict for defendant be rendered in each case, cannot be considered; our investigation being confined to an examination of the rulings on the admissibility of testimony alleged to have been erroneously excluded: *Board vs. Brown* (Minn.).

On the trial appellants' counsel repeatedly attempted to show that, from the beginning of the negotiations which led to the payment of the money and the assignment and surrender of the certificates, Pleins made false and fraudulent statements and representations to Gardner, the insured, and to Warner, the beneficiary, concerning all

three of the certificates, and their value in case of the decease of the insured, and also as to the defendant association; that both of these persons relied upon these statements and misrepresentations, and believed them to be true; and that by reason thereof Gardner was induced to surrender the first certificate for \$2,500, and take out in lieu thereof the certificate for the same amount in which Warner was designated as the beneficiary; and, further, that by reason of these same false statements and representations, and in the belief that they were true, both Gardner and Warner were induced to surrender up, and to assign, to the association the certificate last mentioned and the joint certificate for \$5,000. And, as those questions were asked and offers made, the court sustained each objection thereto, apparently for the reason that there was no evidence in the case tending to show that Pleins was anything more than a soliciting agent for the association, or that he possessed any authority or power outside of this. If, upon the evidence as it stood, Pleins' authority to act for defendant was limited and restricted to merely soliciting and procuring memberships, it is obvious that his statements, not within the scope of his agency, would not bind his principal, in the absence of proof that he had been held out as authorized to make them, or subsequently and with knowledge of the facts the association had ratified what he said and did. We have no doubt but that, prior to the moment that the contract of agency between Pleins and defendant (the latter's Exhibit 1) was put in evidence, and this was before plaintiffs rested, the rulings were correct. But in that contract was a clause which, in connection with other testimony, had it been offered, might have changed the situation, and have rendered the subsequent rulings erroneous. This contract in terms constituted Pleins an agent for the purpose of procuring applications for insurance on the lives of individuals, and forwarding them to defendant association for approval or disapproval, and, if approved, and certificates were issued, for collecting the amount due upon receipts for dues or premiums accompanying the certificates. It was expressly provided that Pleins should not be an agent for any other purpose, but, in specifying the manner in which he should perform his duties as solicitor and collector, it was provided that he should perform such other necessary duties as might be required, in connection with the general business of defendant association, without other compensation than the previously stipulated commissions as a soliciting agent and collector. So that, by the terms of the contract, Pleins might be required to exercise agency powers and duties of a special or general character, independent of those of a solicitor or collector; or, to put it in another form, he might have been engaged, authorized,

and empowered by the association to open, conduct, and complete the negotiations with Gardner and Warner in which the false and fraudulent statements and representations are alleged to have been made, and in such event the liability of the association for Pleins' fraud could not well be questioned. But it was optional with it to so require, and the burden of proof was on the plaintiffs to show that it had exercised this option, and had required Pleins to open or conduct these negotiations, or that Pleins had been held out as an agent authorized to act in this behalf. It could not be inferred from the fact that these acts might be required of him. As a soliciting agent and collector of dues or premiums to be paid upon certificates when delivered, he could not bind the company by the statements plaintiffs attempted to prove; but, if the association actually required the performance of other general duties, as it had the right to do, or if he was held out as having been so required, a different case would be presented.

So the question is, was any attempt made by plaintiffs' counsel to show either that Pleins had been required or employed to procure the surrender or assignment of the certificates, or to treat with Gardner or Warner, or had the latter been led by the association to suppose that he had? It was not claimed upon the trial that either had any knowledge of the existence of the clause we have spoken of in the special agency contract, or that the association knew, or should have known, that Pleins, acting outside of his powers as a special agent, had assumed to speak for it generally, or had made false or fraudulent representations with a view of securing the certificates, or that the insured had been induced by him to solicit a money payment on the same in consideration of cancellations. The bill of exceptions shows that the offers of evidence were confined exclusively to statements made by Pleins before he went to the principal office of the association in Pennsylvania, armed with written authority from Gardner and Warner to accept a part of the insurance at once, for which they proposed to cancel the certificates; the reason given for this proposal being that Gardner wished to use the money in an effort to regain his health, and that Warner was willing and anxious for him to do so. No attempt was made to show, nor has it been claimed, that, up to this time, the association had any knowledge of Gardner's ill health, or that he or his beneficiary had any cause for seeking to obtain an immediate cash payment, or had thought of so doing. Nor, when the rulings were made, had there been any offer to prove that the association had required or authorized Pleins to act for it in this or any other transaction, except as a solicitor of insurance and a collector of dues and premiums. The

offers which the court ruled upon were not broad enough to have been of any value. They should have included an offer to show that the association had exercised the option right provided for in the contract, or that Pleins had otherwise been authorized to represent it in this matter, or that, without actual authority, he had been held out as empowered to act in its behalf, or that, with knowledge of what had been done, it ratified his acts. The court ruled correctly upon the offers as made.

We have referred to the fact that the motion for a new trial in each of these cases was also upon the ground of newly-discovered evidence. This feature of the appeal we cannot consider. It has not been made to appear by a proper certificate that the "case" contains all that was presented to and considered by the court below upon this branch of the motion. The rule upon this subject, laid down in *Hospes vs. Car Co.* (41 Minn., 256), and several other later cases, is directly in point here.

The orders appealed from are affirmed.

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## SUPREME COURT OF MICHIGAN.

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TURNER

vs.

FIDELITY & CASUALTY CO., OF NEW YORK.\*

The attorneys of a claimant, under an accident policy, notified the company of an accident, and received a reply denying liability, but stating that an adjuster would call in a few days and discuss the matter and endeavor to show that there had been a breach of warranty, and requesting that the matter rest until he should call. No adjuster called and suit was not brought until about a year and a half, whereas the policy stipulated that unless brought within a year all claims should be forfeited.

*Held*, That the limitation was waived and the suit was in time.

Where the insured was in the real-estate business, evidence that, through a dislocation of the arm, though he was able to go to his office every day for a short time, he was unable to do any business but had to get it done by another during ten weeks, was evidence of injuries which wholly disabled him "from prosecuting any and every kind of business pertaining to his occupation."

HANCHETT & HANCHETT, *for Appellant*.

BEACH & GAVITT, *for Appellee*.

LONG, C. J.

This is an action to recover a weekly indemnity under an accident policy issued by the defendant to the plaintiff on the 8th day of

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\* Decision rendered, April 27, 1897.

January, 1889, and subsequently renewed from year to year, the last renewal certificate covering a period from January 8, 1894, to January 8, 1895. On February 10, 1894, while the plaintiff was carrying wood on a wheelbarrow, he slipped and fell, dislocating his right shoulder. He claims an indemnity under the policy for a total disability for a period of ten weeks. At the time the policy was issued, and at the time of the accident, the plaintiff was engaged in the business of loaning money on personal security and real estate. He was insured as a banker and real-estate dealer. He made two claims under this policy, the first one being made on March 12, 1894. Nothing was done in respect to this claim. Afterwards, and on June 21, 1894, the plaintiff made a second statement of claim, which was forwarded to the company by Camp & Brooks, his attorneys. In regard to this letter, the defendant wrote the following letter, dated July 2, 1894:—

Your favor of June 23d, inclosing claim blank regarding the above for an alleged injury stated to have been received February 10, duly to hand. I beg to say that we have already received a claim blank from Mr. Turner for an alleged injury stated to have been received February 10. We have already notified you that we fail to recognize any liability in that matter, and return the claim blank herewith. One of our adjusters will be in Saginaw shortly, and we will have him call upon you, and discuss this matter with you. We think he will be able to show you that there is a breach of warranty in Mr. Turner's application, and, therefore, no liability on the part of the company under the policy Mr. Turner holds. Kindly allow the matter to rest until our adjuster can see you, and oblige.

Nothing more was done by either party until this suit was commenced, February 4, 1896.

The first assignment of error relates to the refusal of the court to direct a verdict for the defendant, on the ground that the suit was not commenced within one year from the date of the injury. The policy provides that "unless affirmative proof of death or duration of disability is so furnished within seven months, and any legal proceedings for recovery hereunder is begun within one year from the time of such accident, all claims based thereon shall be forfeited to the company." The claim of plaintiff is that the letter above quoted, written to Camp & Brooks, constitutes a waiver of this clause of the policy. On the other hand, it is contended that inasmuch as, during the time from the receipt of the letter to the commencement of suit, no adjuster of the company called upon plaintiff or his attorneys, and there was no communication of any kind between them on the subject of the adjustment of the claim, the plaintiff was not justified in waiting a year and a half before bringing suit; and, again, that the statement in the letter requesting him to let the matter rest would not warrant or justify the plaintiff in permitting

the year to go by without bringing his suit if he desired to protect his rights; that the plaintiff might have been justified in waiting a reasonable time after receiving the letter before taking action, but not in waiting the time he did, as the letter held out no hope or promise of an adjustment, but merely asked that an opportunity might be given the company to explain why liability was denied. This clause in the policy, however, was one which could be waived by the company. It cannot be construed as a limitation fixed by law. While the plaintiff was not bound to wait before bringing suit, yet it is apparent that he did wait at the request of the company. He testified that the reason he did not begin his action within the twelve months was because of the receipt of the letter of July 2d. Such clauses in policies of insurance, while held valid as contracts, may be waived by the company. The law does not favor clauses of limitation in policies of insurance, and they are strictly construed, and it does not require the positive act of the company inducing postponement; but, where the evidence is conflicting, the question of waiver is one for the jury. We think, however, in this case, that there is no conflict in the evidence, and that the letter was positive in its terms, asking that the matter be allowed to rest until the adjuster of the company could see the plaintiff or his attorneys. As was said in *Bonenfant vs. Insurance Co.* (76 Mich., 653): "Forfeiture is not favored either in law or equity, and a provision for it in a contract will be strictly construed; and courts will find a waiver of it upon slight evidence when the equity of the claim is, under the contract, in favor of the assured." See, also, *Lyon vs. Insurance Co.*, 55 Mich., 146, and cases there cited; *Insurance Co. vs. Hall*, 12 Mich., 202; 2 May, Ins., § 488; *Insurance Co. vs. Carrow*, 21 Ill. App., 631; *Thompson vs. Insurance Co.*, 136 U. S., 287.

It is next contended that the plaintiff's own evidence and the evidence of his attending physician does not support the finding that he was totally disabled in the sense intended by the policy, and that the court should so have instructed the jury. The policy provides an indemnity of the sum of \$50 per week "against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated." Upon this point the plaintiff testified substantially that the fall entirely disabled his arm to the shoulder, and that it remained in that condition ten weeks; that his business consisted generally in personal security loans, and that during that time he

did no business at all; that he could not dress himself without help, and that he had help during the whole time; that he did not do any work or business during that time, but had a man to do it for him; that he went to his office every day for a short time, but was unable to do any kind of work. We find nothing in the record which shows, or tends to show, from the testimony of the plaintiff or his attending physician, that the plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation. At least, it was a question for the jury to determine, and the court submitted it in these words: "I think that a fair interpretation of that clause is, not that he must be so disabled as to prevent him from doing anything pertaining to the business, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to his occupation; not that he might do some one thing in regard to it, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to that occupation. I submit to you as a question of fact to find whether he was so disabled, and for what length of time under this policy." In the case of *Young vs. Insurance Co.* (17 Ins. L. J., 839), a policy in the exact language of this policy was considered by the Supreme Court of Maine. That court used this illustration: "Suppose a barber, who can use his razor and shears in his right hand only, and can use his left to wipe his customer's face, comb and dress his hair, and receive and make change, by an accident is wholly deprived of the use of his right hand, so that he can neither shave his customer nor cut his hair, can it be said that he is not wholly disabled from prosecuting business as a barber?" It was held by that court that there is a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation. If this language in the policy is ambiguous and susceptible of two constructions, then the question must be solved in favor of the insured; for it is well settled in this state that where a stipulation or exception to a policy, emanating from the insurer, is capable of two meanings, the one is to be adopted which is the most favorable to the insured; and it should be framed with such deliberate care that no form or expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, should be found on the face of it: *Utter vs. Insurance Co.*, 65 Mich., 545; *Grand Rapids Electric Light & Power Co. vs. Fidelity & Casualty Ins. Co.* (Mich.).

It is further contended that the attending physician having testified that, in treating this dislocation, he discovered that the plaintiff



had sustained an injury at some time to that shoulder, which produced, as he called it, "traumatic rheumatism," and a part of the pain was due to that, therefore the company should not be called upon to pay for an injury the inconvenience of which resulted partly and indirectly from disease or bodily infirmity previously existing. We think that question was fully and fairly submitted to the jury, and need not be discussed.

The judgment will be affirmed. The other justices concurred.

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UNITED STATES CIRCUIT COURT.

DISTRICT OREGON.

COCHRAN ET AL.

vs.

MUTUAL LIFE INS. CO., OF NEW YORK.\*

The proofs of death contained, as required, a copy of the verdict of a coroner's jury that the deceased committed suicide, and also to the question in the proofs as to cause of death, the answer by the claimant was, "supposed to have suicided with a pistol."

*Held*, That, while this might be assumed to have put the burden of proving the contrary on the plaintiff, it was not a conclusive admission as to cause of death.

The insured was found dead in a spring from a pistol bullet behind the ear. He had gone to the spring shortly before with the pistol as was his habit to shoot squirrels that were digging and injuring the spring. There was evidence of a previous threat of suicide on account of stomach troubles and of other causes of worry; there was also evidence of accidental shooting from the position of the body.

*Held*, That a verdict for the plaintiff on the theory of accidental death will not be disturbed.

GEO. E. CHAMBERLAIN, J. W. WHALLEY, and J. K. WEATHERFORD, *for Plaintiffs*.

BRONAUGH, McARTHUR, FENTON & BRONAUGH, *for Defendant*.

BELLINGER, D. J.

This is an action upon a policy of insurance upon the life of Cochran. The jury returned a verdict for \$5,000, the amount of the policy. Cochran was found dead in a spring near his house, from a pistol shot in the back part of his head, fired from a pistol in his own hand. A coroner's jury found that the deceased committed suicide, and the widow, in submitting proofs of death, attached a copy of the findings of the coroner's jury, as she was required to do

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\* Decision rendered, Feb. 24, 1897.

by the form of proof provided for her by the company, and stated as the cause of death, "Supposed to have suicided with a pistol." It is claimed in support of the motion for a new trial that this answer put the onus upon the plaintiff of explaining this statement, and of showing that the deceased did not commit suicide, and that as to this there is a failure of proof. It is held that representations made in the proof of death as to the manner of the death of the insured are intended for the action of the insurance company, and upon the truth of such representations the company has a right to rely, and that the party making such representations must be held to them until it is shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained. I assume that the statement in the proof of death that the deceased was "supposed" to have committed suicide, although not the representation of the manner of death, but of a current theory in respect to it, has so far the effect of such a representation, inasmuch as it was intended for the action of the company, as to justify the company in relying upon the assumption that the deceased committed suicide, and put the burden upon the plaintiff of showing that the manner of death was otherwise; and the question, therefore, is, do the facts in evidence warrant the conclusion reached by the jury that such representation was not true, and that, contrary to it, the deceased was killed by the accidental discharge of his own pistol?

The evidence tended to show that the supply of water for the domestic and farm uses of deceased was from a large spring near the dwelling house; that it was the dry season of the year; that squirrels had been digging holes beneath the spring, in such a way as to cause loss of a part of the water therefrom, and consequent inconvenience to the deceased and his family, from lack of water; that deceased had been in the habit of taking his pistol and visiting the spring to shoot these squirrels; that on the morning of his death he went to the spring, having the pistol with him (this was before breakfast); that, when breakfast was ready, Mrs. Cochran called to her husband, who responded to the call, and came and ate his breakfast with the family; that after breakfast he returned to the spring, having the pistol with him, as was his habit; that shortly thereafter a pistol shot was heard in that direction, and, upon investigation, deceased was found floating in the spring, face downward, dead, with a large bullet hole behind the right ear. The bullet had passed through the temporal bone and into the brain, ranging slightly upward and transversely through the brain, lodging there, according to the testimony of the physician who conducted

the post-mortem examination. Other witnesses, who were present and saw the wound probed, testify that the bullet ranged downward and forward, so that it would have come out at the lower end and in front of the left ear, had it passed through the head. The wound was a ragged, irregular one—large enough to admit the index finger of the physician who conducted the post-mortem examination. The spring is inclosed in cement walls five feet high. It is nine feet square, and at the time in question it had a depth of water of about three feet. Over this is a spring house, built of wood, six feet high at the cone of the roof from the top of the cement wall. The door is at the edge of the spring, and is about two and a half feet high, and of about the same width. The bottom of the door opening is the top of a sill some three or four inches above the ground. There was some testimony tending to show powder stains or marks at the surface of the wound, but the preponderance of the evidence was against any indication of powder burn upon the skin or hair of deceased, the wound being at a point just in the edge of the hair. There was nothing unusual in the conduct of deceased prior to his death. He was a sufferer from stomach ailments. His son George admitted that he had testified at the coroner's inquest that deceased told him he would kill himself if he did not get over his stomach trouble; but the witness testifies that he was much excited at the time, and did not know all that he testified to, and that now he has no recollection of such a statement by deceased. The financial circumstances of the deceased were good, although there was an attempt to show that he was involved over his business matters, and was in mental worry on such account. One of these matters involved a friend to whom he had given a check for \$600, and who was in danger of losing the money through failure of a bank other than the one on which the check was drawn, where he had placed the check for collection. The deceased was in no way involved in the transaction. The other business matter grew out of a note indorsed by deceased, with a number of other persons, for the Albany Woolen Mill. The note was for a large sum, but the woolen mill was solvent, and there was no ground for apprehension on that account. Moreover, all the other indorsers were men of recognized financial ability. The burden put upon the plaintiff by the representation of suicide as to the manner of death in her proof of death makes the case one where she must show that her husband did not purposely kill himself. Do the facts warrant such a conclusion? It does not necessarily follow from the facts which the evidence tends to establish, but this is not required. The nature of the case necessarily leaves the question uncertain. It is enough if, by a process of reasoning,

such a conclusion becomes probable. Were there such facts, therefore, in evidence as warranted the jury, in the exercise of their right to judge of the credibility of the witnesses and of the weight to be given to their testimony, in the conclusion, upon the probabilities of the case, that the deceased did not commit suicide? In discussing the facts, much was said as to the testimony bearing upon the question of powder marks and burns upon the skin and hair of the deceased. There was testimony tending to prove that there was no indication of powder burn about the wound, and the jury might properly arrive at that conclusion. From such a conclusion it seems probable that the pistol from which the shot was fired was held at some distance from the head. This may be called one of the phenomena in the case, and it points to an accidental rather than an intentional shooting. The difficulty of firing such a shot, and the uncertainty of aim which it involves, makes it improbable that such a shot was intentional. The position of the body at the time the shot was fired is inexplicable upon any other theory than that of an accidental shooting. The deceased was necessarily leaning so far over the spring that the body fell entirely within it. There is nothing to explain such a posture in a premeditated shooting. It is doubtful if such a position could be maintained under such circumstances; and, if it could, did the deceased intend in this way to provide two methods of self-destruction—to drown himself if his pistol failed? It was within his power, by placing the muzzle of the pistol against his head, to avoid any possible chance of a miscarriage in that method of suicide. Why a second method? And would the spring, which was the source of his family supply of water be chosen for such a purpose? The habits and instincts of men are against such a hypothesis. The theory of the plaintiff is much more reasonable, and it is consistent with the known facts. Deceased had been in the habit of visiting this spring, sometimes with his pistol, sometimes with a rifle, and shooting squirrels there. He had already made such a visit before breakfast on the morning of his death. These animals had dug holes about there, and these had a tendency to draw off the water from the spring, already low and insufficient. It is not improbable that he would cock his pistol on approaching the spring, and carelessly proceed to inspect the interior of the spring after getting there, without thinking of the condition of his pistol. In examining for squirrel holes that might exist under the cement wall, he would naturally lean over the spring, and in so doing he would quite as naturally grasp the side of the low doorway near him. It is not improbable that he would do this with the pistol still in his hand. As he leaned forward over the spring, examining

its interior—unmindful, in his interest in what he was doing, of any danger—the pressure of his weight on the hand by which he was supporting himself probably discharged the pistol while the arm holding it was extended at its full length, or nearly so. This explains those features of the case not otherwise explainable, and yet necessary to be explained in determining the question at issue. All minds may not agree as to the deductions thus drawn from the facts in evidence, but if the jury made these deductions, as they must have done, the court cannot, upon any argument of a different conclusion, overrule them and set their verdict aside. The motion is denied.

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## SUPREME COURT OF MICHIGAN.

SLOMAN ET AL.

vs.

MERCANTILE CREDIT GUARANTEE CO., OF NEW YORK. }

The policy insured against loss from the insolvency of debtors owing for merchandise delivered between April 1, 1893, and March 31, 1894, inclusive. It provided that notice should be sent within ten days of knowledge of insolvency, and final proofs must be presented within ninety days of the expiration of the policy. No loss would be payable unless proof was made within such time. But should the policy be renewed on or before its expiration, a loss occurring after its expiration should be payable on the same terms as if it occurred under the renewal.

*Held*, That losses occurring after its expiration on sales made while it was in force were payable provided proofs were made within the ninety days.

Proofs of loss are not evidence of the facts of loss, but where there was other uncontradicted evidence of such loss a failure to so instruct is not harmful.

The court instructed that the amount of authorized sales, so far as the contract bore on the losses, was \$70,000, and there was to be deducted from these losses three-fourths of one per cent.

*Held*, That where it appeared that all understood correctly the amount of deduction to be allowed, and no objection was made, it will not be deemed error because the percentage might be erroneously construed to refer to the losses instead of the sales.

WISNER & HARVEY, *for Appellant*.

SLOMAN & GROESBECK, *for Appellees*.

HOOVER, J.

This action was brought upon an insurance or guaranty policy, which provided that,

In consideration of the sum of \$72, hereby insures S. A. Sloman & Co., of Detroit, in the state of Michigan, to an amount not exceeding \$2,000, against loss sustained by reason of the insolvency of debtors owing the insured for

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\* Decision rendered, March 29, 1897.

merchandise usually dealt in, sold, and delivered in regular course of business, between the 1st day of April, 1893, and the 31st day of March, 1894, both inclusive, in excess of  $\frac{1}{4}$  per cent on the total gross sales and deliveries made during said period, subject to the terms and conditions printed below or attached hereto. This policy shall expire on the 31st day of March, 1894.

The insured sent nine notices of loss to the insurer before March 31, 1894, and twenty-two after that date, but within ninety days after such date. Those last mentioned were admitted in evidence, subject to an objection "that these losses were not covered by the policy, and were not sent in during the life of the policy."

Under a request to charge, it is claimed that the court should have excluded from consideration by the jury all claims of loss not shown to have accrued before April 1, 1894. The question discussed is whether the policy covers losses where the insolvency or act of the debtor which makes the debt a loss, within the meaning of the policy, occurred after March 31, 1894, that being the date of the expiration of the policy; and counsel for the plaintiff argue that it cannot be reasonably said that the parties intended that the sales on the last day, viz., March 31st, should not be protected by the policy, as would be practically the case if the defendant's claim is the correct one. He (the plaintiff) urges that the loss may occur afterwards, and that if the insured serves his notice within ten days after learning of the loss, and makes his final proofs of loss within ninety days after the date upon which the policy expires, he may recover for a loss that occurs after such expiration. From that portion of the policy quoted, it is said that the losses to be covered are those that arise upon sales made between the 1st day of April, 1893, and March 31, 1894. There seems to be no dispute about this. In addition to that portion hereinbefore quoted, the policy provides that

The insured shall notify this company by registered mail \* \* \* of the insolvency of any debtor, within ten days after he receives information of the same;

Also,

Final verified proof of loss \* \* \* must be presented \* \* \* within ninety days after the expiration of the policy;

And, again,

No loss shall be payable unless included in said proof of loss submitted within said stated period. Should, however, this company renew the policy, or issue a new one, on or before the expiration hereof, a loss occurring after such expiration, on a sale and delivery of merchandise, made during the existence of the policy, shall be payable in the same manner as if it occurred under the renewal or new policy.

It is obvious that this policy contemplates a credit business, for there would be nothing to insure if it does not. The time and terms

of credit are not fixed, nor can we indulge in any assumptions upon the subject beyond the inference that the usages of trade in this respect were expected to be followed. Of necessity, there would be sales made during a time immediately preceding March 31, 1894, upon which the plaintiffs would receive no indemnity under this policy if defendant's construction is to be adopted, unless insolvency should immediately follow the purchase. The sales made during the period are clearly covered by the policy, and it is improbable that it was intended that the insured should be deprived of indemnity upon such sales; and, unless the policy clearly indicates such intent, the writing should not be so construed. The clauses which are said to give the policy such effect are the statement that "this policy shall expire on the 31st day of March, 1894," and the clause relating to renewals, already quoted. Under the several provisions quoted, the right to recover a loss depends upon the presentation of final, verified proof of loss within ninety days after the expiration of the policy. To this there is an exception, viz., in case where a new policy or renewal is issued on or before the expiration of the old policy, in which case the intent is plain that the insured should be permitted to recover for a loss occurring after the expiration of the original policy, at any time when losses occurring under the renewal might be recovered. This appears from the last clause mentioned, and is dependent upon it; and it is not necessary to infer from that provision that losses occurring after the 31st of March are not recoverable at all, unless by reason of the renewal. It is just as consistent to say (so far as this provision is concerned) that the loss occurring thereafter is limited to cases where proof is filed within ninety days as to say that they are excluded altogether, unless the policy is renewed. This leaves the contention with no other support than the statement regarding the expiration of the policy, which is met by the improbability of parties intending to take all substantial benefit away from the insured upon a considerable portion of the sales actually covered by the policy, and an extension of ninety days, or (perhaps more properly speaking) a limitation to ninety days, of the time within which proofs should be made regarding losses upon sales made during the life of the policy. We are of the opinion that the fairer view to take is that the provision in relation to the expiration of the policy refers to the time when sales, to be covered thereby, shall cease, and that it does not determine the time when losses must occur upon such sales, but that these shall be recoverable, regardless of that date, subject to the limitation as to final proof. This conclusion is justified by the rule that an ambiguity in an instrument is to be resolved against the

draftsman, which is supported by authorities cited by counsel. See *Tebbets vs. Guarantee Co.*, 19 C. C. A., 281; *Wallace vs. Insurance Co.*, 41 Fed., 742; *Wadsworth vs. Tradesmen's Co.*, 132 N. Y., 540; *Guarantee Co. vs. Wood*, 15 C. C. A., 563; *Bank vs. Wilkin* (Wis.); *Shakman vs. System Co.* (Wis.)

We think the court did not err in admitting proof of the losses which occurred after March 31, 1894. The final proofs of loss were received in evidence against objection, and the court failed to instruct the jury (as requested) that such proof could not be taken as proof of any fact therein contained. We are satisfied that such document was not proper evidence of the fact of loss, but if there was not other evidence of loss, upon each of the items submitted to the jury, counsel do not show or state the fact. No testimony was offered by defendant's counsel, and the *prima facie* case of plaintiff, not being contradicted, was sufficient evidence, and defendant was not injured by the failure to give this request. Counsel say that this document was assumed to be *prima facie* evidence of the claim, but we find testimony which supports it. Mr. Sloman testified, without objection, that the paper "correctly represents the insolvent's accounts and losses sustained," etc. Upon cross-examination he was examined at length upon the respective items.

The next important question raised relates to the alleged refusal to instruct the jury that "there must be borne by the plaintiffs losses amounting to \$525 before the defendant's liability begins." The court did instruct the jury upon this subject. He said: "It appears that, in estimating the losses under the terms of this contract, the amount of yearly sales which the plaintiffs were authorized to make, as far as this contract bears upon the losses in this case, was \$70,000. It also appears that there is to be deducted from these losses three-quarters of one per cent, according to the terms of this policy." If it appeared that this meant three-fourths of one per cent upon the losses, instead of upon \$70,000, it would be erroneous; but there is everything to indicate that the plaintiffs' counsel made no such claim, and that all concerned understood the amount to be \$525. Apparently, the court supposed that he was giving the substance of the request, as indeed he was if the amount was not in dispute. His attention was not called to the matter by exception or otherwise, and we should not reverse the case upon a technical construction of language if it misled no one.

Error is assigned on the refusal to direct the jury "that the loss claimed on A. S. McDonald's account was not a loss under the terms of the policy." Mr. Sloman said that it appeared that all that remained of this item consisted of attorney's fees, protest fees, and



expenses, and sundry small claims, which McDonald would not recognize or pay, and which they did not care to litigate. Counsel say that this testimony shows that the entire claim was for attorney's fees, expenses, interest, and protest fees, and in no sense a claim for goods sold and delivered, and was not covered by the policy, and, furthermore, that it appears that in the computation it must have been allowed in full. It seems to be conceded by counsel for the plaintiffs that this was a claim for attorney and other fees, etc., and not a balance upon sales; and we think the evidence shows it. It does not appear that it was not included in the verdict, nor is its allowance in any way disputed by counsel. It is true that the court repeatedly said that attorney's fees could not be recovered, and it is not surprising that this subject should have been overlooked as to other items. We think, however, that the request should have been given, and this claim withdrawn from the jury. We are of the opinion that the sale of the Burrows and McKinstry stock by the sheriff brought this claim within the terms of the policy. The claim against Webb was clearly so, under the execution, returned unsatisfied, and the same is true of the Zabbets claim, upon the report of the collection agency to which it was sent. As there is reason to believe that the McDonald claim was included in the verdict, we feel constrained to reverse the judgment, and direct a new trial, unless the amount of said claim shall be remitted. The defendant should recover costs of this court. It is so ordered. The other justices concurred.

On Motion to Modify.

(April 27, 1897.)

In this cause the defendant's counsel move a modification of the judgment, counsel for the plaintiffs having elected to remit the sum of \$140.32, as permitted by the opinion filed. The motion is based upon the claim that, after deducting the sum of \$140.32, the judgment is still greater by \$107.18 than it should be. The original brief of the defendant contains a computation purporting to show that plaintiffs sustained losses upon accounts against "rated debtors" of \$375.36, and unrated debtors \$500, making \$875.36, from which the "initial loss" to be borne by plaintiffs, of \$525, should be deducted, leaving, with interest added, \$380.13 as the total, including the McDonald claim of \$140.32, which being deducted would leave \$239.81 as the limit of defendant's liability. It is admitted that the question was not raised by an exception, but it is urged that, inasmuch as error was found upon another point, the court should have ordered a new trial, inasmuch as the judgment was clearly excessive, after deducting the McDonald account of \$140.32. If we accept the

theory of defendant's counsel upon the law, we must then inquire whether the evidence in the case supports his claim that the verdict was excessive.

In plaintiff's original brief, counsel submit a table which he asserts to be correct. Whether it is or not depends on the version of each account being verified by the undisputed testimony. We are not only not referred to the pages of the record sustaining the defendant's contention as to all of these items, but the brief does not advise us that all of the testimony is included in the bill of exceptions. The brief filed on this motion is open to the same criticism. It gives a list of debtors that it says were rated, and states that the others were unrated, quoting appellant's statement of the case in the former brief as evidence of the fact, and stating that this was not disputed by counsel for the plaintiff. As the case was presented, counsel for the defendant had no occasion to dispute the accuracy of the statement, as its only importance was in connection with an assignment, which was not based upon an exception. In the brief filed in opposition to this motion, it is disputed, and the claim made that a number of rated debtors are classed as unrated in defendant's table.

It is a general rule that error will not be presumed, but must be made to appear. The only error clearly shown involved \$140.82, and we required plaintiffs to remit the amount or submit to a new trial. We are now asked to grant a new trial upon the statement of counsel that the verdict is excessive. If this record clearly showed that items were included in the verdict unjustly, it may be doubted if we should send the case back for a new trial, if error was not assigned upon them, inasmuch as counsel see fit to remit the only claims upon which error was assigned. Still less would we be justified in doing so where the record makes it uncertain that the verdict was excessive. It is the practice of this court to refrain from ordering new trials where the record is such as to enable it to eliminate the errors, and render a judgment for the items regarding which no error is shown. One of the most pernicious features of our jurisprudence is the opportunity afforded to defeated litigants to compel their opponents to follow cases up and down through various courts, until costs become the principal controversy, and the original causes of action merely incidents, and citizens hesitate to commence a petty justice court case, lest it should ultimately involve them in financial ruin. Justice is practically denied to a large class of people. While it seems to be the policy of the law to allow this sort of thing, it has always been the practice of the courts to put an end to litigation as soon as the circumstances of the case will

permit with safety to the interests involved. The presumption is, as it should be, that justice was done in the circuit court; and, the contrary not being shown, we see no occasion to compel the plaintiff to submit to another trial, upon a suspicion that the verdict was excessive. The motion is therefore denied.

The other justices concurred.

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## SUPREME COURT OF WISCONSIN.

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AGNEW

*vs.*

FARMERS' MUTUAL PROTECTIVE FIRE INS. CO.,  
OF TOWN OF MEDINA, ET AL.\*

Where the defense to a policy was that the property was wrongfully fired by the plaintiff, evidence as to tracks which might have been made by the plaintiff, and as to his conduct, statements, and appearance relating to the fire, are admissible.

A refusal to charge that the verdict must be in accordance with the weight of evidence given was not error when the court had already charged that the verdict must be for the plaintiff, unless the defense be established by a fair preponderance of evidence.

Notice of assessment for losses inadvertently sent by the secretary in the course of a general assessment after the fire was not a waiver of the defense.

A true statement of what was claimed by the plaintiff and defendant, with the further statement that what was claimed by the defendant was a disputed fact, and denied by the plaintiff, was not error.

GEORGE W. BIRD, *for Appellant.*

W. G. COLES, R. M. LA FOLLETTE, and G. E. ROE, *for Respondents.*

CASSIDAY, C. J.

It appears from the record, in effect, that the defendant issued a fire-insurance policy to one G. W. Stiles, September 27, 1890, insuring him against loss by fire of his dwelling house for \$1,000, his farm barn for \$700, his grain stock, etc., for \$1,200, all situated on the lands described, for a term of five years from September 27, 1890, to September 27, 1895, at noon; that June 1, 1893, Stiles died intestate, leaving a widow, Catherine J., and two children, Frank E. and Clara M.; that the widow and Frank became administrators of the said estate, and settled the same; that April 28, 1894, the plaintiff purchased and became the owner in fee of the lands described by conveyances from the said widow and the son and daughter, which were recorded

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\* Decision rendered, March 16, 1897.

May 12, 1894; that at the time the plaintiff became such owner the vendors agreed, as a part of the transaction, to assign to the plaintiff said policy of insurance, and the same was so assigned accordingly, with the consent of the defendant; that May 29, 1894, said buildings were destroyed by fire; that thereupon the plaintiff complied with all requirements of the policy, but the defendants refused to pay the insurance; that September 27, 1894, the plaintiff commenced this action to recover \$1,729, the amount of the loss, with interest. The answer admits, *seriatim*, all the material allegations of the complaint, and then alleges as an affirmative defense that the fire which destroyed the property was wrongfully set, or caused to be set, by the plaintiff, for the purpose of destroying the property, and enabling him to procure the insurance. At the close of the trial the jury returned a verdict in favor of the defendant, upon which judgment for \$371.55 costs was entered, and from which judgment the plaintiff brings this appeal.

It appears that the premises in question were eight or nine miles north of the village of Marshall; that the plaintiff at the time was about 31 years of age, and lived at his father's, about two miles west of Marshall; that the plaintiff returned from Madison on the evening of May 29, 1894, and attended a concert at Marshall with the lady whom he expected to marry on the evening of the next day; that the concert closed somewhere between 10 and 11 o'clock; that the fire was discovered according to the testimony on the part of the plaintiff, shortly after 11 o'clock, and, according to the testimony on the part of the defendant, shortly after 12 o'clock. The plaintiff testified that after the concert was out, and his intended had started for her home, about  $4\frac{1}{2}$  miles southeast of Marshall, in a buggy with her brother, he started to drive his horse and buggy to the premises in question, but that, after proceeding about half-a-mile, he found that he did not have the key to the Stiles house, and so he turned back, and drove to his father's house, and got into bed just as the clock struck 12, and remained there until 4 or 5 o'clock the next morning. The evidence is voluminous and circumstantial on the part of the defendant, but after careful consideration we think it is sufficient to sustain the verdict.

1. Numerous errors are assigned for the admission of testimony to the effect that a certain witness who had examined certain tracks of a team told other witnesses what he found in respect to such tracks; also in allowing the witness to testify why he and his companions got out of the buggy at particular places, and examined the tracks; also for allowing the defendant to cross-examine one of its witnesses when taken by surprise by his testimony; also in allowing

Frank E. Stiles to testify as to the comparative value of the different parts of the farm; also in allowing a witness to testify as to what interest the plaintiff manifested in the examination of the tracks; also in allowing a witness who lived one block from the hall where the concert was held, and who had been in bed 15 or 20 minutes before he heard the crowd coming from the concert, state that, judging from the time he went to bed, he should think it was about 10 o'clock when the concert was out that evening; also in allowing a witness to testify as to what the plaintiff had offered to take for the land, and particularly a certain 40, before and after the fire; also in not sustaining an objection to a question put to the plaintiff on cross-examination as to whether he had not stated to a person named, three or four days after the fire, that he could not have been at the premises at the time of the fire because he had driven three miles and a half south of Marshall that same night; also in not sustaining an objection to a question put to the plaintiff on cross-examination as to whether he called the attention of a certain witness to the fact that he could not find any track leading out of the barn yard while at the barn yard. Some of these circumstances, taken by themselves, would seem to be without any significance, but, when taken in connection with other facts and circumstances which the evidence tended to prove, they may have had more or less bearing upon some of the questions suggested, as to the time when the concert closed, and the fire was first discovered, as to the whereabouts of the plaintiff between the time of the concert and the fire, as to the connection between the tracks discovered and those which may have been made by the plaintiff's agency, or as to the conduct, statements, and appearance of the plaintiff in respect to the tracks and the fire, and his motive for burning the property. The evidence in such a case must, necessarily, take a broad range. But reversible error must, "affect the substantial rights of the adverse party," and we fail to find any such errors in the rulings thus made: Rev. St., § 2829.

2. The same may be said of the 10 errors assigned for the rejection of the testimony. As, for instance, one witness on the part of the defendant testified that when he discovered the fire he looked at the clock, and it was 10 or 15 minutes after 12; that the barn was then nearly burned down,—all consumed but the posts and the frame; and that the house was on fire. We perceive no error in rejecting a question put to that witness on cross-examination, as to how long, in his judgment, the fire had been burning when he first saw it, and also whether he had not stated to certain parties named that from what he saw he should judge the fire commenced about half past 11. Other testimony rejected was as to whether there

were three single places for horses to stand in at Agnew's barn, to which the court said he had just answered that he would not call them stalls; also as to the time which elapsed after the witness left the plaintiff that night and when he went to bed; also as to whether a witness had any further conversation with another witness in June, 1894; also as to the condition of the buggies at Agnew's barn when the witness examined them; also as to what the witness then said as to the length of time which had elapsed, apparently, since the double buggy had been out; also as to whether, after examining the horses' feet at Agnew's barn, he stated that they did not correspond with the tracks; also as to where the plaintiff was living in May, 1894, which, according to the statement of the court, he had answered two or three times before; and also as to the conversation of one witness with another witness as to the time when the fire commenced and as to having told still another witness. We cannot undertake to give reasons for each and all of such several rulings. It is enough to say that some of such exceptions are trivial, and each and all of such rulings may be fairly sustained upon well-established and familiar principles of law. The trial court necessarily has a wide discretion in such matters, and we perceive no abuse of such discretion.

3. There was no error in refusing to instruct the jury that there was no testimony showing or tending to show that the plaintiff had arranged with anybody to have a team waiting anywhere to go or take him to the Stiles farm to set or cause the fire to be set, and that they could not base their verdict on any such supposition or surmise. Such instruction called upon the court to determine the effect of the circumstantial evidence in the case, and to hold, as a matter of law, that there was no evidence tending to prove the fact stated.

4. There was no error in refusing to instruct the jury that their "verdict must be according to the weight of the evidence given in the court," and that they could only find such a verdict as should be supported by the evidence. There is no pretense that there was any evidence except such as was given in court. The court charged the jury that the burden of establishing the defense rested upon the defendant, and that "it must be established by a fair preponderance of the evidence;" that unless "the evidence preponderates to establish" the defense, their verdict must be for the plaintiff. This necessarily refers to the evidence given in court on the trial, and hence covers the request: *Stilling vs. Town of Thorp*, 54 Wis., 536, 537.

5. There was no error in refusing to instruct the jury that: "About October 21, 1895, the defendant made and notified plaintiff of an assessment upon his policy for losses occurring since October 29, 1894. By so doing defendant waived and estopped itself from insisting upon the affirmative defense set up in its answer, and your verdict must be for the plaintiff for the full amount claimed." At the time mentioned in the request the suit had been pending for a long time, and was at issue. The notice of the assessment seems to have been inadvertently sent out by the defendant's secretary in making a general assessment, and we cannot hold that it took away and destroyed the defense which had long before been set up in the answer in the case. It is unlike the very numerous class of cases, some of which are cited by counsel for the plaintiff, where, after the forfeiture of the policy by reason of the breach of some condition therein, the company waives the forfeiture by insisting upon the enforcement of its provisions. The defense here is not based upon any condition contained in the policy, but upon a fact existing outside of the policy, to the effect that the plaintiff intentionally burned his own buildings for the purpose of obtaining the insurance.

6. After stating in the charge that the only issue for the jury to determine was whether the plaintiff set fire or caused fire to be set to the buildings in question, the court further stated that: "All other matters claimed in the complaint stand admitted as true, if the plaintiff is entitled to recovery." That statement contained nothing prejudicial to the plaintiff. On the contrary, it states just what he claims.

7. There was no error in charging the jury that: "The defendant company claims in this case that the plaintiff was actuated by a motive of gain, in that he had purchased this property whereon these buildings were situated for the purpose of speculation,—that is, for the purpose of making money by such purchase, and the sale of it again,—and that he determined that if he could collect the insurance on those building, and then sell the land, that he would then gain by such transaction a considerable sum of money. Whether or not the plaintiff was actuated by any motive of that kind is a disputed fact. He denies it. It is for you to determine whether any such fact existed." This stated just what the defendant claimed. It further stated that whether the plaintiff was actuated by any such motive was a disputed fact; that he denied it; that it was for the jury to determine whether any such fact existed. The claim that the verdict is not supported by the evidence has already been disposed of. The judgment of the circuit court is affirmed.

## COURT OF APPEALS OF COLORADO.

STRAUSS ET AL.

vs.

PHENIX INS. CO.\*

An agent's daily report, containing among other things, an unfilled blank regarding other insurance, is not admissible to confirm his testimony that he had no knowledge of other insurance. At best, it was but a memorandum to refresh his memory.

Where the agent issued a policy on a personal inspection without a written application, an instruction that any misstatement regarding the risk or overvaluation by the insured would avoid the policy is error.

Where knowledge of other insurance by the agent was knowledge by the company that it waived written consent required by endorsement, and the jury were so instructed, it was error also to instruct that the policy provision prevented any waiver by the agent except by written endorsement.

The policy limited its liability to three-fourths of the value, or its pro rata share of such three-fourths, and also that the "total insurance permitted is hereby limited to three-fourths of the cash value of the property herein described, and to be concurrent herewith."

*Held*, That this was consent to concurrent insurance up to three-fourths of the value.

F. C. PERKINS and ROGERS, CUTHBERT & ELLIS, *for Appellants*.

RITTER & RUSSELL, *for Appellee*.

BISSELL, J.

Shields & Bunger were indebted to Strauss & Co. for goods sold and delivered, and the vendors brought suit in the County Court of La Plata County to collect their claim. It was put into judgment, and, by the proceedings which we are asked to review, Strauss & Co. sought to compel the appellee, the Phenix Insurance Company, to pay a loss covered by a policy which the insurance company had issued. The general facts out of which the liability is said to arise are not disputed. The judgment is not assailed, and the right of Strauss & Co. to enforce their claim against the insurance company is only contested on the general basis of the nonliability of the company for the loss. The policy was issued on the stock owned by Shields & Bunger; there was a fire; the goods were destroyed; and the only two matters litigated are the value of the goods, and the liability of the company under their agreement of insurance. There was evidence given by both parties respecting the amount of the stock and its value, and, as is usual in such cases, there was a wide discrepancy between the opinions of the witnesses. The opinion

\* Decision rendered, April 26, 1897.



will not turn on this question, and we shall not express our views about it, because this is a matter for the jury to determine on the subsequent trial. The insurance company disputed their liability mainly on the ground of a breach of the condition against other insurance, and, to settle the question presented, it is necessary to state what was done at the time the policy was procured. It was issued on the 22d of May, 1894, through the agent of the company, Gallotti, and was in the usual form of such policies. It provided generally against false representations, and that, if the surety had made or should make any other contract of insurance without written notice to and the consent of the company indorsed thereon, then the policy was to be void. It was further stipulated that no agent of the company should have the power to waive or modify these provisions. There was another stipulation, which is of very considerable significance in the interpretation of the contract. Its substance will be stated in so far as it is deemed important. There was stamped in red on the face of the policy a condition which recited that it was a part of the consideration and basis of the rate of premium that the company should not be liable in an amount greater than three-fourths of the cash value of the property described, or its pro rata proportion of the three-fourths in case of other insurance. This clause followed:—

Total insurance permitted is hereby limited to three-fourths of the cash value of the property herein described, and to be concurrent herewith.

This condition was stamped on the policy prior to its issuance by the agent, and when it was delivered to the insured. When the policy was taken out, the property was visited and examined by the agent, the amount of insurance discussed, and the agent declined to issue the policy for the amount desired, and limited it to the sum of \$800 on the stock of goods, and \$50 on the show case and store furniture and fixtures. At this time there was a policy already in force on the same property issued by another company. It was a matter of dispute whether the agent was informed of this policy when he issued the one in suit. The insured testified that the agent was told of it, and discussed it. This the agent strenuously denied. This was a matter for the jury to determine, and if their general verdict, which may perhaps be taken to include the determination of this question, had been rendered under instructions which left it fairly open for their consideration, we should be bound to affirm the judgment because sustained by the finding. All the substantial difficulties in the case proceed from instructions which the court gave, and those which were refused. It is quite impossible, within the limits of an ordinary opinion, to give them in detail, and we can

only state generally wherein we disagree with the trial court, and the particulars in respect to which we think it erred in stating the law of the case. There are one or two minor errors which will be noticed, though possibly they are not of that gravity and importance which would compel us to reverse the judgment if we did not conclude the jury may have been misled, and rendered the verdict without due apprehension of the rules by which they ought to have been guided.

During the progress of the trial, the insurance company produced a copy of the report made by their agents of their daily business, in order to support the agent's contention that they were without knowledge of the existence of other insurance when they issued the policy on behalf of the Phenix Company. The report could have been offered for no other purpose, and could be of no value as evidence, save as it supported the agent's theory. The blank provided for a statement respecting other insurance, and, as it contained nothing on the subject, it possibly tended in a measure to support the agent's evidence to the point that the company was without knowledge of the other policy. Clearly, this memorandum was inadmissible. In the first place, it was not an original instrument. Neither was it a memorandum which could be offered in evidence to support the defendant's case. If it was available at all, it could only be referred to in order to refresh the recollection of the witness who was testifying about the matter contained in the memorandum, and of which he had no definite memory without a reference to it. There was no foundation laid for its use in this particular, and, as an original document, it was not an admissible piece of testimony: *Jones vs. Henshall*, 3 Colo. App., 488; *Weaver vs. Bromley*, 65 Mich., 212; *Carradine vs. Hotchkiss*, 120 N. Y., 608; *Baum vs. Reay*, 96 Cal., 462.

We now come to the instructions. There will be no attempt to review the whole charge, nor will reference be made to any parts of it save those which are deemed inaccurate as the case stood on the conclusion of the testimony. It is quite impossible to determine the effect of particular instructions, but it may be safely assumed that instructions which are inapplicable to the proof are liable to mislead the jury, and may have a prejudicial weight and force. Possibly, concerning these to which we intend now to refer, it might justly be said the error is not of a gravity sufficient to require reversal; but, since the judgment is to be set aside, we deem it best to refer to them, that the same difficulty may not re-occur.

The jury were told that the assured was required to state fairly and fully the facts in regard to the risk, and that any fraud or

fraudulent concealment of such facts or overvaluation would avoid the policy. Just how the jury construed this instruction, or what force and effect they gave to it, we cannot say. It was inapplicable to the condition of affairs presented by the evidence. There was no application in writing for the insurance. The agent came and inspected the property, and evidently determined the amount of risk which he was willing to take. While this instruction states the true rule wherever there is a written application, it ought not to have been given where none was made. This instruction ought not to have been given, and, unless there is some change in the evidence, should not be repeated on the subsequent trial: *Philadelphia Tool Co. vs. British America Assur. Co.*, 132 Pa. St., 236; *Knop vs. Insurance Co.*, 101 Mich., 359; *Cross vs. Insurance Co.*, 132 N. Y., 133.

The chief difficulty which the case presents springs from three instructions. If they were not on the bases totally different, they were undoubtedly liable to misconception. The three instructions involved are numbers 2, 3, and 11. The eleventh instruction is not inaccurate as a statement of a legal proposition, but it is inaccurate as applied to the case made by the testimony. The third instruction states the law correctly, and if it had been left to stand by itself, and was clearly unaffected by the eleventh, would have furnished a proper guide for the jury. It has been held by the supreme court that where there are two instructions in the case, one of which is a correct statement of the law, and the other inaccurate, the result is, of necessity, an error: *Grant vs. Varney*, 21 Colo., 329; 40 Pac., 771. Possibly that case only goes so far as to hold that, to produce this result, the conflicting instructions must be, the one accurate, and the other inaccurate. But even though one of them be accurate, and the other equally correct as a legal proposition, but inaccurate as applied to the case, and plainly liable to misconception by the jury, the same result must, of necessity, follow, and the rule remain that such a charge constitutes error. By the second and third instructions the jury were substantially told that if they should find, as a matter of fact, that, prior to the issuance of the policy or the completion of the contract of insurance, the agent, and therefore the company were fully advised as to the existence of other insurance on the property, it would be no defense for them on the present trial to show that another policy was outstanding, notwithstanding the condition contained in their own contract that the policy was to be void in case the party had or should procure other insurance. This seems to accord with the general rule prevailing in this country: *Knowles vs. Insurance Co.*, 66 Hun., 220; *Gristock vs. Insurance Co.*, 87 Mich., 428; *Insurance Co. vs. Lorenz*, 7 Ind. App., 266; *Insurance*

Co. vs. Norwood, 16 C. C. A., 136; Insurance Co. vs. Hart, 149 Ill., 513; Renier vs. Insurance Co., 74 Wis., 89; Insurance Co. vs. Lewis, 30 Mich., 41; Quigley vs. Trust Co., 60 Minn., 275; Gray vs. Insurance Co., 84 Hun., 504; Insurance Co. vs. Wilkinson, 13 Wall, 222; Wood vs. Insurance Co., 149 N. Y., 382; Robbins vs. Insurance Co., 149 N. Y., 477.

Had these instructions with reference to the knowledge of the company been left undisturbed, the case would have presented very little difficulty. By the eleventh instruction, however, the jury were told that, by the terms of the contract of insurance which was submitted to them, no agent of the company had any power to waive or modify any of its provisions, unless the modification was written upon or attached to the policy. The jury were likewise told by the same instruction that this provision operated to prevent any waiver of any condition of the policy by any local agent, unless this waiver should be found indorsed on the policy itself. Manifestly, this statement was open to the construction that, although the agent might have known of the existence of the other insurance, yet in and of itself this knowledge would be inoperative to validate the policy, unless the agent had indorsed on the policy a waiver of the condition. Probably the court did not intend to so limit the instruction, but gave it as asked, on a general basis that it stated a correct rule of law, overlooking the fact that there was nothing in the case to which it could be applied. This is particularly emphasized by the fact that the condition respecting other insurance stamped on the policy was the only indorsement affecting the right to take out other insurance, and, under the instruction which the court gave concerning it, the jury would conclude there had been no proper waiver, and the plaintiff could not recover. This is rendered evident by the twelfth instruction. The court interprets the indorsement to be simply a limitation on the total amount of insurance which might be taken, and rules that it does not abrogate the provision which made it incumbent on the insured to give written notice of other insurance, and secure the consent of the company thereto. It will thus be seen that the jury had before them three instructions on apparently contradictory hypothesis: First, they were told that if the agent had knowledge, that knowledge could be taken as a waiver of the condition. They were then informed that no agent had authority to waive the condition, and that any waiver must be indorsed on the policy. This was followed by a statement that the condition which was apparently endorsed to comply with the terms of the limitation prevented any other insurance, unless there was written notice of that insurance given the company, and an express consent therefor

indorsed on the policy. These instructions, taken as a whole, do not express the true rules by which the rights of the parties are to be measured. In the next place, we do not regard the instruction respecting that condition in red as a correct interpretation of it. This, apparently, was an effort on the part of the agent to indorse a consent to other insurance in writing on the policy, as well as fix the limits of it. The limitation that the insurance should be restricted to three-fourths of the value of the property limited the liability of the company to their proportionate share of the loss in case of other insurance, and in effect was the expression of a consent on the part of the company that the insured might carry insurance on the stock to the extent of three-fourths of its value. This is the natural and evident import of the provision. It is the only legitimate and grammatical construction of the past principle "permitted," and is the true construction of the language used. The insured had a right so to construe it. It is to be so taken as against the company, because, where there are two possible constructions of a contract, all doubtful provisions of insurance policies must be construed most favorably to the insured. This is the general doctrine, and has been recognized by our supreme court: *Insurance Co. vs. Horner*, 14 Colo., 391; *Insurance Co. vs. Manning*, 3 Colo., 224.

There are some minor errors urged, which we deem it unnecessary to discuss. While, possibly, other instructions are open to criticism, and the court might well have given some which were asked, and modified others, they present no substantial difficulty, and constitute no grave error. If the matters already suggested are eliminated on the subsequent trial, the verdict which the jury may render will undoubtedly settle the rights of the parties, and conclude this controversy. For the reasons suggested, this case must be reversed, and remanded for another trial. Reversed.

Wilson, J., not sitting.

## SUPREME COURT OF TENNESSEE.

SOFGE ET AL.

vs.

SUPREME LODGE KNIGHTS OF HONOR ET AL.\*

Where the rules as well as the certificate of a benevolent society reserve to a member the right of cancellation and disposition of a certificate, the beneficiary has no vested interest.

Where, in such case, the society pays the money into court and itself makes no issue, the rights of claimants, in case of a certificate cancelled and a new one issued to a different beneficiary, must be determined by the power given to insured under the rules of the order, and the beneficiary under the substituted certificate is entitled to the fund.

BRYAN & CARTWRIGHT, *for Appellant.*

EDWIN A. PRICE, *for Appellees.*

McALLISTER, J.

The struggle in this case is between adverse claimants to a fund of \$2,000, proceeds of a benefit certificate in the Knights of Honor. The contest is between the widow and children, respectively, of Louis Lopp, deceased, who was a member of Vanderbilt Lodge, Knights of Honor, and died in good standing, February 13, 1895. In 1892, Louis Lopp, being then a widower, with children by a former wife, intermarried with the defendant. At this time he was a member of the Knights of Honor, carrying a benefit certificate on his life in the order. Prior to his marriage with his second wife, they entered into a marriage contract, whereby he released all his marital rights to any property she then had, or might thereafter acquire. Soon after the marriage, Mr. Lopp cancelled his certificate, then outstanding in the order, and caused another certificate to be issued, payable to his wife, which was delivered to her and kept by her until these proceedings were commenced. This certificate was dated December 6, 1892. Thereafter, for reasons best known to himself, Mr. Lopp caused the cancellation of the benefit certificate to his wife, and the issuance of another, payable to his children by his former wife. It appears that certificates issued by the order at this time, and the one issued payable to Mrs. Lopp, contained the following:—

Provided that this certificate shall not have been surrendered by said member, or cancelled at his request, and another certificate issued in accordance with the laws of the order.

Article 9, § 2, of the by-laws, provides:—

\* Decision rendered, March 18, 1897.

If the benefit certificate of a member be lost or beyond his control, the member may, in writing, surrender all claim thereunder, and direct that a new certificate be issued to him, payable to the same or other beneficiary, in accordance with the laws of the order, upon making affidavit to the fact, and paying a fee of fifty cents to be forwarded by the reporter with the affidavit to the supreme reporter. The issuing of such new benefit certificates shall cancel and render null and void any and all previous certificates to such member.

The court of chancery appeals found that "Mr. Lopp, in securing a change of his benefit certificate from his wife to his children by his former wife, proceeded under said section by making an affidavit as required thereby. This affidavit was sworn to February 1, 1894, before a notary public. Therein, among other things, after designating his children to whom he desired his insurance to be paid, he stated as the reason why he could not surrender the certificate then outstanding that it was held by his wife, who declined to surrender it. Affiant then stated that "he, therefore, hereby surrenders all rights, benefits, and interests in and to benefit certificate dated December 6, 1892, and requests the officers of the supreme lodge to issue to him another one, as hereinbefore stated." The court of chancery appeals further found that the children had no part or instrumentality in securing this benefit certificate, but that Mr. Lopp kept the fact of his change of benefit certificate from his wife, nor did any officers of the order notify her of the change." The court of chancery appeals, affirming the decree of the chancellor, held that Mrs. Lopp had no vested interest in the benefit certificate issued payable to her; that it had been legally cancelled, in conformity to the constitution and laws of the Supreme Lodge Knights of Honor, by the subsequent issuance of the certificate payable to the children of Louis Lopp; and that these children were entitled to the fund.

Mrs. Lopp has appealed to this court, and assigned errors: First.

The rules and by-laws of the order are made for the protection of the order only, and are not invoked by the order in this case, because it, having paid the money into court, is completely discharged from all liability to any beneficiary." Second. "While Mrs. Lopp could only acquire a contingent interest during the life of her husband as against the lodge, she did acquire such an interest as against him, or those claiming under him, by the delivery and acceptance of the certificate made payable to her, as that she could not be deprived of it by any subsequent action of Mr. Lopp in having a new certificate issued, and changing the beneficiary. It is insisted that this was a gift to her of just such interest as she could then acquire, and which would ripen into a complete vested interest at his death;

that having made a completed, executed gift of whatever interest he possessed, and having exercised his power of appointment, he could not, as against his donee or appointee, revoke the gift, and re-exercise the same power in favor of another party. Counsel cite the case of *Lodge vs. Ladd* (5 Lea, 719), as expressly recognizing the principle that a member has an interest which he can pass by a valid executed contract, or by delivery of the policy as a gift."

The question sought to be made in this assignment of error has frequently been before this court, and as uniformly resolved against the contention of appellant. The principle so well settled is that the beneficiary of such a certificate has no vested interest in the same so long as the certificate itself, as well as the rules of the order, reserve to the assured the ultimate right of cancellation and disposition of the certificate. In the case of *Handwerker vs. Diermeyer* (96 Tenn., 619), we said, viz.: "Under the rules and by-laws of the Knights of Honor, any member of the order has a right to change the beneficiary in his certificate, and so long as he lives the said certificate is within his absolute power of disposition." In the case of *Association vs. Winn* (96 Tenn., 226), it was said, viz.: "In an ordinary life policy, where the beneficiary is some other than the assured, and no control over the policy is reserved to him by its terms, the law is that the interest of the beneficiary vests at the time the contract of insurance is complete, and cannot be affected by subsequent acts, etc., of the assured. \* \* \* But the policy sued on in this action is not one that upon its issuance passed beyond the control of the assured. On the contrary, the first of the conditions which are set out on the back of the policy, and by its terms made part thereof, is as follows: 'The member or insured may, upon the approval of the president, change the beneficiary herein named by surrendering this policy, and designating another beneficiary having a lawfully insurable interest in the life of the insured; in which event the within-named beneficiary shall have no claim upon, or be entitled to receive anything whatever from, the association.' Under such a policy, the beneficiary acquires no vested interest until the death of the assured occurs. Until this event takes place, owing to the right of revocation, which is by the condition reserved to the assured, the beneficiary has a mere expectancy, depending upon the will and act of the assured. And this expectancy does not rise to the dignity of a property right:" *Catholic Knights vs. Kuhn*, 91 Tenn., 214.

We do not overlook the point pressed in argument, that the rules and by-laws of the order are made for its protection, and that no issue is made in this case with the order, but that it has paid the



money into court, and retired from the contest. While this is true, the respective rights of these claimants must be determined by a consideration of the power reserved to the assured under the rules and by-laws of the order to deal with the benefit certificate issued upon his life. These rules and by-laws of the order are imported into the contract of insurance, and Mrs. Lopp, accepting the benefit certificate, was charged with constructive notice of the power of revocation and cancellation reserved to the assured. So long as the power of revocation remains in the assured, Mrs. Lopp had no vested interest in the certificate, but a bare expectancy, depending upon the will and act of the assured. As said by the Court of Appeals of New York in *Smith vs. Society* (123 N. Y., 85), viz.: "Where the right of the payee has no other foundation than the bare intent of the assured, revocable at any moment, there can be no vested interest in the named beneficiary any more than in the legatee of a will before it takes effect. In such a case the designation of the beneficiary is in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and remaining wholly under his control." As stated by the court of chancery appeals: "In orders of the kind here, who shall be the beneficiaries of its members, under certificates of insurance issued by them, are, in the absence of a statute, determined by their laws, so long as they do not violate some public policy of the state. When, therefore, a benefit certificate issued by an order of this character is called in or cancelled, in conformity to its laws, it ceases to have any legal existence, and the substituted certificate can alone be recognized. It follows that the holders of the substituted certificate are entitled to this fund, to the exclusion of Mrs. Lopp, whose certificate was cancelled and annulled." It is wholly immaterial to inquire why Mrs. Lopp's certificate was cancelled—whether upon sufficient or insufficient reasons; so long as she had no vested interest in it, these considerations are wholly apart from the real controversy in this case.

**Affirmed.**

## SUPREME COURT OF NEBRASKA.

HOME FIRE INS. CO. }

vs. }

WOOD ET AL.\*

To justify the reformation of a written contract for mistake, the mistake must be mutual, and be established by clear, convincing, and satisfactory evidence.

Evidence examined, and held insufficient to authorize the reformation of the policy in suit.

Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy.

A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained.

A fire-insurance policy provided that it should be void if other insurance was subsequently obtained without the consent of the company. The insured did thereafter procure other insurance on the same property without such consent or knowledge of the insurer of its existence.

*Held*, That there was a breach of the condition of the first policy, and a recovery can not be had thereon.

J. FAWCETT and B. G. BURBANK, *for Plaintiff in Error*.

CHARLES B. KELLER, *for Defendants in Error*.

NORVAL, J.

This was a suit to reform a policy of fire insurance, and for judgment on the policy when so corrected and reformed. The court found for plaintiffs, reforming the policy, and entering judgment for the full amount of insurance, with interest and costs. The only assignment urged for a reversal is the one which challenges the sufficiency of the evidence to sustain the finding and judgment.

The facts may be briefly summarized thus: Wright Bros., on and for some time prior to June 27, 1891, were and had been engaged in the mercantile business at Fairfield, and B. F. Hyde was the soliciting agent at said place for the Home Fire Insurance Company, of Omaha, with power to solicit applications for insurance, transmit them to the home office at Omaha, where the policies were written, and on the receipt of the policies by Mr. Hyde, he delivered the same to the insured, and collected the premiums. On the date aforesaid Hyde solicited insurance of Wright Bros. on their stock of merchandise and store fixtures in the sum of \$1,000 for the period of one year. The policy was prepared and executed by the proper officers of the defendant company in Omaha, after which it was

\* Decision rendered, Jan. 19, 1897. Syllabus by the Court.

transmitted to Mr. Hyde, who thereupon delivered the same to Wright Bros., and collected the premium thereon. The policy contained a provision that

This policy shall be void \* \* \* if there is now, or shall hereafter be obtained, any other insurance (whether valid or not) on said property or any part thereof,

and further, that

No agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, or make any indorsements thereon, except only the secretary of this company, and any waiver or alteration by him must be in writing, and must be signed by him.

The property covered by the policy was wholly destroyed by fire on December 8, 1891, and at that time the insured were carrying a total insurance of \$5,500, \$2,000 of which was in force when this policy was given, and Hyde then knew it; but the policy in suit contained no stipulation permitting other concurrent insurance. After the loss, the policy was assigned to plaintiffs. The company defends on the ground of the obtaining of additional insurance subsequent to the issuance of the policy, without notice thereof to it, or making any request that consent therefor be given. On the other hand, plaintiffs alleged in their petition, in effect, that at the time the insurance was written it was agreed between Wright Bros. and the company that plaintiffs were to be permitted to carry \$5,500 total insurance on the property; that, without any fault or neglect of theirs, but through design or mistake of the defendant or its agent, the company omitted to write in the policy, or to indorse thereon, any provision for concurrent insurance; and that said policy was received and the premium paid by Wright Bros. in good faith, without reading the same, believing that the policy contained the proper and necessary provisions permitting concurrent insurance. This averment was put in issue by the answer. The question involved is whether the evidence was sufficient to justify the reforming of the policy relative to additional insurance.

The only testimony adduced on that branch of the case by plaintiffs was given by B. J. Wright, one of the insured, and is as follows: "Mr. Hyde came to me several times before we made out the policy, or gave him a right to make it out, and wanted to take out a policy in the Home for \$1,000, and tried to get us to take out more in that company." Mr. Fawcett: "State what he said. Don't give your conclusion. A. Well, he said he wanted us to take out more insurance, —make the policy larger; and at that time I told him that I did not see fit to do that, but we intended to replenish the stock, and take out more insurance afterwards, which we did, and stated to him

about the amount that we intended to carry, which at that time I told him we intended carrying about \$5,500; and, a few days after he had been several times, I told him to make out a policy for \$1,000, and told him the amount of insurance we had then, and what we intended to get. Q. How much insurance did you then have upon that stock at the time this policy was written? A. \$2,000. Q. State whether or not you told Mr. Hyde what companies that insurance was in, and whether you showed him the policies or not. A. I do not remember whether I showed him the policies or not, but think I told him the companies it was in, and the amount. Q. And how much insurance do you swear that you told Mr. Hyde at that time that you wanted to carry on that stock, and intended to carry on that stock? A. \$5,500. Q. What, if anything, did you say to Mr. Hyde with reference to renewing the policy in the German-American, and taking it out for \$1,500 instead of \$1,000? A. Why, I think I told Mr. Hyde about the running out of this policy that Mr. Randall carried, and that I was going to renew it, with an additional amount of \$500 or \$1,000. I do not remember just the words that we used at that time. We had several talks about it. \* \* \* Q. When you received this policy what was done with it? A. I received it, and put it in the safe with the balance of them. Q. State whether or not you examined or read over that policy at the time you received it. A. No, sir; I did not. Q. When did you first read over and examine that policy? A. The next day after the fire." Cross-examination: "Q. Did you ever, at any time after this policy was delivered to you, direct the defendant company, or any of its agents, to make any indorsements upon the policy for additional insurance? A. I did not. Q. Did you ever, at any time after you put on the additional \$500 insurance in the German-American, and before the fire, notify the defendant company, or any of its agents, that you had done so? A. No, sir; I did not. Q. Did you ever, at any time after obtaining that additional \$500 insurance in the German-American, request the defendant, or any of its agents, to indorse permission for such additional insurance upon your policy? A. Not that I remember of." It is also admitted of record that, prior to the fire, no request was made of the company by the insured to indorse any provision upon the policy permitting additional insurance.

B. F. Hyde testified: That he was a soliciting agent of the defendant, issued no policies for them, and made no indorsements thereon, and had no authority to do so. That he had no recollection, at the time he solicited this insurance, of B. J. Wright telling him it was the intention to carry \$5,500 insurance on the property, and that he wished to arrange to carry that amount. "It has

occurred in my mind that I never had any conversation about it, except, at the time of soliciting the insurance, he showed me two policies of \$1,000 each." That he informed the company, when he made the daily report of the risk, of the amount of insurance on the property. A. C. Hull testified: That he was special agent of the defendant, empowered to inspect risks, and approve or reject them in the south half of the state; that, on June 27, 1891, he visited the store of Wright Bros. at Fairfield, and inspected and approved their risk; that on that occasion one of said firm told him they were carrying \$2,000 other insurance, besides the \$1,000 they were applying for that day; that \$3,000 was the total amount they asked for, or wanted to carry, on this stock; that there was nothing said about any additional insurance above \$3,000.

That a court of equity will relieve against a mutual mistake there can be no question; but it will not reform a policy of insurance or other contract on the ground of a mistake of fact, unless the proof is clear, convincing, and satisfactory, and free from reasonable controversy. The burden is upon the party alleging the mistake to establish it upon trial: *Blake Opera House Co. vs. Home Ins. Co.*, 73 Wis., 667; *Cox vs. Woods*, 67 Cal., 317; *Insurance Co. vs. Crane*, 16 Md., 260; *Steinberg vs. Insurance Co.*, 49 Mo. App., 255; *Smith vs. Allen* (Ala.); *Insurance Co. vs. Sweet*, 46 Ill. App., 598; *Osmundson vs. Thompson* (Iowa); *Howland vs. Blake*, 97 U. S., 624. In the last case cited above, Mr. Justice Hunt, in discussing the question of the reformation of written instruments upon the ground of mistake, observes: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

A careful reading and consideration of the proofs on behalf of plaintiffs convinces us that it falls far short of establishing that a mistake was made in writing the policy, in its not providing for subsequent concurrent insurance. It probably should have contained an indorsement of the \$2,000 prior insurance. But that it failed in this respect did not affect the rights of the insured, since the company, at the time this risk was written, had notice of the existence of such prior insurance: *Insurance Co. vs. Hammang*, 44 Neb., 567. It does not appear from Mr. Wright's testimony that

there was any agreement or understanding between himself and defendant's agent, Mr. Hyde, that the policy should provide for \$5,500 concurrent insurance. The most that can be claimed for Mr. Wright's testimony is that he informed the company's agent of the intention of his firm to replenish the stock, and afterwards take out additional insurance, so as to make the total amount of insurance on the property about \$5,500. Not until the stock was increased by new purchases was it proposed to take out other policies. The insured should have applied for and obtained an indorsement upon the policy in suit for additional insurance after the stock was replenished. The evidence of Wright, standing alone, falls far short of establishing a mutual mistake such as would justify a court of equity in reforming the policy. This being true, it is unnecessary to discuss the evidence on behalf of the insurer.

It is undisputed that the company had no notice of the additional insurance. The statement of Mr. Wright to defendant's agent, when the risk was solicited, that the former intended to take out additional insurance on the property, is not notice that the insured had procured such additional insurance: *Eagle Fire Co., of New York, vs. Globe Loan & Trust Co.*, 44 Neb., 380. The procuring of the subsequent insurance by the insured on the property without the knowledge of the defendant, or its written consent therefor being indorsed on the policy, is in violation of the clause therein forbidding additional insurance, and avoids the policy: *Insurance Co. vs. Heiduk*, 30 Neb., 296; *Hughes vs. Insurance Co.*, 40 Neb., 626. From this it follows that the district court erred in reforming the policy and entering judgment thereon. The judgment will therefore be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

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## SUPREME COURT OF PENNSYLVANIA.

HERON

vs.

PHOENIX MUT. FIRE INS. CO.\*

The insured purchased and stored a lot of fireworks in his house for use on the following day, which was the Fourth of July. They took fire and caused the damage. The policy provided that it should be void if the hazard were incurred with the knowledge of the insured, or if fireworks, among other things, were allowed on the premises.

*Held*, That the policy was avoided.

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\* Decision rendered, March 1, 1897.

H. H. GILKYSON, *for Appellant.*

R. T. CORNWELL and GIBBONS GRAY CORNWELL, *for Appellee.*

STERRETT, C. J.

This action of assumpsit, brought to recover the value of certain household goods, etc., insured by the defendant company, and destroyed by fire on July 3, 1895, involves the construction of certain provisions of the policy in suit. There is no controversy as to any of the material facts. For the purpose of celebrating the 4th of July of that year, plaintiff bought a lot of assorted fireworks, which were delivered at his residence on the morning of the 3d, and were shortly afterwards, with his knowledge and approbation, placed in the parlor, for use on the following evening. In some unexplained way, they took fire on the afternoon of the same day, and caused the damages for which this suit was brought. The defense interposed by the insurance company was that placing the fireworks in plaintiff's house, with his knowledge and consent, and permitting them to remain there, was a violation of the following clause of the policy, and rendered the latter void:—

This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void \* \* \* if the hazard be increased by any means within the control or knowledge of the insured, \* \* \* or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light).

The defendant's contention as to the proper construction of the above-quoted clause is clearly presented in its requests for charge recited in the first three specifications, respectively. Each of these requests was refused by the learned trial judge, and the jury were instructed to find for the plaintiff the amount of the loss he "sustained by reason of the fire." The third request was that, "under all the evidence in the case, the verdict of the jury must be for the defendant." We have never gone to the length that other courts have in construing away express provisions or stipulations as to forfeiture. While some hold that it is permissible to use the articles prohibited by the general printed clause, provided they are such as naturally pertain to the stock of goods or property described in the written part of the policy, this court has refused to go so far. In *Insurance Co. vs. Kroegher* (83 Pa. St., 66), where petroleum was kept for sale in a country store in violation of a printed clause very

similar to that above quoted, this court said: "If the question were whether this kind of oil was an article of merchandise ordinarily included in the stock of a country store, or if it were only an inquiry as to the increase of risk, it might well be referred to the jury. But it is nothing of the kind. It is an express stipulation that petroleum or its products shall not be kept on the premises, and, if it be so kept, the policy is void. It matters not that it was a part of a customary stock of goods, for by express contract it was excluded." This case was followed in *Insurance Co. vs. Lenheim* (89 Pa. St., 497), and must be accepted as the settled construction of such conditions. In the first of these cases, however (*Insurance Co. vs. Kroegher*, supra), a qualification was suggested which has since been adopted, and which the learned trial judge in this case sought to carry to a length not warranted by any of our cases. It was there said by Mr. Justice Gordon: "It is probable that this provision would not apply to the oil used in lighting the premises, for such a use has, in these days, become a necessity for all buildings in the country in which light is required during the night." This suggested distinction, in principle, has since been adopted in *Mears vs. Insurance Co.*, 92 Pa. St., 15; *Lancaster Silver Plate Co. vs. National Fire Ins. Co.*, 170 Pa. St., 151; and *Lancaster Silver-Plate Co. vs. Manchester Fire Assur. Co.*, 170 Pa. St., 166. In the latter, our Brother Dean, speaking for the court said: "If the fact were that the use were a necessary one in conducting the business, then it must be presumed the intent of the parties was to insure the subject of the contract as it then was, and as it would continue to be during the life of the policy, notwithstanding the printed condition." A further and fuller discussion of this subject will be found in the next preceding case,—*Lancaster Silver-Plate Co. vs. National Fire Ins. Co.*, supra. These cases rest on the necessary and contemplated use of the property, and cannot be supported on any other ground. They furnish no warrant for the advanced position taken by the plaintiff in this case. There is no ground for a presumption that the parties here contemplated even the temporary presence of fire-works in the insured building, in the face of an express contract to the contrary. If the policy had contained only the clause relating to increased "hazard" above quoted, the case should have gone to the jury, but the additional prohibitory clause made it incumbent on the court to withdraw it from their consideration by affirmance of defendant's third point. In view of the undisputed evidence in the case, it was error not to do so. Judgment reversed.



## SUPREME COURT OF PENNSYLVANIA.

TRITSCHLER

vs.

KEYSTONE MUT. BEN. ASS'N.\*

The policy provided that it should be void in case of suicide, sane or insane. *Held*, That the risks assumed in life policies may be limited by agreement of the parties, and the stipulation would exclude death by the insured's hand while insane.

The opinion of the court below is as follows: "This is an action by the administratrix of Fidel Tritschler, deceased, to recover from the Keystone Mutual Benefit Association of Allentown \$5,000, which it is alleged is due under a policy insuring said deceased. The policy provides that it is declared to be the true meaning of the policy, and the same is accepted by the assured upon the express condition that, in case the person whose life is insured shall die by suicide, feloniously or otherwise, sane or insane, or in consequence of an attempt to commit suicide, the policy shall be null, void, and of no effect. Plaintiff's statement avers that Fidel Tritschler, upon whose life the policy was granted, died on May 10, 1896, by his own hand, by shooting himself while insane, and while, by reason of such insanity, he was not responsible for his acts and conduct; further, that he, by reason of said insanity, was unconscious of the moral and physical consequences of his acts and conduct at the said time of his shooting himself. To this statement defendant has demurred, alleging that the statement shows that the insured violated the essential provisions of his contract; that no sufficient legal cause of action is set forth in the statement. It is settled in this state that a policy of insurance which provides that it shall be void if the insured shall die by suicide is not forfeited by the insured destroying himself, he being insane at the time, but intending to take his life, and knowing that death would result from the act. The ground upon which said conclusion rests is that in legal acceptance and in popular use the word 'suicide' is employed to characterize the crime of self-murder; that self-destruction under insane impulses so strong as to be beyond the control and restraint of the will is a result produced by disease for which the victim of it is no more morally responsible than he would be for any other of the maladies of which

\* Decision rendered, Feb. 22, 1897.

men die: *Insurance Co. vs. Groom*, 86 Pa. St., 92. The rule recognized in said case prevails in perhaps all the states of the Union where the question has arisen, and also in the United States courts: *Newton vs. Insurance Co.*, 76 N. Y., 426; *Insurance Co. vs. Terry*, 15 Wall., 580; *Bigelow vs. Insurance Co.*, 93 U. S., 284. The reason for the rule elsewhere has been expressed thus: 'Self-destruction of a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose.' *Breasted vs. Trust Co.*, 4 Hill, 73; *Insurance Co. vs. Broughton*, 109 U. S., 121. And as illustrated by an English chancellor: 'The deceased was subject to that which is really just as much an accident as if he had fallen from the top of a house.' *Horn vs. Assurance Co.*, 30 Law J., Ch. 511. That rule was applied to cases where the policies did not stipulate for nonliability if the insured committed suicide while sane or insane. Where there is such stipulation, the authorities are almost uniformly to the effect that such provision is binding, even if the act of self-destruction was the result of insanity: *Pierce vs. Insurance Co.*, 34 Wis., 389; *De Gogorza vs. Insurance Co.*, 65 N. Y., 232; *Insurance Co. vs. McConkey*, 127 U. S., 661. As was said in said case of *Pierce*: 'The intention here manifested is so plain as to seem incapable of further explanation, and, unless there is something in the policy of the law which forbids such stipulation, we have nothing to do but to give it effect.' Neither in that, nor any other adjudicated case that this court is aware of, nor in the learned and exhaustive argument of plaintiff's counsel, has it been demonstrated that such limitation of liability contravenes any rule that the good of the public requires. As has been said, if a man by reason of irresistible impulse, the result of mental aberration, takes his own life, it is as much an accident, and a matter beyond his control, as if his death was caused by smallpox, scarlet fever, or the accidental fall from the top of a house. But what plausible argument could be advanced that a stipulation in a policy excluding liability for death owing to said specified diseases or cause was invalid? Who doubts the validity of the very frequent exclusion from the risk of death occasioned by employment on railroad trains, the high seas, about explosives, dwelling in tropical countries, and the like? A sane person, while contracting for insurance upon his life or against accident not resulting in death, may agree to any limit of causes of death or injury he sees fit, so long as no immorality is involved. It is to be presumed that the price of insurance is affected by the extent of the risk of the insurer. Where the consequences of certain maladies, whether mental or physical, are excepted from the insur-

ance, naturally the premium, dues, or assessments are lower. The able argument of plaintiff's counsel, fortified by citation of many legal authorities, has for its object the establishment of the principle that where the self-killing was unintentional because of insanity, where, by reason of insanity, the suicide was unconscious of the moral and physical consequences of his acts and conduct, there the insurer shall be liable, notwithstanding a covenant that the policy shall be void in the event of suicide, while the insured is insane. It is urged that it would be contrary to the policy of the law to uphold a contract for nonliability under those conditions. The court cannot assent to said contention for reasons already indicated. November 2, 1896, upon the demurrer judgment is given for the defendant."

JOHN RUPP, *for Appellant.*

EDWARD HARVEY, *for Appellee.*

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below.

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## COURT OF APPEALS OF KENTUCKY.

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SUN MUTUAL INS. CO. )  
 vs. )  
 CRIST.\*

The insured requested by letter the policy from an agent living in another county, by whom it was issued.

*Held*, That the transaction took place in the county of the agent, within the meaning of a statute requiring suit to be brought where the transaction took place.

It was claimed that the insurance was a renewal of a previous policy under an application for two years, for a different amount and period, in another company.

*Held*, That such claim could not be allowed, nor the application admitted as evidence.

Where it did not appear that any inquiries had been made regarding stipulations in fine print on the policy, their violation does not render it void unless they are material, where the statute provides that all statements shall be regarded as representations, and shall not work a forfeiture if false unless material.

It is the duty of the company to propose arbitration in case of disagreement, and the insured need not plead performance of such provision.

Where defects in proofs of loss could not be prevented, they are not a bar to recovery.

CHAS. H. FISK, *for Appellant.*

HARVEY MYERS, *for Appellee.*

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\* Decision rendered, March 26, 1897.

DU RUELLE, J.

This was a suit on a fire-insurance policy dated January 12, 1891, against the appellant, an insurance company existing under the laws of Louisiana. It was brought in the Kenton Circuit Court, and several motions to quash the service of process were made, appellant's appearance being entered for that purpose only; but the last motion was overruled. The first question, therefore, is as to the jurisdiction. Under section 51 of the Civil Code, in an action against a private corporation, the summons may be served in any county upon the defendant's chief officer or agent who may be found in the state; but, whether the return of the process issued to Jefferson County was sufficient or not, on September 9, 1892, the defendant appeared for the purpose only of making a motion to correct the record and to correct a clerical misprision. It is well established that a party defendant may appear for the purpose of moving to quash a summons, or the return thereof, without thereby entering an appearance to the action. Not so, however, when he appears for the purpose of seeking affirmative relief, as in the case of a motion to discharge an attachment; nor, we think, in a case like this, where defendant moved to correct the record.

It is further objected to the jurisdiction that the provision of section 71 of the Civil Code, providing that if any action against an insurance company

Arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place, does not apply to the case at bar. It appears that the application was made to Wiggins & Law, who were agents of the defendant company, by Nesbit & O'Hara, at the request and as agents of plaintiff, for the insurance in question, by letter from the latter firm, sent from Grant County by mail to the former firm at Covington, in Kenton County. The objection is that the action does not arise out of a transaction with Wiggins & Law, as agents of the company in Kenton County. It is true that the contract was not complete until the acceptance of the policy by the insured or his agent, but we think the issuance of the policy by the company's agents in Kenton County was a transaction there with the agents of the company, out of which the action arose.

A further objection is based upon the fact that an appeal was taken by plaintiff to the superior court from the first order quashing the return of summons, and it is urged that unless that appeal resulted in a reversal, no case was pending in the lower court, and it was error to enter an order redocketing the case, and to issue new summons upon the petition. After the appeal was taken, the court

ordered the summons which had issued to be quashed, and refused to redocket the case, until, upon plaintiff's motion, the appeal which had been taken was discontinued by the superior court, and the mandate of that court filed in the Kenton Circuit Court. Without considering the question whether the appeal was taken from a final order, and, if not so taken, could have no effect upon the proceedings of the lower court, it may be said that, after that appeal was discontinued or dismissed, the action remained in the lower court in exactly the same condition as it was at the time the appeal was taken; and, the petition not having been dismissed, the order to redocket the case was proper, and summons was properly issued after that order was made.

It is not necessary to consider the demurrer to the petition, as the defects objected to therein were supplied by an amended petition. After the demurrer was overruled to the petition, an answer was filed, and to this answer were filed what are called "partial demurrers" at the same time, with motions to strike out various parts of the answer. A number of these so-called "partial demurrers" were sustained, as well as several of the motions to strike out. It is supposed that the partial demurrers were filed under section 113 of the Civil Code, providing that "a party may demur to part of a pleading and present an issue of fact as to another part." While we are of opinion that the reference to "part of a pleading" was intended to mean a separate paragraph attempting to set up a separate cause of action or of defense, and not to isolated sentences, and that the proper mode of procedure in such case is by motion to strike out, or by compelling the other party to paragraph, and then filing a demurrer to the defective paragraph, there was no error in the action of the court to the prejudice of the defendant's rights, inasmuch as the allegations contained in those parts of the answer thus eliminated, which were not averments of conclusions of law, are sufficiently pleaded elsewhere in this extremely voluminous pleading.

It is also claimed for appellant that certain stipulations appearing in the policy were warranties, and that any failure as to them avoided the policy, even in the case of what is termed a "promissory warranty" to keep the books of the accounts of the insured in an iron safe, or remove them from the building every night. Counsel seems to have overlooked the statute of this state in force at the date of this policy in respect to such statements in policies of insurance. By the act of February 4, 1874, to amend chapter 22 of the General Statutes, tit. "Contracts," it is provided that

All statements or descriptions in any application for or policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy.

Much stress is laid by counsel upon the fact that, notwithstanding the policy sued on contains the provision as to the iron safe, the plaintiff had no iron safe, and consequently could not keep books therein, as showing a fraudulent concealment; and an application made two years before for insurance in a different amount, for a different period, and to a different company, is greatly relied on by counsel, it being claimed that the policy sued on was a renewal, though in a different company, of the policy issued under the written application. We think the court properly excluded as evidence that application. It is impossible to suppose that the policy sued on could have been issued in compliance with it. Nor does it appear that any inquiries were made by defendant or its agents in regard to a number of stipulations in fine print upon the back of the policy, or upon a slip of paper attached to the policy containing the iron-safe clause. In a recent opinion by Judge Hazelrigg in *Insurance Co. vs. Monroe* (March 3, 1897), this court said: "It seems to us that the insured has the right to assume that the company has made inquiries of him touching every material fact affecting the risk, and if he does not scrutinize the multitude of conditions and stipulations with which he finds his policy shingled over, he only risks the avoidance of his policy if it turns out that he has failed to disclose what is in fact material, and what he ought to have known to be material, to the risk assumed by the company. We think this is the effect of the later decisions of this court, as it is certainly the trend of the authorities generally." And in *May, Ins.*, § 207, the doctrine is thus stated: "When no inquiries are made, the intention of the assured becomes material, and, to avoid the policy, it must be found not only that the matter was material, but also that it was intentionally and fraudulently concealed."

It is also claimed by appellant that the provision for arbitration contained in the policy was a condition precedent to recovery, and performance thereof was required to be alleged in the petition. We do not so regard it. After proof of loss was made, it was the duty of the company to propose the arbitration if a difference existed as to the value of the property; and no averment or evidence of such proposal appears in this record.

The objections to the proof of loss are based upon formal defects and irregularities, which, under the circumstances of this case, could not have been prevented. This court, in the case of *Insurance*

Co. vs. Atkins (3 Bush, 333), after saying that it may be regarded as authoritatively settled that a substantial compliance with such a condition must be made by the claimant before a right of action will accrue to him for loss, unless the right to insist upon such preliminary condition be waived, proceeded as follows: "But such conditions have generally been liberally expounded, and held to require only the best evidence of fact which the party possesses at the time:" Phil. Ins., 498. It does not appear that the claimant is bound to "comply with each requirement with technical strictness, either as to time or manner of compliance." Moreover, it has been held in Insurance Co. vs. Stein that "preliminary evidence required by a policy of insurance as indispensable before nonpayment is actionable may be dispensed with or waived by the conduct of the agent of the company in giving assurances that the company is exonerated:" 5 Bush, 652.

Those of the grounds for new trial which have seemed to us to be at all substantial have been considered in the opinion. There was no error in refusing the instructions offered by defendant. Those which correctly stated the law were substantially included in the instructions given. The instructions given appear to us to correctly state the law to the jury, and the judgment is affirmed with damages.

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## SUPREME COURT OF OHIO.

GERMAN FIRE INS. CO. )

vs. )

ROOST.\*

The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.

A special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained.

A fire-insurance policy on a house and contents contained, in the printed portion, a provision that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only," and had attached thereto a special clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." There were stored in a certain powder house, situate across the street from the building insured, and seventy-one feet distant therefrom, over which

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\* Decision rendered, Jan. 26, 1897. Syllabus by the Court.

house neither party had any control, two tons of powder. The powder house was struck by lightning, causing an explosion of the powder, by force of which explosion the insured house and contents were totally destroyed. *Held*, That, within the meaning of the clauses recited, the loss was occasioned by explosion, which was not included in the risk, and that the company is not liable.

Statement of facts by SPEAR, J.

The action was upon a policy of fire insurance, with lightning clause attached, issued upon a house and furniture therein; the allegation of the petition as to loss being that "on the 3d day of June, 1890, said house and furniture were wholly destroyed by lightning." The answer admitted the issuing of the policy as alleged, and denied the other allegations. At the trial a jury was waived, and the cause submitted to the court. Being requested to find its conclusions of fact and law separately, the court found as follows: "That said policy of insurance was issued by said defendant company as alleged. That the following clause was contained in the general contract of insurance: 'Sec. 2. This insurance does not apply to or cover \* \* \* any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only.' That upon a printed and written slip, pasted upon the body of the policy, is the following clause, which is a part of said contract of insurance:—

It is hereby specially agreed that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy hereby referred to,

—i. e., the policy in question. That the insurance was \$400 on house and \$100 on furniture therein. That the house and furniture were totally destroyed by the force of the explosion. That the house stood on the west side of a street forty feet wide, and twenty-one feet from the street. That on the east side of said street, and opposite said house, was located a powder house. Neither plaintiff nor defendant had any interest in or control over said powder house. That, shortly before January 3, 1890, there were stored in said powder house two tons of powder, and on said January 3d said powder house was struck by lightning, causing said explosion, which destroyed said property as aforesaid. As its conclusion of law the court find that said damage was not caused by the explosion, as contemplated by the exception contained in said policy, but that said loss was caused by an explosion occasioned by lightning, and was included in the risk." Judgment for the plaintiff followed, which was affirmed by the circuit court. To reverse these judgments the present proceeding is brought.



JOHN H. DOYLE and JENNER & WELDON, *for Plaintiff in Error.*  
DONNELL & MARRIOTT, *for Defendant in Error.*

SPEAR, J. (after stating the facts.)

The plaintiff in error urges two propositions, either one of which being found in its favor would result in a reversal of the judgments: (1) That the proximate cause of the fire was the explosion, the lightning being only the remote cause, and the loss is, therefore, not within the terms of the lightning clause of the policy. (2) That whether the lightning clause, taken alone, would, under the facts, create a liability or not, yet, when that provision is considered in connection with the entire policy, it is plain that the loss which occurred was not, within the contemplation of the parties at the time of the making of the contract, one which was intended to be covered.

1. Respecting the first proposition it may be said that undoubtedly the rule is that the proximate and not the remote cause of the loss is to be regarded in determining liability. As said by Lord Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." And it is contended here, with much effect, that the true rule is that, where a new cause has intervened between the fact accomplished and the alleged cause, such new cause must be considered the real cause; that in this case the lightning striking the powder house was inadequate to produce the disruption of the insured property without the intervention of some other and nearer cause; that the force and energy which produced the mischief came, not from the lightning, but from the explosion, and therefore the explosion was a new cause, which intervened, and hence must be regarded as the proximate cause. While, on the other hand, it is insisted that the law seeks the first efficient cause, which will be regarded as the *causa proxima*, however many other agencies may have intervened, and that in this case the lightning was the efficient cause and the other merely incidental, and therefore the mere agent or instrument through which the cause operated. Attention has been called to a formidable array of decisions, pro and con, giving a review of the question of proximate and remote cause, as the same has arisen and been decided in a great variety of cases, and these decisions bring before the mind, as a subject of study, the general doctrine of proximate and remote causes. But we would regard it as unprofitable labor to seek through the cases for a satisfactory expression of the rule, since no general rule will be found suited to all conditions, and each case, as it arises, must,

after all, be decided upon the special facts belonging to it, and often upon the very nicest discriminations. And it seems not worth while to pursue the point in considering the present case, because, as it appears to us, there is no necessity for such inquiry, inasmuch as the case may be satisfactorily disposed of upon the second proposition.

2. It is contended, in support of the judgment below, that, inasmuch as the lightning clause is not a part of the original policy, but is attached thereto as a modification, it must, therefore, control where it is inconsistent with other portions of the policy, and that it is inconsistent with that part of section 2 which relates to loss by explosion. It is a rule of construction, founded in reason and resting upon abundant authority, that the meaning of the contract is to be gathered from a consideration of all its parts, and that no provision is to be wholly disregarded because inconsistent with other provisions, unless no other reasonable construction is possible, and that a special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, then both are to be retained. Are the two provisions referred to irreconcilably inconsistent? The lightning clause insures against loss or damage caused "by lightning to the interest of the assured in the property described;" but it is "subject in all other respects to the terms and conditions of the policy." That is, while affording protection to the property insured from lightning, the other terms of the policy are to have full effect. Recurring, now, to the other provision involved, we find that the insurance "does not apply to or cover any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only." Here there was no fire. We think that these two clauses are not inconsistent, but that each can be given effect without destroying the other. Construed together, they made the company liable for any damage to the building and contents in case the same were injured by lightning, but that in no event would the company be liable if the loss were occasioned by an explosion. The provision is against loss by lightning to the property insured, subject to the terms of the policy; i. e., provided the loss is not occasioned by an explosion. This, it seems to us, gives a reasonable construction to each clause, and does no violence to any part of the contract.

We think, also, without stopping to refine upon the doctrine of proximate and remote causes, that, within the meaning of these provisions, the loss in this case was by explosion, and not by lightning. And this, it is reasonable to assume, must have been the understanding of the parties in the making of this contract, for, while it is un-

likely that either had actually in mind the extent of the peril from the proximity of the powder house across the way, yet no more apt language could have been used to exclude liability for this very peril had the parties contracted with full knowledge of its existence and dangerous character. Construed with reference to the subject-matter, the language used is equivalent to a declaration on the part of the company that it will not be held for any loss, whether it comes within the general peril of lightning or not, and without undertaking to consider whether it does or not, if such loss occurs by explosion, unless fire ensues. If fire follows an explosion, then liability attaches; if not, there is none. Nor can it reasonably be urged that the insured did not understand the meaning of the language of this provision, for it is obvious. He could not, as a reasonable man, in the face of such an exception, have expected the company to be liable for any loss, save from consequent fire, if such loss should accrue from explosion. Although the explosion of gunpowder by means of lightning happens but rarely, yet it is a possible peril, and sometimes occurs, which fact may account for the company declining to take such risk, while its infrequency may account for the willingness of the insured himself to bear it. But, whether the latter actually had the extent of this risk in mind or not when he entered into the contract, he must be held in law to have assented to an exception which, upon its face, takes risks by explosion out of the perils insured against. That destruction by explosion of a house seventy-one feet away from one struck by lightning should be deemed a natural result of the lightning is at least a doubtful proposition. But, be that as it may, when there follows in a policy, after a lightning clause, a provision which distinctly excludes liability for loss by explosion, it appears plain that, within the contemplation of the parties at the time of the making of the contract, a loss by explosion could not have been understood to be embraced within the protection of the policy.

The conclusions stated are sustained by abundant authority. True it is that cases are to be found which declare principles of construction which, if applied here, would make the company liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation, and we have examined a great many, has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or the lightning, without either of the latter agencies coming in contact with

the insured property: *Everett vs. Assurance Co.*, 115 E. C. L., 126; *Caballero vs. Insurance Co.*, 15 La. Ann., 217; *St. John vs. Insurance Co.*, 11 N. Y., 518; *Briggs vs. Insurance Co.*, 53 N. Y., 446; *Montgomery vs. Insurance Co.*, 16 B. Mon., 427; *Heuer vs. Insurance Co.*, 144 Ill., 393.

Judgments of the circuit court and of the court of common pleas reversed, and judgment for plaintiff in error.

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## UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

TRAVELERS INS. CO. }

vs. }

SELDEN.\*

An accident policy excepted from liability death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary over-exertion. The insured fell over and shortly after died, after running rapidly up a hillside in connection with his work. According to the uncontradicted testimony of two physicians, death was due to apoplexy, to which the insured was predisposed by a bodily infirmity.

*Held*, That as a matter of law a verdict should have been directed in favor of the company.

Before Goff, Circuit Judge, and Morris and Brawley, District Judges.

J. ALSTON CABELL and PATRICK H. C. CABELL, *for Plaintiff in Error*.  
BARTON H. WISE and JOHN S. WISE, *for Defendant in Error*.

BRAWLEY, D. J.

The policy of insurance on which this action is based is on its face called an "accident policy," and contains the covenant of the Travelers Insurance Company to pay a stipulated indemnity to Richard C. Selden for loss of time

Resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business.

It also contained a covenant to pay \$5,000 to his wife, or legal representative, if death results from such injuries alone, with a proviso that the company should not be liable in case of accident or death

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\* Decision rendered, Feb. 2, 1897.

resulting, wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary over-exertion, nor for injuries of which there was no visible mark on the body. The policy was issued on the 22d of March, 1895. The insured died on the 23d of April, 1895, and this is an action of assumpsit on the policy, resulting in a verdict for the plaintiff for \$5,000, with interest, and the case is before us on a writ of error.

Various exceptions were taken to the charge of the presiding judge, and to his refusals to charge as requested, but the conclusion reached by us renders it unnecessary to consider them in detail.

The testimony shows that, on the morning of April 19th, the deceased, a farmer, residing on his plantation, went to his barnyard for the purpose of castrating a colt; that he was apparently in his usual health, which is described as that of a vigorous, hardy man, somewhat fleshy, about 53 years of age, and accustomed to lead an active life; that upon his arrival at the barn the colt was seized by some of the men employed on the farm, and thrown down; that Selden thereupon tied him, and proceeded to castrate him; and that, after removing one of the seeds, it was found that the iron used in burning the part was too cold for the purpose, whereupon Selden got up from his stooping posture, ran rapidly up a little hillside, to a fire, where he heated the iron, and ran back to where the colt was lying, when he stooped over, burned the place, and applied the grease, and proceeded to remove the other seed. Before the operation was entirely finished, he showed signs of distress, threw his hand up over his eye, and exclaimed, "I have a fearful pain over my eye," and, as he was about falling over on the colt, he was caught by the attendants, and carried to the barn steps, having lost the use of one of his legs and becoming very sick. After reaching the barn, he put his hand to his head, and said to one of the men, "John, this is the last of me." He was soon removed to his house in a buggy, put to bed, and a physician was summoned. Two physicians attended him until death, on the 23d, and the certificates of both state that he died of apoplexy. The testimony shows that, in going from the colt to the fire, deceased passed over a rough, rocky piece of ground, on which corncobs were scattered in places; but there is no proof that he stumbled or fell, either going or returning. One of the attending physicians was examined at the trial, and testified that the deceased died from a well-defined case of apoplexy, which he defined to be the rupture of a blood vessel on the brain, and that the same was regarded by medical writers and the profession as a bodily infirmity or disease. He

further gave it as his opinion, after hearing the witnesses detail the occurrences on the 19th of April, that there was not enough in those circumstances to have caused death, had there not been some bodily infirmity, or the existence of disease, or predisposition to apoplexy. The certificate of the other attending physician, who was the family physician of the deceased, was also offered in evidence by the plaintiff. It is to the effect that he was called in on the 19th of April, and found Mr. Selden critically ill; that he called another physician in to consultation (the same as was examined at the trial); that he was with him day and night until his death; that he died of apoplexy; that there was no history of injury, and no signs of any; and that no post mortem was held. The defendant company offered no testimony, and upon the conclusion of the plaintiff's case duly moved the court to direct a verdict. This motion, which is in the nature of a demurrer to the evidence, is in accordance with the practice in this jurisdiction, and it is now to be considered whether, under the circumstances of this case, it should have been granted.

"It is the settled law of this court," says Mr. Justice Gray, in *Randall vs. Railroad Co.* (109 U. S., 482), "that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." Other cases of equally high authority declare that it is not only the right, but the duty, of the court, if the evidence is such as not to warrant a verdict for a party, to direct the jury accordingly, and that in every case, before the evidence is left to the jury, there is a preliminary question to be decided by the judge whether there is any evidence produced by the party upon whom the onus of the proof is imposed on which the jury can properly proceed to find a verdict for the party introducing it. The legal sufficiency of the evidence to support the verdict presents a question of law, the decision of which is not a matter of discretion, but of duty, and is as much the subject of exception and review as any other ruling of the court in the course of the trial. In all cases where there is conflict of testimony, or question as to the credibility of witnesses and preponderance of proof, and in actions of negligence, where the line which separates questions of law from questions of fact is so close that it cannot be accurately delimited, and minds equally intelligent and equally impartial might draw different conclusions, the judgment of twelve impartial men, of the average of the community, applying their separate experiences of life to the solution of such doubts as may arise, is more likely to be wise and

safe than the conclusion of any single judge, and the practice is not to be encouraged which would substitute the conclusions of one mind for that average judgment which it is the object of our system of jurisprudence to obtain in all proper cases. But where there is a simple question of contract or its breach, and the facts are undisputed, it must be ruled as a question of law; for the rights of parties in such cases must be decided according to the law of the land as expounded by the courts, and cannot be left to the arbitrary determination of a jury, which may adopt theories without proof, substitute possibilities for facts, and conjectures for evidence. Judges are no more free from the weaknesses of human nature than are jurors, but where responsibility is diffused the obligation of duty seems to rest more lightly upon the individual than where it is concentrated, and the pleadings of sympathy or the promptings of prejudice or passion are oftentimes likely to produce that result on a jury which it is the special and highest duty of the judge to prevent.

The case under consideration was simply one of contract. Had the policy of insurance been an ordinary life policy, the right to recovery was plain; but it is the duty of the courts to enforce contracts as made, and not to make, or allow to be made, new contracts between the parties. The contract was what is known as, and what on its face and in its terms it purported to be, an "accident policy," and the defendant corporation covenanted to pay the sum of money named if death resulted from bodily injuries through "external, violent, and accidental means alone, independently of all other causes," and it was expressly stipulated that it should "not cover injuries of which there is no visible mark, nor death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity," or from "voluntary over-exertion." In an etymological sense anything that happens may be said to be an "accident," but, in the sense in which the word is used in this policy, as shown by the context, and as expounded in similar cases, it is to be taken as meaning "an event which proceeds from an unknown cause, or as an unusual effect of a known cause, and therefore unexpected,"—something casual and fortuitous. To entitle the plaintiff below to recover, the burden of proof was upon her, not only to show that the deceased came to his death through "external, violent, and accidental means alone," but also to show that the death was not due, in whole or in part, directly or indirectly, to disease or bodily infirmity. There was not only no proof of any accident, but conclusive evidence, from the only medical witnesses examined, that death was due to disease. If, during the operation upon the colt, while running to the fire for the

hot iron, the deceased had stumbled or fell, that might have been considered an accident; but there was nothing of the kind. At most, it might be contended that the exertions and activities of that morning tended to bring into activity a then existing but dormant disorder; but "voluntary over-exertion," and disease and bodily infirmity, are in express words not insured against.

There was not only no evidence that the death was caused by external, violent, and accidental means, but conclusive evidence to the contrary. The only medical testimony as to the cause of death was that of Dr. Michaux, who swore that the deceased died of apoplexy, and that there was nothing in the circumstances detailed sufficient to cause death without a previously existing disease. He was a witness put upon the stand by the plaintiff, and there was no evidence to contradict him. Where the weight of credible testimony proves the existence of a fact, it must be accepted as a fact. Where an event occurs which can be readily explained as an operation of nature, working through natural, usual, and ordinary laws, that cannot be called an accident; nor can conjectures be allowed to displace proofs. Most modern writers apply the term "apoplexy" to cerebral hemorrhages. It is a well-defined disease,—as well understood as pneumonia. It is a disease to which men of the age of the deceased are most peculiarly subject. Hippocrates states that it is of the most frequent occurrence between the ages of 40 and 60, and all medical experience confirms the truth of this observation, and the reason is obvious, for the blood vessels of the brain are liable to undergo degenerative changes after middle life. The texture becoming fragile, their functions in carrying on the healthy nutrition of the brain are impaired, and, being liable to give way, the blood escapes into the brain. If the hemorrhage is slight in amount, and in that part of the brain where its presence gives rise to little disturbance, the effused blood undergoes gradual absorption, and a certain measure of recovery takes place, while, if a large vessel is ruptured, and blood extravasated in or around the important structures at the base of the brain, death is likely to follow within a short period. Severe exertion of mind or body, much stooping, anything, in fact, which tends, directly or indirectly, to increase the tension within the cerebral blood vessels may bring on an attack. When a man with delicate lungs exposes his breast unprotected to the wintry blast, you could as well attribute the pneumonia and death which may ensue to accident, as you could the stroke of apoplexy which follows when a man over 50 years of age engages in an operation which demands violent exertion and much stooping. In either case a man in the full vigor of youth and manhood might



pass the ordeal unscathed; in both, death is due, directly or indirectly, to bodily infirmity.

Not only is there an entire absence of proof of any accident likely or sufficient to cause death in this case, but positive proof that death was due to disease, and no conflicting testimony whatever. What question, therefore, was there which could properly go to the jury? In *Barry's Case* (131 U. S., 100), relied upon by the defendant in error, there was proof that the deceased jumped from a platform four or five feet high, alighting so heavily as to attract the attention of his companions, and was hurt; that he became ill on his way home, and much conflicting testimony as to the cause of his death, as to whether it resulted from duodenitis, or a stricture of the duodenum, caused by the jump. There being a conflict of testimony as to the cause of death, such question was properly submitted to the jury. In *Burrough's Case* (69 Pa. St., 51), there was conflicting testimony as to whether deceased received a blow upon the abdomen from a pitchfork, causing internal injuries, or whether death was due to a strain. The court held that an accidental strain, resulting in death, was an accidental injury, within the meaning of the policy; that being an unexpected event, happening by chance, and not occurring according to the usual course of things. In *Martin's Case* (1 Fost. & F., 505), it was held that an injury to the spine, caused by the lifting, of a heavy burden, was within the meaning of the policy, which was against any bodily injury occasioned by an external or material cause operating on the person of the insured.

It is unnecessary to cite the numerous and familiar cases which declare it to be the duty of the court to direct a verdict when the evidence is undisputed, or is of such conclusive character that the court would, in the exercise of sound judicial discretion, be compelled to set aside a verdict rendered in opposition to it. In *Improvement Co. vs. Munson* (14 Wall., 448), Mr. Justice Clifford says:

"Formerly it was held that if there was what is called a 'scintilla' of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon which the onus of proof is imposed."

"Such is the constant practice," says Mr. Justice Swaine, in *Bowditch vs. Boston* (101 U. S., 16), because "it gives scientific certainty to the law in its application to the facts, and promotes the ends of

justice." The court cannot allow the jury to assume the truth of any material fact without some evidence legally sufficient to establish it, and the jury cannot legally infer the existence of a material fact unless there is some proof of it. "The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings:" *Railroad Co. vs. Woodson*, 134 U. S., 622. It therefore follows that, when the facts and circumstances are admitted and undisputed, it becomes a question of law for the court to decide whether they support the averments of the pleadings, and it is error to leave a question of law to the arbitrary determination of a jury, for everybody knows that a case of this kind can have but one result if left to a jury, moved, as it must be, by the natural and creditable instincts of human nature, to sympathize with the afflicted. No case can be conceived which more strongly invokes the obligation to duty imposed upon the courts as set forth in the oft-quoted language of Mr. Justice Miller, in *Pleasants vs. Fant*, 22 Wall., 116:—

"It is the duty of the court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial."

That the contract between the parties in this case, if decided by the rules of law, and not determined by the sympathies of the jury, would have had another result, finds apt illustration in the case cited in the brief, *Mary M. Selden vs. American, etc., Insurance Co.*, where Mr. Commissioner Guy, in a carefully considered report, which was confirmed by the Circuit Court of the City of Richmond, reaches the conclusion that there was no liability upon a similar policy. The judgment of the court below is reversed.

## SUPREME COURT OF NEBRASKA.

FARMERS &amp; MERCHANTS' INS. CO. }

vs. }

GRAHAM.\*

A mere agreement of a soliciting agent to procure to be issued a policy of insurance does not create a present liability against the insurance company, his principal.

Proof that an insurance agent has solicited and forwarded risks and collected premiums is not such evidence as will justify an inference, against positive, uncontradicted evidence, that the powers of such agent were in excess of those above indicated.

The petition examined, and *held* not to state a cause of action. The evidence considered, and found insufficient to sustain an action, even if a good cause of action had been stated in the petition.

CHAS. E. MAGOON, *for Plaintiff in Error.*

POUND & BURR and JOHN S. BISHOP, *for Defendant in Error.*

RYAN, C.

In the District Court of Lancaster County there was a judgment against the Farmers & Merchants' Ins. Co., for the review of which these error proceedings are prosecuted. It was alleged in the petition in the district court that on November 30, 1891, plaintiff was the owner of certain household furniture in use in a house on North Thirteenth St. in the city of Lincoln; that on December 2, 1891, the defendant, the aforesaid insurance company, executed a policy of insurance on said furniture, whereby it was insured in the sum of \$1,000 against loss, from November 30, 1891, till November 30, 1894, for which insurance the plaintiff paid the required premium of \$14 to Burt W. Richards, the agent of the defendant. It was further averred in said petition that on or about June 14, 1892, the plaintiff made arrangements to pack her household goods and move them from her dwelling on North Thirteenth St. to a certain warehouse on Fourteenth and G Sts., excepting the piano, which was to be removed to the residence of the above-named Burt Richards, on K St., and that at said time there was an unearned premium on said policy amounting to more than \$8.40. The transaction which was claimed sufficient to create a contract to insure, and which therefore should, as the plaintiff claims, be held to be in effect an insurance, was in the fifth paragraph of the petition described as follows: "(5) That on the said 14th of June, 1892, said Richards, at request of

\* Decision rendered, March 3, 1897. Syllabus by the Court.

plaintiff, came to plaintiff's house, at said No. 228 North Thirteenth St., and, as agent of said defendant, agreed with this plaintiff to have said policy of insurance on said goods cancelled, and to have made out and delivered by defendant to plaintiff another policy of insurance that would insure plaintiff against loss or damage by fire on said goods in the sum of \$1,000, for a period of ninety days from said 14th of June, 1892, and said insurance should be seven hundred dollars (\$700) on all goods, except the piano, while stored in said storage warehouse at Twenty-fourth and G Sts., and three hundred dollars (\$300) on said piano while kept at said No. 1917 K St., all in said city of Lincoln; and it was further agreed that said unearned premium on said first policy of insurance should be applied on and pay the premium of said new policy to be issued to plaintiff by the defendant, and, if the amount of said unearned premium was more than the amount of said premium on said new policy, the difference was to be paid to the plaintiff by the defendant, and, if it was less, plaintiff had to pay to defendant such difference, and plaintiff then and there offered to pay the same." The furniture was stored at the warehouse above indicated on June 14, 1892, and on the following day it was destroyed by fire. The judgment was for the value of the said furniture.

This judgment, we think, should be reversed, for various reasons, which we shall now proceed to state as briefly as possible. Burt W. Richards was the soliciting agent of the insurance company. There was no evidence introduced by the plaintiff which showed facts inconsistent with the limitation of his agency shown by the company to be confined to soliciting insurance, taking and forwarding applications; and possibly premiums may, in some instances, have been paid to him. In the transaction under consideration, however, there was no premium paid. Indeed, the requirement of payment is apparently sought to be obviated by allegations of an agreement to cancel an existing policy, and use the unearned premium thereon for a payment. But this cancellation of the policy, the above averments show, was not assumed to be within the scope of the powers of Mr. Richards. In this respect the averment was that Mr. Richards agreed to have the old policy cancelled, thereby implying that this must be done by some other representative of the insurance company than Mr. Richards. As to the issuance of a new policy, the allegations of the petition were, in effect, that Richards, as agent of the company, agreed to have made out and delivered by defendant, the insurance company, to plaintiff, another policy of the insurance company, which would insure plaintiff against loss or damage by fire on said goods. In *Wallingford vs. Burr* (15 Neb., 204), it

was held that a contract of sale was not complete, because, while all the terms had been agreed on, there had not been made, according to the requirement of the agreement between the vendor and the vendee, a bill of sale evidencing the fact of such sale. By the very terms of the contract, as pleaded in the petition, a policy was required to issue, to complete the contract of insurance. This requirement was never met; hence, on plaintiff's own statement of the basis of his cause of action, there was no executed contract of insurance. The reason for the rule enforced in *Wallingford vs. Burr* applied to the executory contract to insure, and such a contract was not sufficient to render the company liable for a loss before the condition precedent was performed; that is, before a new policy had issued. In our opinion, the petition failed to state a cause of action against the insurance company, and the proofs fell far short of sustaining one, even if it had been stated.

The judgment of the district court is reversed. Reversed.

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UNITED STATES CIRCUIT COURT.

W. D. PENNSYLVANIA.

WILLEY ET AL.

vs.

FIDELITY & CASUALTY CO.\* }

Where the usual course of dealing between the company and its general agent was for the former to charge the latter with renewal receipts forwarded for delivery, and this was done in this case, and the renewal was countersigned by the agent and delivered to the policyholder, the insurance will remain in force according to the terms of the receipt, although the premium was unpaid through the sudden death of the insured.

KNOX & REED, *for Plaintiffs.*

STONE & POTTER, *for Defendant.*

ACHESON, C. J.

The verdict of the jury, which is supported, I think, by ample evidence, establishes that it was the usual course of dealing between the defendant company and its general agent, Mr. Scott, for the company to charge Mr. Scott as its debtor with the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named in the receipt.

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\* Decision rendered, Jan. 16, 1897.

The question of law reserved is whether, under these circumstances, the fact that the renewal premium was not actually paid by Mr. Getty constitutes a defense to this action.

In the case of *Miller vs. Insurance Co.* (12 Wall., 285, 303), Mr. Justice Clifford, speaking for the Supreme Court of the United States, said:—

“Where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended; and the rule is well settled, where a credit is intended, that the policy is valid, though the premium was not paid at the time the policy was delivered; as, where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment.”

The decisions of the Supreme Court of Pennsylvania are in harmony with this statement of the law. Thus, in *Elkins vs. Insurance Co.* (113 Pa. St., 386, 394), after reciting that it appeared from the testimony of Crane, the agent of the insurance company, that he “had power, on receipt of a policy, to deliver it to the assured, or to his agent, and to collect the premiums,” that “the company looked to Crane either for the return of the policy or for the premium;” that “upon delivery of the policy he was obligated to pay the premium as for his own debt;” and that he kept an account with the company, in which he charged himself with the premiums as the policies were delivered, and took credit with any remittances he might make,”—the court said:—

“In view of the course of business pursued by this company with Crane, and by this agent in the consummation of their contracts, we think the implication might fairly arise that any absolute requirement of the policy as to the actual prepayment of the premiums had been dispensed with, and that the obligation of the agent to pay the premium was, in effect, the payment of it by the assured.”

To the like effect was the ruling in *Insurance Co. vs. Hoover*, 113 Pa. St., 591, 595, 599. In *Insurance Co. vs. Carter* (Pa. Sup.), where the course of business between the company and its agent was similar to that pursued here, the trial judge charged the jury that the actual payment of the premium to the company before a loss was dispensed with, and the obligation of the agent to pay the premium was, in effect, the payment of it by the insured, and this instruction was approved by the Supreme Court of Pennsylvania.

I am of the opinion that the renewal premium in this instance must be regarded as having, in effect, been paid, or that cash payment thereof was dispensed with by the defendant company. The

case, I think, does not turn upon the question of the agent's power to waive any stipulation of the written contract. We have here the conjoint action of the defendant company and its general agent. The case falls exactly within the rule laid down in *Miller vs. Insurance Co.*, supra, and is covered by the decisions of the Supreme Court of Pennsylvania.

Upon the undisputed facts, the defendant company cannot justly refuse to pay this policy merely because the renewal premium was not actually paid by Mr. Getty to Mr. Scott. The company transmitted for delivery, from its office in the city of New York, to its duly-commissioned general agent, resident in the city of Pittsburgh, a renewal receipt, signed by its treasurer and secretary, "continuing in force" the accident policy it had issued to Mr. Getty for another year. The only conditions on the face of the receipt were that the statements and warranties in the original application were still true, and that nothing had occurred or existed to affect the risk, with an appended notice that the receipt was "not valid unless countersigned by the duly-commissioned agent of the company." The company, when it transmitted this receipt to its agent, Mr. Scott, charged him as its debtor with the premium, as it was accustomed, with the knowledge of Mr. Scott, to do. Mr. Scott, having countersigned the renewal receipt, brought it in a completed form to Mr. Getty's place of business in the city of Pittsburgh and delivered it to him before the original policy had expired. Unquestionably, under the evidence, by that delivery Mr. Scott became absolutely bound to the company for the payment of the premium. The understanding between Mr. Scott and Mr. Getty without doubt was that the latter should have a short credit. Mr. Scott, occasionally at least, had thus delivered policies and renewal receipts upon credit to persons in good financial standing. The sudden death of Mr. Getty by a casualty within the policy prevented the payment of the renewal premium to Mr. Scott. From the conduct of the company and its general agent, Mr. Getty had reasonable and just ground to infer that his policy was continued in force, and fair dealing forbids the company to assert the contrary.

Let judgment be entered in favor of the plaintiffs upon the verdict and reserved question of law.

## SUPREME COURT OF PENNSYLVANIA.

YOST  
vs.  
MCKEE ET AL.\* }

An agreement to arbitrate which does not provide for submitting to a particular person or tribunal, but to parties mutually chosen, is revocable by either party.

The title was by will, devising the property forever, subject to a restriction against alienation for thirteen years, and ownership is unconditional and sole.

The will also divided other property among the heirs including insured, and then provided that all property and bank stock should be sold and divided, and in case of death of insured before reaching thirty, his estate was to be divided among the other heirs.

*Held*, That the homestead insured already given in fee was not included in the property to be divided.

SAMUEL J. GRAHAM and WILLIS F. MCCOOK, *for Appellant*.

WILLIAM YOST, *for Appellees*.

MCCOLLUM, J.

The refusal of the insured to comply with the condition in the policy in regard to the appointment of appraisers to ascertain the amount of the loss in case of a disagreement concerning it does not constitute a good defense to this action. The condition was nothing more than an agreement to refer to three appraisers, to be appointed at a future time, to determine the amount of the loss by the award of any two of them. It was a revocable agreement, and the insurance company is in no position to complain, here or elsewhere, of the revocation of it. It has not shown that it admitted the validity of its policy, or its liability under it; but, on the contrary, it has, in the language of the learned judge of the court below, "always denied its liability on ground which, if sustained, cuts up the contract by the roots." The foregoing views are fully warranted and sustained by the decision of this court in *Mentz vs. Insurance Co.*, 79 Pa. St., 478. In *Assurance Co. vs. Hocking* (115 Pa. St., 407), it was distinctly held, in an opinion by Mr. Justice Clark, that where an agreement to arbitrate does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be eventually chosen by the parties, it is revocable by either party. Further consideration of this branch of the insurer's contention is deemed unnecessary, because the cases cited furnish a sufficient answer to it.

\* Decision rendered, Jan. 4, 1897.



Another defense to the action is that the interest of the insured in the property destroyed was "other than unconditional and sole ownership," and this depends on the construction of the will by which he acquired title to it. The property destroyed was a dwelling house included in the devise by David McKee of his homestead to John D. McKee, "to be his forever for his own proper use," subject, only, to a restriction of alienation until he attained the age of thirty years, which, in his case, was for the period of thirteen years. In *Jaureche vs. Proctor* (48 Pa. St., 466), Woodward, C. J., said: "A partial restriction, such as not to alien to a particular person or for a limited time, may be supported, but a general restraint of alienation, when annexed to an absolute estate, is void, upon the familiar principle that conditions repugnant to the estate to which they are annexed bind not." This is in accord with the view expressed by Tilghman, C. J., in *M'Williams vs. Nisly*, 2 Serg. & R., 507, and by Coulter, J., in *M'Cullough's Heirs vs. Gilmore*, 11 Pa. St., 370. It is said, in 6 Am. & Eng. Enc. Law, p. 877, note 4, that "the weight of authority seems to be against such restraints, however limited as to time." The ground on which a partial restraint of alienation is supported is that it is not inconsistent with a reasonable enjoyment of the fee: *M'Williams vs. Nisly*, supra, and *Libby vs. Clark*, 118 U. S., 250. While the cases on this point are conflicting, the Pennsylvania cases we have cited seem to sustain a partial restraint of alienation. But we may assume that the restriction in question is valid, without conceding that it relieves the insurer from liability on its policy. The conditions of the policy are to be understood, not in their technical sense, but as requiring that the insured be the actual and substantial owner: *Beach, Ins.*, § 405. The risk was not affected by the restriction. It was not inconsistent with a reasonable enjoyment of the estate devised, and the insured was the actual, sole, and substantial owner of the property destroyed. For the reasons above stated, the restriction in question cannot be regarded as affording a defense to the action.

It is contended, however, that if the insured, by the devise to him of the homestead, acquired an estate in fee simple, it was, by another provision of the will, defeasible on his death under thirty years of age without issue. The provision referred to is preceded by the devise of the homestead, by gifts of annuities to the brothers, sisters, and children of the testator, and by the appointment of executors. It is as follows:—

On the death of my heirs herein named all property and bank stock to be sold and divided among all the heirs should my grandson, John D. McKee, die before he is thirty, without having any heirs, his estate to be divided pro rata among the heirs.

We have quoted it entire, and as it was written. It is quite clear that by "my heirs herein named" the testator meant the annuitants, and that "all the heirs" included John D. McKee. It is also obvious that "all property and bank stocks" did not include the homestead previously devised in fee. The part of the provision which relates to the division of John D. McKee's estate may be fairly referred to his share of the proceeds of the property previously directed to be sold. It may be possible to construe it as including the homestead, but it seems to us that this is not the reasonable interpretation of it. "The clearly-expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention:" Sheetz's Appeal, 82 Pa. St., 213. "Where there is a clear gift in a will, it cannot afterwards be cut down, except by something which, with reasonable certainty, indicates the intention of the testator to cut it down:" 2 Jarm. Wills, 443. Applying this well-settled rule of construction to the will under consideration, we hold that there is nothing in it which clearly indicates that it was the intention of the testator to defeat or modify his devise of the homestead. There is no other question raised by the specifications which requires discussion. All the specifications are overruled. Judgment affirmed.

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## SUPREME COURT OF TEXAS.

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AMERICAN CENTRAL INS. CO. }

vs. }

BASS ET AL.\* }

The policy stipulates that the loss should be estimated by appraisalment, and that any proceeding relative to an appraisalment would not waive any of the policy conditions.

*Held*, That denial of liability after an appraisalment on the ground of a breach of policy conditions did not waive the company's right to insist on the appraisalment as conclusive of the amount of loss.

HARRIS & KNIGHT, *for Appellant*.

COCKRELL & HARDWICKE, *for Appellees*.

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\* Decision rendered, Feb. 4, 1897.

GAINES, C. J.

In this case the court of civil appeals for the second supreme judicial district have certified for our decision the following question: "Under a fire-insurance policy which provided that the amount of the loss should be ascertained by appraisalment, in accordance with the usual stipulations in such policies, the amount of the loss resulting to appellees in this case from the burning of their stock of goods covered by said policy was so ascertained, but appellant refused to pay same, upon the ground that it was not liable for any amount; and, in bringing the suit, appellees sought to recover, and did recover, a greater amount than had been so ascertained, the appellant pleading the appraisalment or reward as conclusive upon the amount of the loss, but also denying any liability under the policy. No such denial, however, has been made before the appraisalment. The policy contained a provision to the effect that any proceeding relating to the appraisalment would not waive any of the conditions of the policy, the ground upon which liability was denied being a breach of one of these conditions. The material question which we deem it proper to certify to your honors for decision is: Did the denial of liability on the part of the appellant after the amount of the loss had been ascertained by appraisalment, as provided in the policy, have the effect of waiving its right to insist upon the appraisalment as conclusive of the amount of the loss; such appraisalment being otherwise valid, if not thus waived?"

It is settled law, at least in this jurisdiction, that a stipulation in an insurance policy, by which it is agreed that the amount of the loss shall be determined by an appraisalment, is valid, and that, if such appraisalment be made a condition precedent to the bringing of a suit upon the policy, it will be enforced: *Insurance Co. vs. Clancy*, 83 Tex., 113; *id.*, 71 Tex., 5. It was held in the case cited that the attempt to adjust the amount of the loss by agreement was not a waiver of the stipulation. A waiver may arise either by an agreement between the parties, or by estoppel; but in the latter case "the acts relied on as constituting a waiver should be such as are reasonably calculated to make the assured believe that a compliance on his part with the stipulations providing the mode of proof of loss, and regulating the appraisalment of the damage done, is not desired, and that it would be of no effect if observed by him:" *Insurance Co. vs. Clancy*, *supra*. A policy of insurance may provide that an appraisalment shall be made, and that it shall only be conclusive in the event the liability of the insurer is not disputed, or it may be stipulated for such a determination of the amount of the loss, without reference to the question whether the liability be contested or

not. It seems to be generally held that a stipulation that the question of liability shall be determined by arbitration is contrary to public policy and void, but it is otherwise, as we have seen, as to the ascertainment of the amount of the loss. There is neither repugnancy nor inconsistency in leaving the former question to the courts when the liability is disputed, and at the same time in providing that the amount of the recovery shall be settled by arbitration. The policy in question, as outlined in the statement of the court of civil appeals, does not expressly provide that, in the event an appraisal is demanded, it shall be equivalent to an admission of liability, or that, if the liability be contested, the appraisal shall go for naught. On the contrary, it provides first that "the loss shall be ascertained by appraisal," without expressing any exception whatever, and then specially stipulates that "any proceeding relative to the appraisal should not waive any of the conditions of the policy." From the latter provision we think it is to be inferred that the parties contemplated that there might be an appraisal binding upon the parties, and at the same time a denial of liability on the ground of a breach of one or more of the conditions of the contract. There being no stipulation to the effect that the appraisal should be of no force in the event the company should contest its liability in a suit for the loss, the provision as to the appraisal was not waived by the terms of the policy; and since the appraisal did not in any manner embarrass the insured in prosecuting their suit to recover upon the policy, and since whatever labor and expense which attended the appraisal would have been incurred if there was no contest of the right to recover, we think that there was no waiver of the condition as to appraisal. The amount of the loss being determined, there was one issue less to be tried, and to that extent the prosecution of the suit was less burdensome upon the plaintiffs by reason of the appraisal. We answer the question in the negative.

## SUPREME COURT OF PENNSYLVANIA.

McMAHAN

vs.

SEWICKLEY MUTUAL FIRE INS. CO.\* }

The by-laws of a mutual company provided that failure to pay an assessment within ninety days after notice thereof should forfeit the policy.

*Held*, That in the absence of notice until after suit was brought to recover for a loss on the policy, there was no forfeiture, but any assessment due should be deducted in case of recovery.

S. A. KLINE, *for Appellant*.

BEACOM & NEWILL, *for Appellee*.

STERRETT, C. J.

While it may be conceded, as claimed by defendant, that the plaintiff must be presumed to have known the terms of the charter and by-laws, it by no means follows that the mere existence of unpaid assessments worked a forfeiture of his membership in the insurance company. No duty was imposed on him to inquire, in the first instance, whether or not any assessments had been made. It would only have been after notice had been given by the executive officers, whose peculiar function it was to assess and collect, that action on his part would have become imperative. This will appear from even a cursory reading of the charter. It expressly provides, in section 5, that when an assessment shall be made by the board of directors, the secretary shall place a duplicate in the hands of the collector, and, upon the refusal of any member to pay, the treasurer shall bring suit; and, if such assessment remain unpaid for the space of 90 days "after notice thereof," the policy of insurance or certificate of membership of such delinquent shall be forfeited. The whole burden of initiative is placed on the company officers, and their power to declare a forfeiture of membership is expressly made dependent on default in payment "after notice." It is not alleged that any notice was given the plaintiff in this case of assessment against him until after suit brought. That being so, he was not bound to pay or tender payment of assessments of which he was not notified, and was, therefore, entitled to maintain an action for his loss under the terms of his policy, unless estopped by voluntary relinquishment of his membership, of which there was some evidence to go to the jury. In his fourth prayer for instruction, plaintiff

\* Decision rendered, Jan. 4, 1897.

VOL. XXVI.—46.

declares he "was ever ready and willing to pay any and all claims that might have been made or demanded of him" by the defendant company, etc. In view of this, it would be but just and equitable, in the event of a recovery, that the sum or sums duly assessed against him and remaining unpaid should be first deducted from the amount to which he may appear to be entitled. The case lies in a very narrow compass, and needs no further discussion.

Judgment reversed, and a venire facias de novo awarded.

## COURT OF APPEALS OF KENTUCKY.

PHENIX INS. CO., OF BROOKLYN, ET AL. }

vs. }

ANGEL ET AL.\*

Proper parties in case of garnishment considered.

The agent, knowing that the goods insured belonged to two parties, while the remaining property belonged to only one of them, insured the whole in a policy to the latter to avoid trouble.

*Held*, That the company was estopped from setting up the defect of title.

The policy stipulated that the books should be kept in a fireproof safe or other secure place.

*Held*, That being without consideration, and not affecting the risk, its violation would not work a forfeiture.

B. F. BUCKNER, *for Appellants*.

P. B. & UPTON W. MUIR and RICHARDS, WEISSINGER & BASKIN, *for Appellees*.

GUFFY, J.

This appeal is prosecuted by the appellants, the Standard Fire Insurance Company, of Kansas City, Mo., and the Phenix Insurance Company, of Brooklyn, N. Y., from a judgment of the Jefferson Circuit Court, Law and Equity Division, rendered in the consolidated actions of S. Lehman & Son and Curry, Tunis & Norwood against Angel & Vanderpool, etc. The above-named appellees held debts due them from the appellees Angel & Vanderpool, and instituted suit thereon, and caused appellants to be summoned as garnishees, and alleged that appellants were indebted to Angel & Vanderpool in the sum of \$750. The indebtedness was alleged to exist by reason of a policy of insurance issued by the first-named appellants, payable to appellee Angel for \$750, \$300 being on the store, \$150 on the furniture and fixtures, and \$300 on the stock of

\* Decision rendered, Feb. 2, 1897.

goods. The entire property was destroyed by fire in October, 1891. The appellants resisted a recovery upon several grounds, viz.: That \$150 of the claim had been assigned to C. W. Howe. That the building and personal property insured were not at the time the property of D. B. Angel, but were the joint property of the firm of Angel & Vanderpool. The policy only requires the company to pay three-fourths of the value of the property lost. That the assured shall at least once a year take an itemized inventory of the stock, and keep books of account showing the purchases and sales of said stock; and shall during the hours said store is closed from business keep such books and inventory securely locked in a fireproof safe or other secure place from fire; and that a failure to observe the other conditions shall work a forfeiture of the policy. Angel & Vanderpool made no defense to the suits of these creditors; hence the contest was between the companies and the appellees. The proof clearly showed that Angel owned the land; had paid for it at the time of the insurance, but had no deed to the same, but that the agent of the company was advised of the state of the title; and that part of the defense is not insisted on now. The Phenix Insurance Company had reinsured the risk, and for that reason was made a party, and held bound with the other appellant. It seems that appellant moved for a rule on plaintiffs to compel them to make Howe a party, which motion was properly overruled. If appellant had made its answer a cross-petition against Howe, and had sufficiently shown that he was a necessary party, doubtless the court would have permitted him to have been made a party. It is admitted that Vanderpool was the owner of half the stock of goods at the time of the insurance, but there is proof conducing to show that the agent of appellant was aware of the fact, and included the goods in the same policy to Angel, to save the trouble of issuing two policies; Angel being the sole owner of the other property. The taking of the inventory and accounts of purchases and sales seems to have been complied with; hence the effect of noncompliance need not be decided. It is, however, admitted that the inventory and books were not kept in a fireproof safe, nor in any fireproof place or apartment, but it is claimed that the agent at the time knew that the assured had no fireproof safe, nor anything of the kind, and waived that part of the policy; and, if that be true, then the failure of the assured in that regard cannot defeat a recovery in this case. But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most would only tend to the better preservation of the evidence

to show the amount of the loss sustained in case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party.

It is also contended by appellants that the evidence did not authorize the judgment, and especially as to the furniture and fixtures. The evidence as to the value of the entire property shows it to be worth \$1,400 or \$1,500. It seems to us that the evidence introduced sufficiently sustains the judgment of the court below, and that judgment is affirmed, with damages.

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## SUPREME COURT OF NEBRASKA.

MODERN WOODMEN ACCIDENT ASS'N

vs.

KLINE.\*

Where, by reason of omission or ambiguity in a written policy of insurance, the time when such instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission.

The parties to a contract of insurance may stipulate that such contract will not become operative as an indemnity until payment in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer.

*Held*, From an examination of the evidence, that the receipt of payment by the defendant association, subsequent to the injury claimed for, applied to future indemnity only, and was not a waiver of payment in full, as a condition to the taking effect of the certificate or policy of insurance.

A. R. TALBOT, *for Plaintiff in Error*.

W. J. LAMB and H. W. QUAINANCE, *for Defendant in Error*.

Post, C. J.

The defendant in error, Albert M. Kline, recovered judgment in the District Court for Lancaster County upon a contract of indemnity issued by the defendant in error, the Modern Woodmen Accident Association, a Nebraska corporation, hereafter called the "Association." The certificate of membership, which is made a part of the petition below, recites that

In consideration of the warranties in the application for this certificate, and the agreement on the part of the certificate holder to accept the conditions contained in his application and this certificate as the basis of this contract, and in consideration of three dollars (\$3) paid by Albert M. Kline, of Lincoln, Lancaster County, Nebraska, the receipt whereof is hereby acknowledged,

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\* Decision rendered, Jan. 19, 1897. Syllabus by the Court.



does hereby constitute the said applicant a certificate holder of said association, and agrees to pay the said certificate holder, upon the following conditions, the following sums of money: provided, however, \* \* \* : First. That the certificate holder shall be bound by the rules and regulations of this association; second, that the certificate holder shall pay all assessments levied or assessed upon him by this association; and this certificate shall not take effect until all assessments as aforesaid, and payable prior to the accident for which indemnity or benefit is claimed, are received by the association previous to such accident; and a failure to pay such assessments on or before such assessments are due and payable shall render this certificate void, and all moneys paid by the holder thereof on account of this certificate shall be forfeited to this association.

Section 4, art. 8, of the constitution of the association provides that Assessments for the payments of benefits will be made in sums of \$2.00 and \$3.00 each, and, as far as possible, at the beginning of the quarter, and shall be used for no other purpose except as herein specified.

It is by section 6 of the same article further provided that

Any one desiring indemnity from the date of his application must forward to the secretary therewith an amount equal to 15 or 25 cents per week until the next quarterly assessment.

Mr. Kline, according to his own testimony, visited the office of the association on the 16th day of November, 1891, where, after some conversation relating to the subject of insurance, he remarked to Mr. Hicks, the secretary, that he would like a certificate, or "policy" as it is called by him, but would not be prepared to pay the charges therefor before the 28th day of the same month, and that in reply thereto Mr. Hicks said: "'All right; that don't make any difference. \* \* \* You can hand it to me the first of the month.' \* \* \* I asked how much it would be. He said: 'The fee is \$3.00. We charge \$2.00 a quarter at the rate of 15 cents a week.' I said: 'How much will that be?' He said: '90 cents on the first day of January.'" An application was at said time signed by the insured, presumably in the usual form, except that the words "insurance in force from date of certificate" appear to have been erased, and the certificate issued thereon, bearing date of November 17th, was received by the insured on the 18th. On the following day, to wit, November 19th, the insured received the injury for which he claims in this action, and on November 30th he paid to Mr. Hicks, for the certificate so issued, the sum of \$3.75, taking the latter's receipt therefor as secretary of the association. He further testified, referring to the transaction on the day last mentioned, as follows: "I went round, as I said, to pay him \$3.90. I handed him \$5.00. He took out \$3.75, and gave me a receipt. \* \* \* I said, 'I thought it was \$3.90.' He said, '\$3.75.' I told him what I heard him say, and he said, 'I know.' \* \* \* He said, 'That does not cover your

late accident.' Q. Did he [Hicks] tell you when the policy took effect? A. Yes, sir. Q. When did he tell you that? A. He told me that day when I paid him. Q. When did he tell you it took effect? A. The 30th day of the month, when it took effect. Q. He did not tell you when you made the application? A. No. He said, 'Come on the first day of the month, and I will give you the policy.'"

It is argued in support of the judgment that the recital of the certificate, acknowledging the receipt of the premium or membership fee, cannot be controverted in an action on such certificate, and that the defendant association is thereby estopped from averring nonpayment as a defense thereto. But the evidence, even of the insured himself, instead of contradicting the certificate, merely tends to establish that which is left in doubt by the recitals thereof, viz., the date when such certificate became effective as a contract of indemnity. There is, it will be observed, a marked difference between the terms of the agreement here involved and those contracts of insurance which are in terms or by implication made effective for a definite period or from a specified date. The certificate, as we have seen, provides that it shall not take effect until after payment in full by the insured of all assessments levied against him, while by the terms of the constitution, and also according to the understanding of the insured, he was chargeable with the assessment for the unexpired portion of the current quarter. The regulation in that regard transgresses no rule of law or morals, since the burden thereby imposed upon new members is in exact proportion to that borne by those holding certificates in the association at the beginning of the quarter. We are, by counsel for the defendant in error, referred to decisions of this court declaring that stipulations for the forfeiture of policies of insurance on account of the nonpayment of premium notes is for the benefit of the insurer, and will be waived by an acceptance of the premium subsequent to the default. Such is the holding in *Insurance Co. vs. Lansing*, 15 Neb., 494; *Schone-man vs. Insurance Co.*, 16 Neb., 404; *Insurance Co. vs. Christiansen*, 29 Neb., 572; and *Insurance Co. vs. Batchelder*, 32 Neb., 490. But in the cases above mentioned, and we believe in each of these cited by counsel, the insurance was for a definite period, and the waiver operated merely to prevent a forfeiture of a policy which had by its terms become operative as a contract. In this case, however, there was, so far as the record discloses, no agreement, written or otherwise, to the effect that the certificate should become operative previous to the payment in full of the membership fee and assessment prescribed by the constitution. The sum paid by defendant in error to Mr. Hicks on November 30, 1891, was the precise amount

essential to constitute the former a member of the association from and after that date, and was received with the statement that the indemnity provided for did not include the injury previously received by the insured. The reasons which controlled the cases cited are here entirely wanting, since, as we have seen, the real question at issue is the time when the certificate took effect as a contract of insurance; and there is certainly nothing inequitable in the proposition, abundantly sustained by the record, that the payment of \$3.75 was made and accepted in consideration of future indemnity. It follows that there was no waiver of the terms and conditions of the contract with respect to payment by the insured. The judgment is accordingly reversed, and the cause remanded for further proceedings in the district court. Reversed and remanded.

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## SUPREME COURT OF MICHIGAN.

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GUTERMAN ET AL.

vs.

GERMAN-AMERICAN INS. CO.\*

While a general creditor cannot insure specific property of his debtor, the latter may insure for the benefit of a creditor, and a policy so issued, loss payable to the creditor as interest may appear, as security for advances, is valid regardless of insurable interest of the creditor in the property where the company consents to the arrangement, and the creditor can recover according to his general interest.

### Statement of facts by GRANT, J.

Plaintiffs sued one Henry A. Harrison, who was indebted to them for goods sold, and garnisheed the defendant insurance company. The following are the facts as found by the trial court: "On April 3, 1893, defendant, Harry A. Harrison, insured his stock of merchandise, consisting of stationery and jewelry, located in Sault Ste. Marie, Michigan, with the garnishee defendant, for the sum of \$750, receiving a Michigan standard policy, which contained the following clause: 'Loss, if any, payable to Eaton, Lyon & Co. of Grand Rapids, Michigan, as their interest may appear.' Eaton, Lyon, & Co. were jobbers and creditors of the defendant Harrison. When he purchased the stock of goods insured under the policy in question, he made arrangements with said Eaton, Lyon & Co. by virtue of which they were to furnish him backing as he wanted it, in

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\* Decision rendered, Feb. 18, 1897.

the way of merchandise and credits for the same, he to give them as security therefor, an assignment of the insurance upon his stock of merchandise. At the time this insurance was effected, the arrangement between Eaton, Lyon & Co. and defendant Harrison was stated to the agent of the insurance company, who was consulted in relation to it. After consultation with the agent of the garnishee defendant, the policy was made out in the form and with the provision stated, and was sent to Eaton, Lyon & Co. for the purpose of carrying out the arrangement between them and defendant Harrison as to the credits and security. A loss by fire occurred upon the property insured, which was subsequently satisfactorily adjusted between parties in interest, which adjustment showed a liability upon said policy due from the garnishee defendant, to whoever was entitled to it, of \$375.72. At the time of the fire and adjustment of loss, defendant Harrison owed to Eaton, Lyon & Co., for merchandise purchased of them, about \$3,000."

E. S. B. SUTTON, *for Appellants.*

H. M. OREN, *for Appellee.*

GRANT, J. (after stating the facts.)

It is contended that Eaton, Lyon & Co. had no insurable interest in the property. It is true that a general creditor cannot insure the property of his debtor for his own benefit without the assent of the debtor and the insurer. There is, however, no reason why a debtor may not insure his property for the benefit of his creditor. "It is not necessary that the assured should have either a legal or equitable interest, or, indeed, any property interest, in the subject-matter insured. It is enough that he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss for him or those for whom he acts:" 1 Wood, Ins., § 281. In *Bates vs. Insurance Co.* (10 Wall, 33), Justice Miller used this language: "Now, it is a well-known and frequent thing in insurance business for a person to insure his life or his property, and either in the policy itself, or by indorsement at the time it is made, or by subsequent indorsement, to which the consent of the company is generally required, to direct the loss to be paid to some third party. And this is done in language similar, if not identical, with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill, and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation.

The property of the debtor at risk, being thus insured for the benefit of the creditor, gives him this indemnity." While the precise point now before us was not involved in that case, yet the language was not merely obiter dicta, but was the deliberate determination of the learned justice who wrote the opinion, and the other members of the court. It enunciates the principle governing this and other cases. The precise point was involved in *Roos vs. Insurance Co.* (27 La. Ann., 409), and the validity of such a policy sustained. See also, *Clay Fire & Marine Ins. Co. vs. Huron Salt & Lumber Manufg. Co.*, 31 Mich., 355. There is no good reason why a party desiring to purchase goods upon credit may not insure his property for the benefit of his creditor, when the assurer agrees to such an arrangement.

The judgment is affirmed. The other justices concurred.

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## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### EVIDENCE AS TO SUICIDE.

In the case of *Beckett vs. Northwestern Masonic Aid Association*, decided by the Supreme Court of Minnesota, Jan. 22, 1897, the following syllabus was prepared by the court:—

The complaint duly alleged that the probate court appointed G. B. guardian of the infant plaintiff, A. B. The plaintiffs were named in the title of the complaint as "G. B., in Her Own Behalf, and as Guardian of A. B." *Held*, The court might, after verdict, grant leave to amend such title, so as to read "G. B., in Her Own Behalf, and A. B., by G. B., His Guardian."

*Held*, The widow and beneficiary of the insured could not, on cross-examination in an action brought by her on the life-insurance policy, be questioned as to statements made to her by her deceased husband in his lifetime.

The insured was found dead, with a bullet hole in the back of his head, and a revolver in his hand. The defense to the action was that he committed suicide. There was evidence tending to prove that there were no powder marks around the wound. *Held*, For the purpose of rebutting the theory of suicide, it was competent to prove experiments made in discharging the same revolver loaded with similar cartridges, and noting at what distances from the muzzle of the revolver the object fired at was found to be singed or powder-burned.

*Held*, Whether a witness is sufficiently qualified as an expert is a question of fact for the trial court, and an appellate court will not hold the ruling thereon erroneous unless it is clearly so.

The policy required proofs of death to be furnished to the insurer, but did not state what such proofs should contain. *Held*, Plaintiff could, on the trial,

explain and contradict statements made in such proofs as to the manner of death.

*Held*, The verdict is sustained by the evidence.

#### NOVATION AND RIGHT OF ACTION IN CASE OF BENEVOLENT SOCIETY.

In the case of *Burns et al. vs. Grand Lodge of Ancient Order of United Workmen*, decided by the Supreme Judicial Court of Massachusetts, Jan. 16, 1891, the constitution provided that certain lodges might be set apart from the parent lodge and collect and disburse their own funds. One of such lodges was afterwards set apart and assumed the obligations of the parent lodge as to the beneficiary, after which the member paid to such new lodge and was recognized as a member of the same. It was held that this constituted a novation and the new lodge was liable on the certificate. It was further held that the administratrix and not the beneficiary was the proper party to sue, where the constitution and by-laws provided that the beneficiary might be changed, and that in case of death all the money should be paid to the heirs of the insured.

#### LIABILITY FOR FIRE CAUSED BY NEGLIGENCE OF RAILROAD.

In the case of *Chickasaw County Mutual Fire Ins. Co. vs. Weller*, decided by the Supreme Court of Iowa, Oct. 8, 1896, it was held that the insured was not entitled to double compensation for loss by fire both from a railroad company which negligently caused it, and from the insurer; and that if, after receiving satisfactory compensation from the former, the insured collects his insurance also from the latter without notifying it of the fact, the company may recover back the money so claimed. It was further held that the officers of such insurance company summoned as witnesses in an action brought by itself were entitled to the ordinary fees.

#### PLEADINGS IN CASE OF CONDITIONAL CONTRACT.

In the case of *Coolidge vs. Continental Ins. Co.*, decided by the Supreme Court of Vermont, Nov. 10, 1894, it was held that a contract insuring against loss or damage by fire except as hereinafter provided, followed by conditions that in certain cases the policy should be void is a conditional contract; that the stipulation that the insurance is against loss only while located and contained as described and not elsewhere is conditional in its character; and that a failure in the declaration to state such condition, though referring to it, is a fatal variance, but it is not necessary that matters of defense, such as stipulations regarding the settlement of damages, etc., should be set forth. Failure to state that the loss is not payable within a specified period after proofs is fatal, as such lapse of time is a condition precedent to payment.

#### WAIVER OF INCUMBRANCE—TAX LIST AS EVIDENCE OF VALUE.

In the case of *German Mutual Ins. Co. vs. Niewedde*, decided by the Appellate Court of Indiana, Jan. 31, 1895, it is held that in case of an oral application where nothing is said about incumbrance, and, unknown to the insured, his policy was void by its terms in case of such existing incumbrance, the company will be deemed to have waived the forfeiture. It is further held that denial of liability on other grounds is a waiver of the sufficiency of proofs of loss when they are in substantial compliance with the requirements of the policy. It is further held that the valuation sworn to by insured for

purposes of taxation is not admissible as evidence of value for other purposes, as in case of loss claims, such tax valuation being for a special purpose.

#### INSURANCE MONEY IN CASE OF FORECLOSURE.

In the case of *Carlson vs. Presbyterian Board of Relief for Disabled Ministers et al.*, decided by the Supreme Court of Minnesota, Feb. 9, 1897, the syllabus by the court is in part as follows :—

A mortgagee, holding a fire policy providing that the loss, if any, should be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage, and bid in the premises at the sale for the full amount of his debt. Afterwards, but before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale. *Held*, That the mortgagor could not recover of the mortgagee the amount so paid, but, if he had redeemed, he would have been entitled to have had the amount applied pro tanto on the redemption.

#### LEGAL NOTICE OF PREMIUM DUE CONSTRUED.

In the case of *Griesemer vs. Mutual Life Ins. Co.*, decided by the Supreme Court of Washington, Nov. 26, 1894, it appears that the policy was issued upon an application taken by the agent of a New York company in Pennsylvania and was delivered to the insured in that state. It was held that the New York statute, providing that no life company doing business in that state should have power to declare a policy lapsed for nonpayment of premium unless notice stating the amount, the place where, and person to whom the same is payable, should first be given to the insured, applies only to policies issued in that state and not to those issued in other states by New York companies; but where, as in this case, the policy provided that it was a contract made and to be executed in the state of New York, and construed only according to the laws of that state, it will be regarded as having been executed and delivered in New York. It was further held that a notice mailed to the insured simply stating that in accordance with "your contract No. 204,439 with this company, \$47.70 will be due on the 28th day of August, 1892, and payable to yours respectfully" was not a compliance with the law which required a further statement that the policy would be forfeited unless payment was made within thirty days. It was further held that, where in such case the insured is notified after proofs of loss have been presented that the policy was forfeited for nonpayment of premium, a tender of the premium so overdue was waived.

#### RIGHT OF RECEIVER TO STATE DEPOSIT.

In the case of *Hayne vs. Metropolitan Trust Co.*, decided by the Supreme Court of Minnesota, Jan. 19, 1897, the following syllabus was prepared by the court :—

An insurance company assigned to and deposited with the insurance commissioner certain securities in trust for the benefit of its policyholders, pursuant to Gen. St. 1894, § 3332. Subsequently the insurance company and the defendant trust company made an arrangement by which the former assigned to the latter these securities in exchange for other securities. The two companies then procured from the insurance commissioner a retransfer and surrender of the securities deposited with him, the insurance company substituting in place of them (but of much less value) part of the securities which it had received from the trust company, and the trust company depositing with the state auditor, in trust for itself, the securities thus surrendered by the insurance commissioner. The surrender by the insurance commissioner of the

securities deposited with him, and the substitution of others in their place, was without the knowledge of the policyholders, and without the knowledge or approval of the state treasurer. The trust company had notice of these facts. In an action brought in behalf of all the policyholders of the insurance company for the purpose of administering and distributing the proceeds of all securities deposited with the insurance commissioner in trust for their benefit, the plaintiff was appointed receiver, with power to take possession of all such securities, and to bring such actions as might be necessary for that purpose. He then brought his action against the trust company and the state auditor to compel the delivery to him of the securities withdrawn from the insurance commissioner, and tendering a return of all the securities given by the trust company in exchange for them, which had been deposited by the insurance company with the insurance commissioner, but not those thus deposited, but retained, by the insurance company. *Held*, That the insurance commissioner has no authority to transfer, surrender, or exchange securities deposited with him in trust for policyholders without the approval of the state treasurer in the cases and in the manner provided by Gen. St. 1894, § 3155; and that the attempted transfer and surrender by him was not merely voidable, but absolutely void. Hence, that this action by the receiver is not one for a rescission, and that the rules governing such actions have no application. He is not required to make good to the trust company that part of the securities given by it in exchange which was retained by the insurance company, and has never come into his hands. All that is required of him is to do equity by returning those which have come into his possession from the insurance commissioner.

The fact that the amount of the securities deposited by the insurance company in trust for the benefit of policyholders exceeded the minimum deposit required by statute is not material. The excess was as fully bound by the trust as the balance.

Gen. Laws 1881, c. 123 (Gen. St. 1894, § 3331 et seq.), authorizes the business of insurance against losses resulting from the insolvency of those to whom goods are sold on credit.

The court had jurisdiction of the state auditor as respects the control and disposition of this trust fund for the benefit of policyholders in which the state, as such, has no interest. Former decisions as to the control of the courts over the official acts of executive officers of the state government distinguished.

#### WARRANTIES IN CASE OF LIVE-STOCK.

In the case of *Johnston et al. vs. Northwestern Live-Stock Ins. Co.*, decided by the Supreme Court of Wisconsin, Oct. 13, 1896, the policy was on a horse which was mortgaged for \$500, as stated in the application; in fact, the mortgage had previously been for a much larger sum but had been reduced to \$525. The insured claimed that he represented to the agent that he thought the amount was about \$500, while the agent insisted that he unqualifiedly asserted this to be the sum. It was held that, where the policy made the statements in the application a warranty, the statement would be regarded as simply a representation if the testimony of insured was true and the agent filled in the application without the knowledge of insured, unless the representation was made in bad faith, and it would be a question for the jury whether such representation was material to the risk.

#### TAXATION OF LIFE POLICIES.

In the case of *Holliday et al. vs. State Board of Tax Commissioners et al.*, decided by the Marion County (Ind.) Circuit Court, May 29, 1897, it was held that such board had no power to determine what subjects should be taxed; this was a prerogative of the legislature, which could not be delegated. It was held that there was nothing in the statutes of Indiana implying an intention to make life-insurance policies a subject of taxation as being personal



property; that the universal policy of this and other states has been to exempt such policies from taxation, and such policy cannot be changed by a State Board of Tax Commissioners.

#### ACCIDENT IN CASE OF DEATH FROM SHOOTING BY ANOTHER.

In the case of *Jones vs. United States Mutual Accident Association*, decided by the Supreme Court of Iowa, Dec. 15, 1894, the policy provided that it should not cover injuries received while under the influence of liquor, while fighting, or in consequence of violating the law. It was held that it was not necessary in the complaint to deny a breach of condition, the burden of showing such breach being on the defendant, nor does the unnecessary denial of such breach shift such burden of proof. In case it appears that the insured was killed by a pistol shot, the burden of proof is on the insurer to show that such killing was not an accident. It appeared in this case that the insured was killed in a row shortly after leaving an illegal bawdy house while carrying a revolver. The counsel for insured stated to the jury that he proposed to show that the party who killed the insured had some time before tried to secure a pistol and had attempted to take valuables of insured with a revolver in his hand, and evidence as to his attempt to secure a revolver was introduced, but ordered stricken out, and the jury were cautioned to disregard it. It was held that a refusal to finally instruct the jury as well to disregard such evidence was error. It was further held that where it did not appear that the killing was the natural result of visiting such illegal house, the other facts involved did not necessarily prevent a recovery under a policy providing that it should not extend to injuries due to unnecessary exposure to danger. Where such killing was not actually provoked by anything done by the insured, it was accidental within the meaning of the policy though intentional on the part of the assailant.

#### TIMELY PROOFS OF LOSS IN CASE OF ACCIDENTAL DROWNING.

In the case of *Kentzler vs. American Mutual Accident Association*, decided by the Supreme Court of Wisconsin, Nov. 13, 1894, an accident policy provided that immediate notice should be given and proofs of death furnished within six months or all claim should be forfeited. The insured, an engineer on a tug boat, disappeared one night and his body was found in the water nearby more than six months later. Immediately upon such finding search was made for his daughter, and she was notified of the fact about one month later, and immediately notified the company of the loss, and about six weeks later furnished the required proofs of death. It was held that under the circumstances this was a sufficient compliance with the requirements of the policy.

#### WAIVER OF POLICY VIOLATION IN CASE OF ARBITRATION.

In the case of *Kiernan vs. Dutchess County Mutual Ins. Co.*, decided by the Court of Appeals of New York, Oct. 6, 1896, the action was to set aside an award as fraudulent, and recover the amount of the policy on the ground that the arbitrator chosen by the company was accepted through false representations as to his disinterestedness, and that he controlled the arbitrator nominated by the plaintiff. It was denied that the award was unfair or fraudulent,

and it was claimed the policy was void because a part of the insured property was mortgaged in violation of the policy. It was held that where the company made no objection to such mortgage with knowledge of the same, but after the appraisal included the mortgaged property and tendered payment of the loss on it and prepared proofs of loss for the insured to sign covering such property, the violation was waived. It was further held that where the insured was induced to accept such appraiser by misrepresentations as to his impartiality, and the award was grossly less than the actual loss, although concurred in by the insured's own appraiser, the award will be set aside.

#### AGENCY OF HUSBAND IN CASE OF FRAUD.

In the case of *Metzger vs. Manchester Fire Assurance Co.*, decided by the Supreme Court of Michigan, Oct. 16, 1894, the policy stipulated that it should be void in case of fraud by the insured touching any matter relative to the insurance, and that the word "insured" should be held to include the legal representative of the insured. It was held that the mere agent of the insured, while living, was not intended, the words "legal representative" referring to the party succeeding to the rights of insured in the case of death. Where in such case the husband had entire control of the business of the wife and was her agent in adjusting the loss, statements by him for the purpose of securing a larger payment than was justified if made without the knowledge of insured would not defeat recovery. A witness testified that he had frequently been in the store where the goods were destroyed within a year, but could not say that he was there within a month of the fire, but thought he noticed a stock amounting to anywhere from \$9,000 to \$12,000, but his estimate was not confined to the time mentioned. It was held that such evidence was inadmissible.

#### WAIVER OF CHATTEL MORTGAGE.

In the case of *Milwaukee Mechanics' Ins. Co. vs. Niewedde*, decided by the Appellate Court of Indiana, Feb. 1, 1895, it is held that an insurer is not chargeable with notice of the record of a chattel mortgage, and failure to cancel a policy after such record is not a waiver of a condition against incumbrance; nor is a failure to require an answer to a question in the application regarding such incumbrance a waiver of the condition; nor is it material in such case whether the risk was increased or not by the incumbrance.

#### UNNECESSARY DANGER AND NEGLIGENCE IN CASE OF ACCIDENT POLICY.

In the case of *Shevlin vs. American Mutual Accident Association*, decided by the Supreme Court of Wisconsin, Oct. 13, 1896, the policy excepted death or injury resulting wholly or in part, directly or indirectly, from exposure to unnecessary danger. According to the evidence of a witness which was undisputed, the insured in company with himself climbed on a car in rapid motion to ride to a station nearby, and they agreed to jump off if it failed to stop; that the car increased its speed on approaching the station and the witness jumped and found the insured near the station by the side of the track with his skull fractured. It was held that it was error to submit the question to the jury whether deceased jumped or fell from the car. The cause of death was exposure to unnecessary danger within the policy as a matter of law.

CHATTEL MORTGAGE AND MECHANICS' LIEN AS INCUMBRANCE—RESCISSION IN  
CASE OF FRAUD.

In the case of Omaha Fire Ins. Co. vs. Thompson et al., decided by the Supreme Court of Nebraska, Feb. 3, 1897, the following syllabus was prepared by the court:—

The filing of a claim for a mechanic's lien does not in itself establish such lien, even *prima facie*. It is merely the performance of a condition essential to consummate the lien.

Therefore, in an action on a policy of insurance, one of the defenses being that the insured had permitted the property to become incumbered, contrary to a provision in the policy, it was not error to exclude from evidence the record of a claim for a mechanic's lien, no facts being offered to establish the substantive facts creating such lien.

A policy of insurance contained the following: "It is agreed that, if any false statements are made in said application, this policy shall be void; \* \* \* or if the property be sold or transferred or incumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title, possession, or interest of the assured in the above-mentioned property, or if the assured shall not be the sole and unconditional owner in fee of said property, \* \* \* then, in each and every one of the above cases, this policy shall be null and void." It did not appear that any application had been made or required, or that any representations had been made with regard to the title. *Held*, That the existence of a chattel mortgage on a part of the property at the time the policy was written did not, under the clause quoted, avoid the policy.

A chattel mortgage in this state creates merely a lien, and does not pass title to the mortgagee.

The voluntary execution by the insured of a bill of sale of a portion of the property, without consideration, without delivery to the vendee, without the vendee's knowledge, without any prior contract, and without change in possession, does not create such a change in interest as to avoid the policy.

To an action on a policy of insurance the defendant pleaded that, after the loss, it had made a settlement with the insured whereby it agreed to pay a certain sum in sixty days, and that, relying on such settlement, it had accepted orders of the insured in favor of third persons for a portion of the amount, and had admitted indebtedness in garnishment proceedings which resulted in a judgment against it for another portion, the aggregate amount assumed being less than the amount of the settlement. It was not alleged that these obligations had been paid. *Held*, That this neither operated as an accord and satisfaction, nor did it estop the plaintiff from rescinding the agreement on the ground of fraud.

To such answer the plaintiff replied, denying the settlement pleaded, and then affirmatively alleging that he had agreed to accept the sum of money named on condition that it be paid in four days. *Held*, That, under these pleadings, the burden was on the defendant to establish the settlement as it alleged it to be.

The mere fact that a verdict for \$2,865.30 was \$105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice.

Under Comp. St., c. 43, § 45, the court may, in an action on a policy covering both real estate and personal property, allow a reasonable attorney's fee, based on the amount recovered on account of the real property.

DUES IN ARREARS IN CASE OF BENEVOLENT SOCIETY.

In the case of Sherry et ux. vs. Operative Plasterers' Mutual Union, decided by the Supreme Court of Pennsylvania, Jan. 19, 1891, the constitution provided that the member should be entitled to benefits if not more than three

months dues were in arrears at the time of death. It was held that where the dues for only three months were in arrears, and the dues for the fourth month did not become due until the day following the death, the member was entitled to the benefit. It was further held that a by-law providing that any member becoming three months in arrears should not be entitled to benefits until eight weeks after the time he had paid up in full was in conflict with the constitution and void. It was further held that where the constitution provided that the money should be paid to the nearest relative, it was sufficient to allege that the plaintiffs were the father and mother as the nearest relatives, without stating negatively that there was neither widow nor children surviving.

PROOFS OF LOSS IN CASE OF BENEVOLENT SOCIETY.

In the case of *Tessmann vs. Supreme Commandery of the United Friends of Michigan*, it was held by the Supreme Court of Michigan, in a decision rendered Dec. 18, 1894, that where the by-laws of such society stipulate that after certain proofs of loss have been furnished, further proofs may be required if deemed necessary by the Supreme Commander, such further proof can only be required when the Supreme Commander deems it necessary. It was further held that a mere statement of facts by a priest, purporting to be certificates of baptism and marriage, as shown by a parish register, but which do not purport to be authentic copies of the register, are not admissible as evidence of age. It was further held that where the beneficiary is other than the insured, and no power to change such beneficiary exists, declarations of insured after the granting of the insurance are not admissible to show a misrepresentation of age.

## SUPREME COURT OF LOUISIANA.

CLIFTON CANNON

vs.

HOME INS. CO., OF NEW ORLEANS.\*

Question presented is whether insurance effected by mortgagee is "other insurance" in the sense prohibited by prior policy taken out by owner of property.

- Held*, 1. That the interest of mortgagee is distinct from that of mortgagor and is insurable.
2. That where mortgagee, of his own notion, takes out insurance in name of mortgagee or owner of property, without authorization of latter, and causes the loss, if any, to be made payable to him, mortgagee, it is in effect insurance by mortgagee of his interest for his account.
3. That such insurance is not "other insurance," which vitiates prior policy of mortgagor.
4. That to constitute "other insurance," avoiding previous policy, the additional insurance must be upon the same subject, risk and interest, effected by the same insured or for his benefit, or with his knowledge or consent; that neither identity of name nor identity of property is decisive upon the question. The interests covered by the policies must also be identical.
5. That the rule governing a provision for apportionment of the loss, where there is no other insurance, is that such apportionment only takes place where the insurance covers the same interest.

CLEGG & QUINTERO, *Attorneys for Plaintiff and Appellee.*

R. H. BROWNE, *Attorney for Defendant and Appellant.*

BLANCHARD, J.

This is an action on a policy of insurance against fire, underwritten by defendant company in the sum of \$10,000, on the sugar house on the Magnolia Plantation, in Rapides Parish, and on the fixed and movable machinery contained therein.

The property insured was destroyed by fire on the 17th of April, 1895. Proofs of loss appear to have been made on blanks furnished by the company, and were delivered to defendant. Payment was declined, and on September 5, 1895, this suit was instituted.

Three defenses are set up in the answer, viz.: Concealment of incumbrances existing on the property at the time of insurance, the taking out of other insurance in violation of alleged stipulation to the contrary in the policy, and the failure of the insured to furnish timely proofs of loss. The first and last of these defenses were abandoned—at least, were not insisted on in argument. Plaintiff's recovery is strenuously resisted, however, on the second ground of

\* Opinion rendered, March 29, 1897. Syllabus by the Court. Reported by W. O. Hart, of the New Orleans Bar.

defense, the taking out of "other insurance," and from a judgment in his favor, this appeal is taken.

The facts pertinent to the issue are these:—

The Magnolia Plantation had been the property of S. S. Pierce. In June, 1891, he mortgaged the place to Caldwell & Judah, of Memphis, Tenn., to secure the sum of \$12,675. One of the stipulations of this mortgage was that the mortgagor bound himself to keep the buildings on the premises insured for not less than \$6,000, the policy to be made payable to the mortgagees and delivered to them; and in event of failure of the mortgagor to do this, the mortgagees were authorized to take out such policy, pay the premiums, and the money paid for premiums was to be considered as added to the indebtedness and secured by the mortgage.

The commercial firm of Flower & King recovered a judgment against Pearce, and under a writ of fieri facias issued thereon, seized and sold the Magnolia Plantation. At this sheriff's sale, which took place on December 2, 1893, Clifton Cannon, plaintiff herein, purchased the property for the sum of \$26,700.53. The sheriff's deed recites that this sum was settled by the purchaser retaining in his hands \$6,890.53, to pay a special mortgage in favor of M. Levy's Sons, \$10,630 to pay a special mortgage in favor of Caldwell & Judah, \$8,850.85 to pay a special mortgage in favor of G. W. Bennett, and by paying the remainder of the purchase price, \$316.15, in cash—these several sums aggregating the amount of Cannon's bid.

It does not appear that Cannon took out any insurance on the buildings of the Magnolia Plantation until October 24, 1894, when the policy now sued on was taken out for six months. Nor is it established by the evidence that any insurance was taken out by any of the mortgage creditors of the plantation, on the buildings thereof, from the time of Cannon's purchase down to March 24, 1895, when Caldwell & Smith (successors to Caldwell & Judah), took out a policy for \$6,000 in the Crescent Ins. Co., on the sugar house and machinery of the Magnolia Plantation. This policy was taken out in the name of Clifton Cannon, owner of the plantation, but was assigned to the Edinburgh-American Land Mortgage Co., Limited, and loss, if any, was made payable to them.

This mortgage company appear to have been the assignees of the Caldwell & Judah mortgage upon the Magnolia Plantation, and Caldwell & Smith were their agents at Memphis, Tenn., where the insurance, in the Crescent Ins. Co., was effected.

The policy in defendant company, which Cannon had taken out, was for his own account.

That taken out by Caldwell & Smith, on the same property, in the Crescent Ins. Co., was, in effect, for account of the mortgage creditors they represented, though, in taking it out, they used Cannon's name.

There was no authorization from Cannon to Caldwell & Smith to take out this policy in his name, nor to take it out at all. The application for the policy was made to the insurance company by Caldwell & Smith; not by Cannon.

Caldwell & Smith wrote Cannon, on March 27, 1895, that they had "taken out \$6,000 for one year," and asked him what other insurance he had upon the building.

In this letter they did not mention what company this insurance had been effected in, nor did they inform Cannon that it had been written in his name.

The only answer Cannon made to this was an acknowledgment of receipt of the letter and the statement that he had \$10,000 insurance on the sugar house, which would expire April 24th, and that, thereafter, he intended taking out a smaller policy "as the grinding season will be over."

On April 1, 1895, Caldwell & Smith wrote again to Cannon, informing him that they had taken out \$6,000 insurance, and this time mentioned that it had been taken out in the Crescent company; that the premium was \$111.00; and that they would have indorsed on the policy \$10,000 concurrent insurance.

Again was there a failure to inform him that the policy had been taken out in his name, and it nowhere appears that he knew, up to the time of the fire, that the policy of the Crescent Ins. Co. had been issued in his name. It seems that the day after the fire, Cannon wrote Caldwell & Smith, announcing the loss of the sugar house. They replied, expressing regret at his misfortune, again stating that they held \$6,000 in the Crescent company, and had informed the company of the loss by fire.

Some ten days after the fire, Cannon had an interview with the president of the Crescent Ins. Co., about the loss, with the view, it seems, of its adjustment. Before the company would proceed with negotiations looking to an adjustment, Cannon was required to sign an agreement to the effect that an investigation looking to a settlement of the loss should, in no wise, prejudice the rights of the insurance company to raise objections to other questions which might be involved, nor be held to waive any of the stipulations of the policy of insurance.

But he went no further in the attempted collection of this policy.

He did not file any claim in respect to it, either at that time, or subsequently, and it seems that the mortgagees, themselves, have not made any effort to collect the policy.

The question presented for decision is, whether the insurance effected by Caldwell & Smith, in the Crescent Ins. Co., is "other insurance" in the sense prohibited by the terms of the policy issued to Cannon by the defendant company. We do not think it is.

This second insurance was not taken out by procurement of plaintiff, and he cannot be held to have had any interest in it.

The only parties in interest in this policy were the holders of the Caldwell & Judah mortgage upon the Magnolia Plantation. These mortgagees might have taken out this insurance in their own names, and it does not help defendant's case that they chose to take it out in plaintiff's name, making the loss, if any, payable to themselves. The use of plaintiff's name did not make the interest thereby insured his. It was none the less the interest of the mortgagees that was thus covered.

In the policy of insurance sued on, defendant company had not stipulated that other parties having distinct insurable interests should not exercise that right, and that a mortgagee or creditor having a lien on property has an insurable interest is well understood: *Bell vs. Insurance Co.*, 5th R., 423.

Having such insurable interest, it did not lie in the power of defendant to prevent the mortgagees, the Edinburg-American Land Mortgage Co., Limited, from effecting insurance for their account on the property.

What amounts to "other insurance," is stated by May on Insurance, § 365, to be additional and valid insurance, prior or subsequent, upon the same subject, risk and interest, effected by the same insured, or for his benefit, or with his knowledge or consent.

"Neither identity of name nor identity of property is decisive upon the question; in order to amount to other insurance, the interests covered by the policies must be identical." Wood on Fire Insurance, §§ 377, 374.

Insurance by a mortgagor and also by a mortgagee, for their individual benefit, is not "other insurance:" *Acer vs. Merchants' Ins. Co.*, 57 Barb. (N. Y.), 68.

Where a consignor of a vessel effected an insurance on the freight with the warranty "no other insurance," and the consignee, who had accepted a draft against such freight, without instruction from the consignor effected another insurance on the freight at the place of destination, it was held that this last insurance could not be considered a violation of the warranty contained in the former: *Williams vs. Crescent Mutual Ins. Co.*, 15 Ann., 651.

The contention of defendant that plaintiff's consent to the second insurance must be presumed from the obligation he was under to



fulfill the stipulations of the mortgage executed by S. S. Pearce upon the property in favor of Caldwell & Judah, is equally unfounded. So, too, the contention that Caldwell & Smith, in procuring the second insurance, acted as the agent of plaintiff, and that plaintiff subsequently ratified their act.

The well-considered case of *Titus vs. Insurance Co.* (81 N. Y., 415), announces a doctrine, which we approve, at variance with these contentions, and so far as the application of that doctrine to the facts of the instant case is concerned, we fail to appreciate that the well-understood difference between a common-law mortgage and a civil-law mortgage, insisted on by defendant, has any bearing.

The liability of defendant attached when the fire which destroyed the sugar house occurred.

Up to that time there had been nothing done by the plaintiff that can be fairly construed into ratification of the act of Caldwell & Smith in taking out the insurance in the Crescent Ins. Co. in his name. It is not shown that he knew of such insurance effected in his name. But it is urged with great ability and force of argument on part of defendant that what the plaintiff did after the fire and after liability of defendant had attached, in conferring with the officials of the Crescent Ins. Co., with the view of the adjustment of the loss, constituted such ratification, which goes back to the very inception of the contract. The effect of this argument, if sustained, would be to defeat the liability of defendant company after such liability had accrued through the burning of the sugar house, by conduct of the plaintiff subsequent to the fire. We cannot sanction this contention. There was no ratification by plaintiff, of the taking out by the mortgagees of this second insurance, in such way as to make the act of procuring it his act. He did nothing affecting this policy until after the right of the parties had become fixed, and what he then did was merely preliminary to the filing of a claim, which was never filed. Even if he had filed a claim and made proof of loss, the money could not have been paid to him. By assignment indorsed on the policy, the loss was made payable to the mortgagees and they alone could have collected the money.

If the act of procuring that insurance did not at the time operate to avoid the contract sued on, it could not after the loss, have such operation by relation.

Nor can we sustain the last contention of defendant, which is, that in the event the validity of the policy of insurance declared on is maintained, defendant company can only be held liable "for its proportion of the loss according to the amount hereby insured shall bear to the whole insurance, whether valid or not, covering such

property." In other words, it is insisted that the policy in the Crescent Ins. Co. must be taken into consideration in making the estimate of the amount for which defendant is liable. We have already shown that the two policies, in effect, covered different interests in the property.

And we understand the rule to be that a provision for apportionment of the loss, where there is no other insurance, applies only to cases where the insurance covers the same interest. If the mortgagor and mortgagee each have separate insurance, covering their respective interests, the condition for apportionment does not apply: *Niagara Fire Ins. Co. vs. Scammon*, 19 L. R. A., 114; *Fox vs. Phoenix Ins. Co.*, 52 Me., 383. The judgment appealed from is affirmed.

#### ON APPLICATION FOR REHEARING.

In the mortgage which S. S. Pearce had granted to Caldwell & Judah on the Magnolia Plantation is to be found this clause: "To keep the buildings on said premises hereinbefore mortgaged insured during the existence of this mortgage for not less than \$6,000, the premium on which is hereby fixed at the rate of \$420 per annum during the existence of this mortgage, the policies to be made payable to the mortgagee." Then followed a stipulation to the effect that should Pearce fail to take out such insurance, the mortgagees were authorized to do so, and the premiums paid by the mortgagees should be held covered and secured by the mortgage.

The fact that the requirement of the act of mortgage was that the insurance thus to be taken out was "to be made payable to the mortgagees" shows that the interest intended to be covered was that of the mortgage creditors in the property. This was an interest distinct from that of the owner. Without that stipulation in the act of mortgage, Caldwell & Judah could, of course, have covered their interest in the property as mortgage creditors by insurance. But they saw fit to bind Pearce, in the act, to himself cover their interest by insurance and to pay the premiums for the same.

They had the right to exact this obligation from Pearce, but this does not militate against the conclusion that the intention of the parties, gathered from the terms of the act, was to cover the interest of the mortgagees in the property.

Subsequently, Cannon, the plaintiff, purchased the plantation at sheriff's sale. The sheriff sold under a writ of *fi. fa.* issued on the judgment of *Flower & King vs. Pearce*. The sheriff's deed to Cannon, which the latter also signs in acceptance thereof, recites no assumption by Cannon of the Caldwell & Judah mortgage. It states only that Cannon retains in his hands on this mortgage the amount of \$10,630, and this sum is made up entirely of the notes yet

to fall due secured by the mortgage. No part of it represented, or was intended to represent, insurance premiums present or future.

By this purchase at the sheriff's sale Cannon did not succeed to all the obligations and liabilities of Pearce, the original mortgagor. Where an owner mortgages his property, agreeing in the act of mortgage to insure the property and make the loss payable to the mortgage creditor, and consenting that the creditor should himself effect such insurance at the expense of the mortgagor if the latter fail to do it, and afterwards the property is sold at a judicial sale and a third person becomes the purchaser, retaining in his hands the amount of the mortgage notes remaining unpaid and not yet due, we do not think the mortgage creditor has the right to take out insurance in the name of this purchaser, making the loss payable to himself—certainly not without the consent of the purchaser. Such an obligation to insure, entered into by an owner when effecting a mortgage on his property, is not a covenant or obligation running with the land and binding the purchaser at a judicial sale to take out insurance in his name, or authorizing the mortgagee to do so.

Such a clause in a contract of mortgage is rather to be viewed as a collateral agreement in aid of the execution of the principal contract. It is not a real obligation; it is a personal, movable obligation, one not imposed upon the new owner as a result of his purchase.

We hold, therefore, that in the instant case the mortgage creditors were without authority to take out the policy in the Crescent Ins. Co. in the name of Cannon, and that their act cannot operate to his prejudice.

The judgment of the court below awarded plaintiff the full amount of the policy of insurance, \$10,000, with legal interest from the 30th day of September, 1895, subject to a credit of \$686.85, amount paid by defendant to Flower & King on a judgment recovered by them against Clifton Cannon, in which cause defendant company was made party as garnishee and condemned to pay.

A review of the testimony herein, on the question of loss and damage sustained, has led us to the conclusion that the judgment below should be reduced from \$10,000 to \$8,291.25, less the credit above mentioned.

It is, therefore, ordered that the decree hereinbefore rendered by this court be set aside, and it is now adjudged and decreed that the judgment appealed from be amended by reducing the same to \$8,291.25, with legal interest from September 30, 1895, until paid, less the amount paid on the Flower & King judgment—costs of appeal to be borne by appellee—and, as thus amended, the judgment appealed from is affirmed. Rehearing refused.

## SUPREME COURT OF SOUTH CAROLINA.

GRAHAM

vs.

AMERICAN FIRE INS. CO. OF PHILADELPHIA.\*

The policy insured G., payable to T. as interest might appear. The property was owned by T., but in possession of G. as superintendent, under a contract which included its insurance. The policy provided that it should be void if the insured was not the sole owner.

*Held*, That the contract was admissible to show the relations of G. and T.

*Held*, That evidence that insurer directed proofs to be made from the books of T. on learning the facts is admissible as evidence of a waiver of the provision regarding ownership.

*Held*, That instructions by G. to the party procuring the insurance for him, regarding the title, which were communicated to the agent of the company, are admissible.

*Held*, That representations regarding the title made to a clerk of the same agent, regarding a former policy in another company similar to this policy, and which was cancelled and replaced by this, are admissible.

*Held*, That admissions by the agent after the loss that he had knowledge of the title are admissible as showing waiver.

*Held*, That knowledge of the facts at the time of issuing the policy was a waiver of the provision regarding ownership.

*Held*, That G. as superintendent in charge of a factory, under a twenty-year contract including certain privileges as a purchaser, in case of discontinuance by T., had an insurable interest.

*Held*, That T. was entitled to recover the full value as owner, although he had replaced the property, and G. suffered no loss.

TRENHOLM, RHETT & MILLER, and JOHN T. SLOAN, *for Appellant*.

J. S. MULLER and JOHN T. SEIBELS, *for Respondents*.

POPE, J.

The defendant, on the 5th day of April, 1894, issued to the plaintiff, John M. Graham, its policy of insurance, wherein, for a premium of \$15, it agreed to indemnify, against loss by fire,

His stock of material for the manufacture of cotton and woolen hosiery, now wrought and in process thereof, while contained in the two-story brick and shingle-roof building situated within the walls of the South Carolina Penitentiary, at Columbia, S. C. Any loss that may be ascertained and proved due the assured shall be payable to G. H. Tilton, as his interest may appear.

The policy contained the usual printed stipulations of those issued on personal property. Two of these, however, were in these words:—

This policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property

\* Decision rendered, January 8, 1897.

be net truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after loss. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership.

On the 25th day of April, 1894, the stock of material, valued at more than \$5,000, was destroyed by fire, except about \$600 worth. Thus, the loss was about \$4,600. There was concurrent insurance, —three policies, each for \$1,000, which latter was the amount named in the policy issued by defendant. Soon after the fire, an agent of the defendant, with agents of the companies which had issued concurrent insurance, was on hand to adjust the loss, or rather losses. G. H. Tilton also appeared on the scene. His home was in the State of New Hampshire. John M. Graham informed the insurance companies at once that G. H. Tilton was the sole owner of the material insured, and that his (Graham's) connection with the hosiery manufactory was as superintendent. After some time, proofs of loss were submitted. Three of the companies paid up in full, but the defendant company declined to do so; hence this suit. The complaint alleges the ownership of the property destroyed by fire to be in G. H. Tilton, but that the same was in the sole custody and control of John M. Graham, under a contract therefor between Graham and Tilton, which included the insurance of the property against loss and damage by fire; that, under said contract, the said Graham was to receive from said Tilton an annual compensation for his services so long as said contract was of force; and that the said Graham was pecuniarily interested in the preservation and continued existence of said property. The contract for insurance was set out, inclusive of the policy itself, as part of the complaint. In the fourth clause of the complaint was set out the allegation that the insurance company was aware that Tilton owned the property, but that the same was in the exclusive possession of said Graham, and that he had a pecuniary interest in the preservation of said property, and that the policy of insurance was issued by the defendant in the name of the defendant, with the indorsement in favor of said G. H. Tilton, as his interest might appear, primarily for the benefit of Tilton, but also for the benefit of said Graham, as aforesaid, and that the said policy was received by the said plaintiffs in good faith, as insuring their interests as aforesaid. In the fifth clause is set out the loss of property by fire on the 25th April, 1894, and plaintiffs' loss thereby. In the sixth clause it is alleged that proofs of loss and interest have been furnished the defendant, and also that all conditions have been truly observed by the plaintiffs. In the seventh clause, demand of payment and its refusal are set forth. The answer admits that the

property destroyed by fire was covered by the policy issued by it; that Tilton was the owner thereof; that said property was in the exclusive possession of Graham; that there were those other policies of concurrent insurance, each for \$1,000, on said property; that proofs of loss have been furnished to it, and demand made for payment of policy. And, affirmatively answering, the defendant alleges that the plaintiff John M. Graham, in whose name the policy was issued, was bound by the express conditions, covenants and promissory warranties in the policy named, two of which were (1) that the entire policy should be void if the insured has concealed or misrepresented any material facts and circumstances connected with the insurance, and (2) that the entire policy should be void if the interest of the insured be other than unconditional and sole owner; and that John M. Graham neither fully discloses the material facts and circumstances connected with the insurance, nor was he the unconditional and sole owner of said property. The action came on for trial before the Honorable I. D. Witherspoon and a jury at the fall term, 1895, of the Court of Common Pleas for Richland County. After plaintiffs had closed their testimony, a notice for nonsuit was made and refused. The verdict was in favor of plaintiffs for full sum complained for, including interest. Therefore the defendant appealed to this court, on many grounds and subdivisions thereof, which will now be disposed of by us. The report of the case will include the exceptions, and also the charge of the presiding judge. We will consider them as embraced in these divisions: First. Did the circuit judge err in admitting the testimony objected to by the defendant? Second. Was the circuit judge in error in refusing the defendant's motion for a nonsuit? Third. Were the refusals to charge, and the charge itself, erroneous in the particulars complained of?

1. As to the first ground of appeal: While the plaintiff J. M. Graham was being examined on his own behalf and that of his co-plaintiff, Tilton, his counsel asked him if the paper containing the agreement between himself and G. H. Tilton touching the control and management of the hosiery mill by Graham, as its superintendent, was the contract between them as to those matters. To this question the defendant promptly objected, because it was not in response to any of the issues raised by the pleadings, inasmuch as the only reference to such contract in the complaint was a conclusion of law; that the defense was surprised at the contents of the paper; and, second, that the contract of insurance sued upon is in writing and is clear and explicit in its terms. The defendant objects to any parol evidence being introduced to vary or contradict the clear and

explicit terms of the contract, or any evidence to do so. To understand the ruling by his honor, the circuit judge, whereby he admitted this testimony, it is important that we should understand his environments. In the first place, the circuit judge was bound to keep in his mind that this being an action to recover upon a policy of insurance of personal property destroyed by fire, while such policy was of full force, the laws of this State, as fixed by the decisions of our court of last resort, held: "Insurance is not an incident to the thing insured, but indemnity or compensation to the person insuring for the loss which he sustained:" (*Italics ours.*) *Annely vs. De Saussure*, 26 S. C., 505; *Pelzer Manuf'g Co. vs. Sun Fire Office*, 36 S. C., 266, 267; *Carpenter vs. Insurance Co.*, 16 Pet., 496; *Imperial Fire Ins. Co. vs. County of Coos*, 151 U. S., 452. The contract of insurance sued upon, by its express terms, provided that any loss to be recovered by the assured should be payable to G. H. Tilton, "as his interest may appear;" and this is the only reference to G. H. Tilton in the entire policy of insurance. Inasmuch as the policy of insurance failed to indicate what was the interest of G. H. Tilton therein, which is to be as it may appear, it must be done by evidence outside of the terms of the policy itself. Then, again, the policy itself fails to indicate what meaning the parties to it intended should attach to the word "interest." In policies of insurance of personal property, the word "interest" is sometimes held to mean "insurable interest:" *Rap. & L. Law Dict.* But it may be that another meaning or other meanings may be ascribed to it. By the pleadings in the case at bar it was distinctly announced that G. H. Tilton was the actual owner of the personal property which was insured, but that the same personal property was in custody and control of the plaintiff J. M. Graham, under a contract with the said Tilton. Hence it seems to us that it was a pertinent inquiry as to what were the terms of that contract. We are at a loss to see any controlling influence in the objections of the defendant to the introduction in evidence of such a contract, for it would in no wise infringe upon the rights of the defendant that Tilton and Graham had made a contract between themselves as to this property, which was to last from the year 1891 until twenty years thereafter, in the light of the contract for the insurance of his personal property, wherein it was alleged that it was the property of J. M. Graham, but coupled with the distinct provision that any loss under the policy to be recovered by J. M. Graham should be payable to G. H. Tilton, as his "interest may appear." To say that the introduction of such testimony would serve to vary or contradict the written terms of the policy of insurance itself will not do, for the parties to the contract of insurance

had it in their power, when such contract was entered into, to make clear what they meant by the use of the words just quoted, and they did not do so. The circuit judge, in construing this policy of insurance, could not tell what the parties to it intended. Hence the necessity of testimony to show what Tilton's interest in such insured property was. This exception is overruled.

(b) The second ground of appeal: When the witness for plaintiff, J. M. Graham, was asked to state how he came to insure the property after the year 1891 (the date of his contract with G. H. Tilton), the defendant objected, upon three grounds: First, that the defendant had no notice of such verbal agreement, or any relation subsisting between Tilton and Graham, in reference to the property mentioned in the policy; second, because there was no ambiguity or uncertainty in the contract, and it should have been conclusively presumed to be the whole engagement of the parties thereto, and it was error to admit evidence seeking to include under said policy an insurable interest not mentioned in the policy, and regulated by its very terms, and of which there was no proof that the defendant had any notice; and, third, on the ground that defendant was surprised thereby, and misled to its prejudice. Again, it is our duty to remember that the circuit judge had the policy before him, and that such policy contained the fatal words "any loss," etc., "to be paid to G. H. Tilton, as his interest may appear." What G. H. Tilton was referred to? The policy failed to show who he was. What was the interest of G. H. Tilton that might be made to appear? The policy is silent. What business corporation, guided by intelligence, could afford to remain ignorant of who G. H. Tilton was, and of what interest he might be possessed? This policy, by its very terms, necessitated a recourse to proofs dehors the policy itself, to show these facts. The plaintiffs accompanied their complaint in this action with a copy of this policy of insurance. The defendant had notice of these terms by the complaint itself, and it is too late to talk of a surprise by which they were misled to their prejudice by allowing this testimony to be introduced. This exception is overruled.

(c) To make plain the question raised by this, the third, ground of appeal, it may be well to state the facts upon which it is based: The policy of insurance sued upon, as we have before stated, stipulated that the defendant did insure, against loss by fire, the personal property as the property of J. M. Graham, but with the provision that "any loss that may be ascertained and proved due the assured shall be payable to G. H. Tilton as his interest may appear." That said Graham, when the adjusters of the different insurance com-



panies which had policies outstanding on said property when destroyed by fire appeared in the city of Columbia, S. C., immediately after the fire, told them that the property was owned by G. H. Tilton, and that thereupon the said adjusters required G. H. Tilton to repair to his home in the State of New Hampshire, in order that he might furnish proofs of loss from his own books; and that some weeks afterwards such said adjusters were notified that Tilton had the proofs of loss, as ascertained from his own books, ready in Columbia for their inspection; and that thereafter the said adjusters returned to the said city of Columbia, S. C., and, upon said proofs from the books of Tilton being inspected by them, they, the adjusters, directed the said J. M. Graham to make up proofs of loss, which he did; and that, while three companies paid up their losses, the defendant refused so to do. Upon these facts, the plaintiffs desired to predicate the proposition that the defendant was thereby estopped by its conduct to deny the validity of plaintiffs' claim for the insurance money under the policy sued upon. The witness, J. M. Graham, was asked to state these facts, but the defendant objected on the grounds: First, that at the time of the occurrence of which he was about to testify the said Graham was fully apprised of the purpose of the defendant to contest any liability under this policy of insurance by reason of the fact that he was not the unconditional owner of the property insured, and that the defendant, in making its requirement of proofs of loss, was but in the exercise of its rights under its contract, with no evidence of the abandonment of such defense; and, second, because the evidence offered did not show any intentional abandonment of his right to hold to the contract of insurance, and in no way caused the plaintiffs to abandon their position, or suffer any injury, loss, etc. We cannot see why the plaintiffs should not be allowed to show by their proofs that the defendant, by its conduct, was estopped from contesting the plaintiffs' right to recover under the policy. We venture no opinion, for under the law we are allowed to express no opinion as to the sufficiency of this testimony to establish this estoppel. The circuit judge was only concerned as to its admissibility, and he held it was competent. We see no error here. Besides all this, the very grounds of objection only go to the sufficiency of the testimony, and of this the circuit judge could express no opinion.

(d) As to the fourth ground of appeal, relating, as it does, to the objection of the defendant to the witness Graham stating what conversations he had with, or directions he (Graham) gave to, Mr. W. C. Swaffield, who procured for him the policy sued on, on the sole ground that the defendant was not present when such conversation

or direction occurred, the defendant is a corporation, but we suppose the appellant means to say the corporation was not present by any of its agents. His honor only admitted this testimony upon the assumption, no doubt, that, while no such agent might have been present to hear the conversation or direction in question, yet it was afterwards communicated to the agent of the defendant. Mr. Graham did not effect this insurance in person, but through Mr. Swaffield as his agent. Under the explanation just made, we see no objection to the testimony.

(e) The next—the fifth—ground of appeal relates to the allowance as competent of the testimony of Mr. Swaffield as the agent of the plaintiffs, detailing his declarations to one Mr. Fripp, who was connected with the fire-insurance agency of Mr. Allen Jones, from which agency the policy now sued on was obtained. We will state the circumstances, so that we may more correctly pass upon the ruling of the circuit judge on this point. Allen Jones operated an insurance agency in the city of Columbia, S. C. He had in his employment a young man, Mr. Fripp, to whom were assigned many duties incident to the issue of the policies of fire insurance, but not to the extent of countersigning the same. That part of the work was always performed by Mr. Jones himself. While Mr. Fripp was employed during the month of March, 1894, Mr. Jones represented the defendant company, and also another company,—the Fire Assurance of Philadelphia. Upon the application of Mr. Swaffield or the agent of J. M. Graham to Mr. Fripp for \$1,000 insurance on the property now under discussion, Mr. Fripp was told by Mr. Swaffield exactly how Mr. Tilton stood to this property, viz.: that he was the owner, and that J. M. Graham was his superintendent in charge of the property. The policy applied for was issued by the said Fire Assurance Company of Philadelphia, but within a short time—say a week or ten days—this company, from its home office in Philadelphia, ordered the policy canceled, which was done, and early in the month of April a policy was issued by Mr. Jones, as agent, in the defendant company. Mr. Fripp left Mr. Jones's employment on March 31, 1894. Mr. Swaffield could not state whether he had told Mr. Jones the facts he had communicated to Mr. Fripp. He was impressed that he had. But it was desired to have Mr. Swaffield testify as to the communication he had made to Mr. Fripp in regard to Tilton's ownership of the property, and that this was the cause of the insertion of the clause in the policy that all losses should be paid to him (Tilton) as his interest might appear. Judge Witherspoon, on this point, ruled as follows: "Under the allegations of the complaint and the terms of the policy issued to J. M. Graham, I hold,

under the authority of *Pelzer Manuf'g Co. vs. Sun Fire Office* (36 S. C., 213), that it is competent for the plaintiff to offer evidence to show that at the time of the issuing of the policy and the receipt of the premium by the company, the agent of the company issuing the policy knew the relation then existing with reference to the property in dispute between Graham and Tilton. I further hold that the admission of such testimony does not violate the general principle or rule that a written instrument cannot be altered or the terms thereof raised by parol testimony." Mr. Chief Justice McIver, in his elaborate opinion in the case of *Pelzer Manuf'g Co. vs. Sun Fire Office* (36 S. C., 273), quotes with approval this language used in *Menck vs. Insurance Co.* (76 Cal., 51): "The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered; otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." Hence, if this defendant company knew as a fact that Tilton was the actual owner of this property, and that J. M. Graham held it as his superintendent only, although it was recited in the policy that it was the property of Graham, coupled with the stipulation that all damages thereunder should be payable to Tilton as his interest might appear, then the defendant company was bound to make good any loss under such contract, for otherwise such "company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." And at page 269 (36 S. C.), and at page 583, in the same case, the chief justice of this court observes: "Insurance companies or their agents are, of course, presumed to know what facts and circumstances are material to the risk offered, much better than the persons who are applying for the insurance; and if they choose to accept the insurance without inquiry, and, when a loss occurs, it appears that some fact which the insurance companies may regard as material to the risk was not communicated by the insured, common honesty and fair dealing forbid that this shall operate as a forfeiture of the policy unless it also appears that the insured either knew at the time, or ought to have known, that such fact was material. Inasmuch as insurance companies, when applied to for insurance, have the right to make, and as a matter of fact do make, the fullest and most minute inquiries when the application is in writing, the insured has a right to assume, when no such inquiries are made, either that the insurance companies or their agents are fully acquainted with all the facts material to the risks, or that they do not regard the facts as are not stated as material."

The agent, Mr. Allen Jones, had just issued a similar policy to the same party on the same property in another company, which had just been canceled, acting in the issuing of such policy through his clerk, Mr. Fripp, to whom Mr. Swaffield, as the agent of the plaintiffs, had made full disclosure as to Tilton's ownership and as to Graham's connection therewith; and as on the 5th day of April, 1894, —not a month after the issuing of the first policy,—the same agent, Mr. Jones (who was a fully-commissioned local agent of the defendant company), was about to issue a new, but similar, policy to the same parties on the same property, in another company, it became important to the plaintiffs to show what notice such agent had given him touching this property so far as its ownership was concerned. The testimony was relevant and advisable. It cannot be said that Mr. Jones, as agent, was not bound by the information his own clerk had received in the due course of his employment by him. All this taken in connection with the charge of the presiding judge: "In order for notice to Fripp to be binding on this company, it must appear that Fripp was Jones's agent at the time, and that he had authority to bind the company in the way indicated." This ground of appeal is dismissed.

(f) As to the sixth ground of appeal, it cannot be sustained. It was perfectly competent for the plaintiffs to show, if they could, that the defendant company admitted a notice of Tilton's ownership of the property at the time the policy was issued as it was as before stated, and to do this no more efficacious mode existed than by showing that the agent, Mr. Allen Jones, who issued the policy, admitted that fact. This was the tendency of the testimony of Col. Marshall and Mr. Seibles, the two witnesses who were introduced for this purpose by the plaintiffs, and whose testimony was objected to. As to the sufficiency of this testimony, that was quite another matter, and is not, and cannot be before us.

2. The seventh ground of appeal questions the correctness of the refusal of the circuit judge to grant a nonsuit:—

First. "Because it appeared from the evidence beyond dispute that Graham was not the sole and unconditional owner of the property mentioned in the policy." Granted that the evidence and admissions established the fact that Graham was not the sole and unconditional owner of the property insured, this would not necessarily defeat the plaintiffs, for there was testimony before the court going to show that the defendant well knew, or was bound at its peril to know, that Tilton was the unconditional owner of that property at the very moment it issued its policy with a contrary recital therein, and yet, after that knowledge, received the premium for

this insurance. There was evidence before the court going to show that Graham had an insurable interest in this property.

Second. "Because there was no evidence upon which to base an estoppel against the defendant preventing its claim that the policy was void from its inception." The estoppel here involved is an estoppel by conduct. This court, in *Bull vs. Rowe* (13 S. C., 370), thus defined it: "As we understand it, estoppel by conduct is where one party has been induced, by the conduct of the other, to do or forbear doing something which he would not or would have done but for such conduct of the other party: *Bigelow, Estop.*, 480. The conduct which is claimed to operate as an estoppel must have induced action the disavowal of which would be inequitable, and which, therefore, the party who holds out the inducements is estopped from disavowing. There is no estoppel without fault to the injury of another." Now, in the case at bar there was strong testimony going to show that the defendant knew, when it issued this policy of insurance, all the facts relating to the ownership of the property by Tilton, and not by Graham, which latter was set out in its policy, and that, after this knowledge, full value was paid for this insurance; that the plaintiffs intended this property to be insured against loss by fire; that the property had been destroyed by fire, and, therefore, could not now be insured. It occurs to us that there was some testimony, to state it most mildly, which it was proper for the jury to pass upon, and which, if true, would estop the defendant from claiming its policy void.

Third. "Because the doctrine of estoppel and waiver is not applicable when the point in issue is as to the subject of insurance, and the contract is explicit on that point." We might be content to quote the words of defendant's attorneys in this appeal: "There is no magic in a contract of insurance. It must be judged of and construed like other contracts between man and man." Although we here state that this language is quoted from appellant's argument, yet it is but just to say it is there recognized and reproduced from the opinion of Chief Justice McIver in *Pelzer Manuf'g Co. vs. Sun Fire Ins. Co.*, 36 S. C., 213. This ground of appeal is dismissed.

Fourth. "Because the plaintiff John M. Graham was, by the retention of the policy without objection, himself estopped from claiming that it did not contain the contract of insurance as agreed, or that he was not bound by its explicit terms." We cannot regard this proposition as good ground for a nonsuit. Graham retained the policy of insurance as issued by the defendant, with full faith that he had carried out the directions of his employer, Tilton, because he saw, from the policy, that the property was accurately

described, and an indemnity promised, in case of its destruction by fire, to be paid to the true owner, Tilton, thereby protecting to him the property he was, by his contract with Tilton, to manage for twenty years at a remuneration liberal in its terms,—for it was to last during his life, and, if he should die, survive to his wife, during the twenty years provided for. Graham is to-day satisfied with the contract of insurance, and in this action seeks its enforcement. We cannot see how the application of the doctrine of estoppel can be made to apply to him.

Fifth. "Because, if the doctrine of estoppel was applicable against defendant, it extended no further than to cover whatever individual insurable interest the said Graham may have had in the property, and for this insurable interest no recovery could be had; for the testimony conclusively showed that the said Graham had suffered no injury to that individual insurable interest." We have heretofore held that, there being testimony before the court upon which, if true and sufficient, the doctrine of estoppel might be successfully applied, as against the contention of the defendant that its policy of insurance was void, no more need now be said on that part of this ground of appeal. So far, however, as the insurable interest of Graham is affected by this ground of appeal, we cannot agree with the appellant, for the reasons we shall set forth in our treatment of the next ground of appeal. We find no fault with the refusal of the circuit judge to grant a nonsuit.

3. We will next consider the alleged errors of the circuit judge in his charge to the jury:—

First. "The circuit judge erred in his refusal to charge that Graham had no insurable interest in the property insured under his written and verbal contract with Tilton." If we were to take this proposition literally, it might well be said that the appellant had sought a charge from the presiding judge upon the facts, which, of course, the judge could not do. But we will assume that the appellant meant to say that, if the facts are established as set out in the contract in writing between Tilton and Graham, and also as embraced in the oral agreement between the same parties, then the question is raised that, under such facts, Graham had no insurable interest. The circuit judge, in his charge to the jury, made these quotations from *May, Ins.*, p. 144, § 80: "Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether the advantage inures to him personally, or as the representative of the rights or interests of another, has an insurable interest." And from the conclusion of the same section the circuit

judge quoted these words: "Persons charged either specifically, by law, custom, or contract, with the duty of caring for and protecting property in behalf of others, or having the right to so protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to estate, or any lien upon or possession of it, have an insurable interest." In *Rap. & L. Law Dict.*, it is said: "In the law on insurance, a person is considered to be interested in property when the destruction or injury of the property would expose him to pecuniary loss,"—and quite an array of authorities is quoted in support of this enunciation of the law. By reference to the contract made between Tilton and Graham in February, 1891, it will be seen that a twenty-year term of service as superintendent is provided for Graham at an annual salary, after the year 1891, of \$2,500, and that, in case he dies before the period of twenty years, his wife is to be paid \$1,200 per year, and in case of his and her death during that period, his children shall be paid \$1,200 per annum; also, that if Tilton wishes to discontinue business during that period, important privileges as a purchaser are secured to Graham. By parol it was agreed between Tilton and Graham that the latter should insure the property. It seems very clear to us that there was an insurable interest in Graham as well as Tilton in this property. It can make no difference that, after the property was destroyed by fire, Tilton re-established the hosiery business, and continued Graham's salary. It must be remembered that he was secured by \$3,000 of the concurrent insurance on this property, and it is not at all unlikely that he acted as if this policy was cash in bond by anticipating its payment. But, be these last matters as they may, Graham had an insurable interest. Suppose, for instance, that by the destruction of insured property the mill had been owned by Tilton, and it, too, was destroyed without any insurance, and that the loss had been so great that Tilton was unable, from the lack of means, to rebuild and re-equip his mill, although the insurance money recovered on the personal property was sufficient to re-establish a hosiery mill in leased quarters; would not Graham have some rights, under his contract with Tilton, he could enforce in equity? The presiding judge was not in error here.

Second. So far as the ninth ground of appeal is concerned, it seems to us to present an abstract question of law. If Graham had no insurable interest, and the defendant, when it issued its policy in Graham's name as owner, with the loss payable to Tilton as his interest may appear, and it did appear that the company knew he (Tilton) was the owner of the property, though it was in the name

of Graham as owner, how did the judge commit any error in the charge? We cannot see. The contract itself provided for Tilton being paid the whole insurance money. It is not a case of a policy being taken out by a person not the owner, but quite the contrary. "Let our just censure attend the true event." This ground of appeal is dismissed.

Third. The tenth ground of appeal will not be considered by us, because it is certainly an abstract proposition of law. The verdict rendered by the jury shows conclusively that they were not influenced by it in any manner whatsoever, for they (the jury) found the exact amount due under the policy, viz.: the sum of \$1,000 and interest thereon after 60 days from the notice of proofs of loss, thus showing conclusively that they paid no attention to any insurable interest of Graham to be paid to Tilton, so far as the value of that insurable interest of Graham was concerned.

Fourth. The eleventh ground of appeal is next in order. A comparison of the terms of the request to charge with the actual charge of the judge will show that he protected the defendant in these matters, here embraced, fully and effectually. We overrule this ground of appeal.

Fifth. The twelfth ground of appeal is fully covered by the judge's charge, and is, therefore, dismissed.

Sixth. The thirteenth ground of appeal seeks to impute error to the circuit judge by his refusal to make the charge as requested. In effect, it states that, if the jury conclude that John M. Graham did have an insurable interest in the property covered by the policy, notwithstanding its knowledge of this fact, that neither Graham nor Tilton can recover unless the jury believes that the destruction of such property caused John M. Graham pecuniary loss; and if the jury believe that John M. Graham lost no salary by reason of the destruction of the business by fire, and that said mill is still operated by Graham under his contract with Tilton, neither Tilton nor Graham can recover under the policy. The judge acted very wisely in refusing to make this charge, for it did not cover the issues raised in this action. If Graham had an insurable interest in this property, and he obtained a policy of insurance therein by which all loss was to be paid to Tilton, its owner, what difference did it make to this company that Tilton provided a new stock for the hosiery mill, whereby Graham was enabled to still earn his salary? Besides, as we remarked before, a judge can only fairly and justly be expected to make his responses to requests to charge where the same practically affect the issues which are on trial in the action. This ground of appeal is dismissed.



Seventh. The fourteenth ground of appeal complained of the refusal of the circuit judge to charge as requested by the defendant, as set out in this ground of appeal: "If the jury believe, from the evidence, that the defendant or its agents had knowledge, previous to the delivery of the policy, to the effect that there was no mortgage on the property, and that the loss-payable clause was inserted for the purpose of permitting Tilton to control the insurance money, that such information was not knowledge of the ownership of Tilton, and the defendant would not be estopped from setting up the defense that plaintiff, Graham, had not truly stated his interest in the policy, or was not the sole and unconditional owner thereof." We think the circuit judge in his general charge covered this point. He explained what was actual notice, and what was constructive notice, but he was careful to explain to the jury the issues as raised by the pleadings, but was equally as careful to refrain from weighing testimony for them. A circuit judge must necessarily observe great care that, in his charge, whether on requests or not, he does not narrow the inquiry into the facts by the jury. There was direct testimony before the jury that the agent of the defendant had both actual and constructive knowledge of the ownership of Tilton of this property. The circuit judge very wisely declined, by refusing this charge, to appear to pass upon the facts, by saying what would be the effect of all the testimony upon the fact of knowledge, or of all the testimony added to a constructive notice as to this knowledge of ownership. All that litigants can demand is that the circuit judge shall faithfully expound the law of the case, and if, in his general charge, which, in effect, covers specific requests, he can better do this than in a direct answer to a specific request, it is not error. This ground of appeal is dismissed.

Lastly, the fifteenth ground of appeal will be considered. So far as this ground of appeal is concerned, we feel that the appellant has overlooked the restrictive words in the judge's charge touching the effect given or to be given by Mr. Swaffield's statement to Mr. Fripp. In our notice of this matter in a previous part of this opinion, we have taken consideration of it, quoting the judge's charge on the point. We do not think, in the light of that quotation from the judge's charge, there is any practical question left open. This ground of appeal is dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J.

I dissent; but, as I am unwilling to delay the filing of this opinion by taking the time necessary to write out my views, I must content myself with simply indicating the points upon which I differ from

the majority of the court, viz.: (1) To the construction and effect given to that clause in the policy providing that the same shall be void if the assured was not the sole and unconditional owner of the property insured. (2) As to the views presented as to the competency of the testimony as to what the clerk, Fripp, was told in regard to the interest of Tilton in the property insured. (3) As to the views presented in regard to the question of estoppel. (4) As to the views presented in regard to Graham's insurable interest in the property insured.

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## SUPREME COURT OF WISCONSIN.

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BOYLE ET AL.

vs.

NORTHWESTERN MUTUAL RELIEF ASS'N.\*

The certificate of a benevolent society was issued on the strength of an application which stated that the applicant was in sound health and the answers were warranted to be true.

*Held*, That if not in sound health there was a fatal breach of warranty, though the insured believed her answer to be true.

A statutory provision that no physician shall be compelled to disclose information acquired in his professional capacity which was necessary to enable him to prescribe for a patient, not only relieves from obligation to disclose, but will not allow such disclosure without the consent of the patient.

### Statement of facts by PINNEY, J.

This action was brought on a certificate of membership issued by the defendant to Bridget Boyle, April 16, 1892, for the benefit of the plaintiffs, in the sum of \$1,000, on her application dated April 1, 1892. The assured died on the 27th of April, 1892. The complaint contained the usual allegations that the plaintiffs had presented proofs of such death, and offered to surrender said policy, and that the assessment had been made and collected by the defendant to pay said loss, and that in consequence thereof the defendant was indebted to them in the sum of \$1,000, for which they demanded judgment. The defendant, among other things, alleged in defense: That in the application of the assured she was asked and answered the following questions, namely:—

Q. Have you received medical treatment or consulted a physician in the past ten years? A. Yes. Q. And if so, in what years? A. In the year 1890. Q. What were the nature and facts of the sickness or disability? A. Change

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\* Decision rendered, Feb. 23, 1897.

of life. Q. How long were you under medical treatment? A. Two months. Q. (16) Are you now in sound health? A. Yes.

That in and by the terms of said application and contract she had covenanted, agreed, and warranted that said answers were true, and particularly that she was on the 1st day of April, 1892, in sound health, whereas said covenants and warranties were false and untrue, and that she was not then in sound health, as she well knew, and for other and different causes than "change of life." That she was then suffering from endocervicitis, or inflammation of the uterus, and also from ulcers, abscesses, and inflammation of the fallopian tubes. At the trial the court ruled that the affirmative of the issue was on the defendant, and it produced in evidence the testimony of four physicians authorized to practice, and who had treated and prescribed for Mrs. Boyle, to prove the defense relied on, by information they had received from her, and knowledge which they had severally acquired when they treated her as a patient, and for the purpose of enabling them to prescribe for her as such patient. The testimony of each of said physicians was objected to, in due season, on the ground that the information and knowledge thus acquired was privileged, and that they ought not to be allowed to disclose the same. The court overruled such objections and admitted the evidence, and the evidence tended to show that Mrs. Boyle was not, at the time she signed said application, in sound health. The testimony of one of said physicians was to the effect that he treated her in April, 1892, but had prescribed for her prior to that time in 1890 and 1891; that he made an examination of the assured on the 19th day of April, 1892, and found that she had a catarrhal difficulty of the uterus, and inflammation of the fallopian tubes, of a chronic and inflammatory character, and one of the tubes was stopped,—was sealed up at both ends; that he told her she was in a dangerous condition, and it might be necessary for an operation to save her, and she ought to be treated right along, and be very careful with herself; that he gave her medicine, and had never seen her since; that her difficulty was certainly of a chronic character, and it, in his judgment, had existed at least a year. The testimony tended to show that the disease was known as endocervicitis. The questions and answers in part first of the application for membership were, among others, as follows:—

Q. (15) Have you received medical treatment or consulted a physician in the past ten years? A. Yes. Q. If so, in what years? A. 1890. Q. What were the nature and facts of the sickness or disability? A. Change of life. Q. How long were you under medical treatment? A. Two months. Q. (16) Are you now in sound health? A. Yes. I hereby certify that the foregoing

answers and statements are written as made and understood by me. Dated April 1, 1892. Bridget Boyle.

Also the following answers to questions put by the medical examiner in part second of the application:—

Q. (48) Are you now free from disease, nervous or muscular weakness? A. Yes. Q. (49) When did you last consult a physician, and for what reason? A. About two years ago, "change of life."

At the foot of this examination is the following, signed by the insured:—

I hereby covenant and warrant all the foregoing answers and statements, including those in part first, to be full, complete, and true, and that this written application, and the truth thereof, shall be the basis of my rights for membership in the Northwestern Mutual Relief Association. Also, that my certificate of membership shall be in the form prescribed, and shall contain the usual conditions and rules and regulations.

Also, in the additional examination for females, the question, among others, "Have you ever had any disease of the breast, or any uterine disease or weakness," which was answered in the negative, and at the foot of such examination was the following:—

I hereby declare that the above-written answers are true, and agree that they shall be a part of the application, which is the basis of the contract for membership in the Northwestern Mutual Relief Association. Bridget Boyle.

The conditions on the back of the policy relied on, among others, were as follows: "First. That this certificate is issued and delivered in consideration and on the faith that the application made by the within-named member is complete and true, and contains all his answers and statements; otherwise this certificate shall be null and void." The case was submitted to the jury to find a special verdict, and answer the following questions, among others: "Q. (1) Did Bridget Boyle, who was insured in the defendant company by policy No. 12,720, believe herself to be in sound health and free from disease on April 1, 1892, at the time she made and signed the application for said policy? A. Yes. Q. (2) Was she in sound health and free from disease at that time? A. No. Q. (4) Did she know when she made said application, or did she then have reason to believe, that she had any uterine disease or weakness, except such troubles as usually attend the 'change of life' in women, and which might be reasonably understood to be included in the term 'change of life'? A. No." The plaintiffs moved the court for judgment on the verdict, against the defendant, for \$1,000 and costs, but the court denied the motion; and they also moved the court to set aside the verdict, and for a new trial, on the ground, among others, of the admission of improper evidence at the trial, and because the answer to the second question was not sustained by the evidence, and that

there was not sufficient evidence to sustain the verdict. The court denied said motion, and entered judgment on the verdict, for the defendant, from which the plaintiffs appealed.

SPENSLEY & McILHON and ORTON & OSBORN, *for Appellants.*

WILSON & MARTIN and BURR W. JONES, *for Respondent.*

PINNEY, J. (after stating the facts.)

The deceased, in her application for membership, in answer to the question, "Are you now in sound health?" answered "Yes," and by the terms of her application she "covenanted and warranted all the foregoing answers and statements," including the one in question, "to be full, complete, and true, and that this written application, and the truth thereof, shall be the basis of my rights of membership" in the defendant association; and on her certificate the condition was indorsed, that it was "issued and delivered in consideration and on the faith that the application" made by her "is complete and true, and contains all her answers and statements; otherwise this certificate shall be void." The jury found that the assured, Bridget Boyle, believed herself to be in sound health, and free from disease, at the time she made and signed her application, and that at that time she was not in sound health and free from disease. We think that the statement in her application and the condition indorsed on her certificate constitute a warranty that Mrs. Boyle was at the time in sound health, and was made by the parties the basis of her rights of membership; that it was a condition of the contract, and, if untrue, that her certificate is null and void. Whether she was in sound health was a matter not presumptively, at least, within the knowledge of the defendant; and it had a right to require, as a condition of Mrs. Boyle's membership, that she should, by express warranty, take all risk as to whether she was then in sound health. We have here, then, a warranty, as distinguished from a representation; and a substantial breach of the warranty, whether affirmative of some existing fact, or promissory, material to the risk, will defeat the policy. The distinction between a warranty and a representation is familiar, and is stated in *Blumer vs. Insurance Co.*, 45 Wis., 622; *Baumgart vs. Modern Woodmen*, 85 Wis., 546. A warranty, it is held, "need not be material to the risk, for, whether material or not, its falsity or untruthfulness will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material:" *Beach, Ins.*, § 459, and cases cited in note; *Jeffries vs. Insurance Co.*, 22 Wall., 54-56; *Dwight vs. Insurance Co.*, 103 N. Y., 341. It is not

important that the party making the warranty really believes in its entire truth; if it be false, it avoids the contract: *Clemans vs. Supreme Assembly*, 131 N. Y., 485. "Sound health," as used with reference to an application for life insurance, has been defined to mean a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously. The word "serious" is not generally used to signify dangerous, but rather to define a grave, important, or weighty trouble: *May, Ins.*, § 295; *Brown vs. Insurance Co.*, 65 Mich., 306. The present case is not really distinguishable from *Baumgart vs. Modern Woodmen*, supra, where a stipulation in an application for membership in a benefit society, stating that the applicant had never had a certain disease, was held to be a warranty, and that, as it was shown that he in fact had such disease, it was held to be a breach of the warranty, although he never knew it, and his death resulted from other causes. The plaintiffs' counsel relied upon the case of *Knights of Pythias vs. Rosenfeld* (92 Tenn., 508), where the language used in the contract was regarded as a representation, and not a warranty, and such was the case of *Society vs. Winthrop*, 85 Ill., 537. The case of *Plumb vs. Insurance Co.* (Mich.) was where the statement that the applicant was "of sound health" was considered a warranty, and it was held that it was a question for the jury whether the insured was in good health when the policy was delivered. The case of *Moulou vs. Insurance Co.* (111 U. S., 335), is distinguishable from the present case, and was decided on the ground that where the policy in question had been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposed upon the assured the obligations of a warranty, and that, in the absence of explicit stipulations requiring such an interpretation, it should not be inferred that the assured took the policy with the understanding that it should be void, if at any time in the past he was, whether conscious of the fact or not, afflicted with the diseases, or any one of them, specified in the questions propounded by the company, and that such a construction of the contract should be avoided, unless clearly demanded by the established rules governing the interpretation of written instruments. This case does not hold that where, as in this case, a clear and explicit representation of then existing good health was made, the parties may not contract upon the faith of it, and the truth of the statements made a condition of the validity of the certificate, so that that question shall be at the risk of the assured. This we hold the

parties did in this case, and their right to make such a contract can not be denied: *Jeffries vs. Insurance Co.*, 22 Wall., 47; *Insurance Co. vs. France*, 91 U. S., 510. In this case the statement in the application and in the certificate or policy, as will be seen, stated an express warranty. The evidence is quite sufficient to support the findings, and to warrant a verdict that Mrs. Boyle had a serious disease at the time she made her application, that had been of a chronic character for a year, though, as it is found, she was not conscious of the fact. For these reasons, therefore, judgment was rightly given in favor of the defendant, unless the evidence of the medical witnesses was improperly received.

2. The question as to the admissibility of the evidence of the physicians, against the objection of the beneficiaries of the certificate, claiming under Mrs. Boyle, the deceased, is not one free from difficulty. There can be no question but that the information they severally acquired, which enabled them to give their testimony, was acquired in attending Mrs. Boyle as a patient, and that it was necessary to enable them to advise her and to prescribe for her as physicians. Was this information privileged, as to her, under Rev. St., § 4075, which provides that

No person duly authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

By the common law, information thus obtained by a physician or surgeon, was not privileged, but he was at liberty to disclose it, either in or out of court, whatever effect such disclosure would have upon the rights, reputation, or feelings of his patient. The contention in favor of the admissibility of the evidence is that the use of the word "compelled" in the section shows that the information thus acquired is not privileged from disclosure as to the patient, whom such a disclosure may most seriously affect, but is privileged only as to the physician or surgeon, and that he may, at his option, disclose it in court, when all the injurious details may be publicly elicited under oath, or he may refuse to do so, in which event only the information is to be privileged, so that its disclosure will not be "compelled." It is argued that this conclusion is strongly supported by sections 4074 and 4076, in relation to a confession made to a clergyman or other minister, or in respect to communications made by a client to an attorney or counselor at law, or his advice given thereon, in the course of his professional employment. In the above cases the provision is that the clergyman, etc., or the attorney, "shall not be allowed to disclose" such confession, communication, etc.,

not that either "shall not be compelled to disclose," etc. Statutory provisions on the subject of privileged information thus acquired exist in very many, if not a majority, of the States; but they are all, as far as we have been able to discover, to the effect that the person acquiring the information "shall not be allowed to disclose" it as a witness, with the exception of the provision in respect to physicians and surgeons in this State, which was adopted in the territorial statute of 1839 (p. 249, § 71), and has been in force ever since: Rev. St., 1849, c. 98, § 75; Rev. St., 1858, c. 137, § 80. The statute of Arkansas, enacted about a year prior to the territorial statute of 1839, from which it may have been borrowed, is in substance in the same terms. It was somewhat considered in *Collins vs. Mack* (31 Ark., 685), but the decision has no decisive bearing. There were no provisions in the statutes of 1839 or of 1849 or of 1858, in respect to information or disclosures to clergymen or attorneys, but these were incorporated in the revision of 1878, and it appears from the note of the revisers that sections 4070 and 4076, in respect to communications to clergymen and to attorneys, were taken from section 833 of the New York Code of 1877; hence the diversity of phraseology in the section in relation to physicians is much less significant, having occurred from revision, than it otherwise would be. Under statutes providing that a professional witness "shall not be allowed to disclose" information so acquired, it has been held in a great number of cases, and with entire uniformity, so far as we have been able to discover, that the privilege is that of the patient, client, etc., and the information or disclosure cannot be given in evidence against him, or persons claiming under him, unless waived. "After one has gone to his grave, the living are not permitted to impair his fame or disgrace his memory by dragging to light communications and disclosures made under the seal of the statute:" *Westover vs. Insurance Co.*, 99 N. Y., 56-60; *Grattan vs. Insurance Co.*, 80 N. Y., 282; *Edington vs. Insurance Co.*, 67 N. Y., 185. The disclosure by a physician of information acquired in his professional character, in attending on a patient, where not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes. It provides that the physician shall not be compelled to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was this provision intended? Clearly, for the benefit of the patient, whose interests, reputation,



and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom protection was so important, and not the physician, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be compelled to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent. In *U. S. vs. Babbitt* (1 Black, 55), it was held, that: "What is implied in a statute, pleading, contract, or will is as much a part of it as what is expressed:" *Board of Sup'rs vs. Lackawanna Iron & Coal Co.*, 93 U. S., 624; *Rogers vs. Kneeland*, 10 Wend., 250. "And a thing within the intention of the makers of the statute is as much within the statute as if it were within the letter:" *People vs. Utica Ins. Co.*, 15 Johns., 379; *Railroad Co. vs. Horst*, 93 U. S., 300. In *Harrington vs. Smith* (28 Wis., 43), it was held that: "The true rule for the construction of statutes is to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and the reason and spirit of the law, and thus to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words." Within these rules, we think that it is a clear and justifiable inference from the section under consideration, and the cause and apparent necessity of making the statute, that the information of the physician, so acquired, is privileged as to the patient, and that the physician can neither be compelled nor allowed to disclose it, as a witness, against the will or without the consent of the patient. This interpretation gives the law the beneficial effect it was evidently designed to have, while by the literal meaning of its language it would be rendered of little or no practical effect. We think that the court erred in admitting the testimony of the physicians thus objected to. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NEWMAN, J. (dissenting.)

The difficulty of construction which Mr. Justice Pinney mentions does not appear until it is attempted to put upon the statute a meaning not found in its words. No person will assert that the

words of section 4075, Rev. St., in their natural and grammatical sense, import what the majority of the court hold that the legislature intended to declare. The court have put into the statute a thought not found there. Something has been added which the words do not express, and which the legislature has not declared. The words "allowed" and "compelled" are not equivalents, but are words of radically different force and meaning. Ordinarily, the plain grammatical sense and meaning of the words of the statute is to be deemed the law declared by it. The purpose of the interpretation of a statute is to find out what the legislature intended by the words used. Where the words used are plain and unambiguous, the thought which they express is the law. The words of this statute are plain and unambiguous. They have but a single meaning, and that is plain and incapable of being misunderstood. They plainly import, in their ordinary and grammatical sense, that, while the physician may be permitted to disclose information which he has obtained through his professional relations to a patient, he shall not be compelled to do so. No other meaning can be legitimately drawn from them. This fundamental rule of interpretation is stated by Johnson, J., in *Newell vs. People* (7 N. Y., 9, 97), as follows: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort, in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning, apparent upon the face of the instrument, is the one which, alone, we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or to take away from that meaning." This rule is quoted by Judge Cooley in *Cooley, Const. Lim.* (6th Ed.), 71. It has often been declared by this court (*Ogden vs. Glidden*, 9 Wis., 46-52; *Battis vs. Hamlin*, 22 Wis., 669; *Brightman vs. Kirner*, id., 54; *Mundt vs. Railroad Co.*, 31 Wis., 451-457; *Boland vs. Gillett*, 44 Wis., 329; *Gowan vs. Hanson*, 55 Wis., 341; *Gilbert vs. Dutruit*, 91 Wis., 661; *Suth. St. Const.*, §§ 236-238, 258, 259), and is now, at least, elementary. As stated by Mr. Justice Marshall in *Gilbert vs. Dutruit*, *supra*, quoting *Vattel*: "It is not allowable to interpret what has no need of interpretation. When the meaning is evident, and leads to no absurd conclusions,

there can be no reason for refusing to admit the meaning which the words naturally present. To go elsewhere in search of conjecture in order to restrict or extend the act would be but an attempt to elude it. Such a method, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not, by interpretation, be rendered useless." The decision in this case is an entire departure from the rule. There is no evidence in the statute itself, or outside of it, nor in the context, of a purpose variant from the obvious meaning of the words, but, on the contrary, rather, that the words were chosen with care and precision, to make the intent plain. This is always to be presumed, but the context, so to speak, and the history of this statute, re-enforce this presumption. This statute (section 4075) is found between two sections which are in *pari materia* with it,—the privilege of confessions to clergymen (section 4074), and the privilege of communications to attorneys at law (section 4076),—in both of which the declaration is that they "shall not be allowed to disclose," while this is that they "shall not be compelled to disclose." This section was adopted from New York in 1839. It is found in the Revised Statutes of that state of 1829, as section 73, p. 406. It was adopted here, with the change of but one word. The words of the New York statute were, "No physician \* \* \* shall be allowed to disclose;" enacted here, "No physician \* \* \* shall be compelled to disclose." The change is palpable, and the purpose evident. That the legislature did not intend to adopt the New York statute, unchanged, is manifest. That it did not intend the statute, as adopted, to be of the same scope and effect as the New York statute, must be equally manifest. Identity of effect can be produced only by a forced construction. Legitimate interpretation cannot produce it. The statute is interpreted as if it read: "No physician \* \* \* shall be allowed to disclose \* \* \* if the patient or his representatives object." Can it be asserted that nothing has been added to the statute by construction? No similar statute existed in Michigan previous to the separation. The New York statute was enacted verbatim there in 1846. This statute made an appreciable change and advance from the law as it was before its enactment. Before the enactment of this statute, at common law, there was no privilege to the knowledge of physicians, acquired through professional relations. They could be compelled to disclose their information. It was a distinct change and advance when they could no longer be compelled to disclose such information. Statutes which change the common law as it existed at the time of their passage are held to change the common law only so far as

the clear intent of the language employed absolutely requires: *Fitzgerald vs. Quann*, 109 N. Y., 441; *Tompkins vs. Hunter*, 149 N. Y., 117; *Suth. St. Const.*, §§ 139, 290, 400. "It is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced:" *Farrall vs. Shea*, 66 Wis., 561-566. So it seems clear that that is as far as the legislature intended to go in that direction. It is, indeed, sometimes permissible to construe statutes contrary to the natural grammatical meaning of the words, to advance an evident intention; but it can never be permissible to construe words against, nor to add to, their natural meaning, in order to carry out some supposed policy of the legislature, nor to conform it to the court's ideal. That is to legislate: *Gowan vs. Hanson*, *supra*. It will hardly be denied that the statute has been improved in the process of construction. Yet it is wiser to let the legislature make the statute law. It is better if the profession, at least, can recognize the law when it is read upon the statute page. This statute should be left as the legislature made it. The evidence was properly received. The physicians were not compelled to disclose.

The judgment of the circuit court should be affirmed.

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## SUPREME COURT OF ILLINOIS.

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HOME INS. CO., OF NEW YORK, )

*vs.*

MENDENHALL.\*

Where the property was bought and placed in possession of the insured by his father, with the understanding that he was to have the property, and it was so stated in his will.

*Held*, That there was sufficient insurable interest to sustain the policy. Such interest is sufficient if it appears that the holder will suffer loss by its destruction.

*Held*, That where the agent was informed of the facts regarding the title, a statement in the policy that it was in fee will not work a forfeiture, although the policy provided that it should be void if the title was not truly stated.

Where the insured swore in the proofs of loss that he held such title, the question whether there was a fraudulent intent was one of fact, where it appeared that the proofs were prepared by the adjuster and might have been negligently signed without reading by the insured.

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\* Decision rendered, Jan. 19, 1897.

Where the tenant had left the premises without notice, and a new one was waiting to occupy it and had begun to move in, it was a question of fact whether the premises were vacant and unoccupied.

Statement of facts by PHILLIPS, J.

This is a suit on an insurance policy, brought by J. A. Mendenhall against the Home Ins. Co., of New York. On the 27th day of October, 1889, J. A. Mendenhall procured from W. S. Rearick, the agent of the Home Ins. Co. at Ashland, Ill., a policy of insurance on two dwelling houses and certain household goods situated near Pleasant Plains, in Sangamon County, Ill., aggregating in amount some \$5,300. The agent of the company wrote up the policy on the ordinary blanks in use by his company, filling in the blank spaces with the data supplied by Mendenhall. As is usual in such policies, the conditions of the insurance were printed on the face and back of the instrument. Among these conditions were the following:—

(1) \* \* \* If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied without notice to and consent of the company in writing, \* \* \* or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, \* \* \* then and in every such case this policy shall be void. \* \* \* (4) If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the buildings stand on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void. \* \* \* (9) \* \* \* All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy. \* \* \* And it being hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the class of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specifically provided for in writing.

On the night of March 5, 1894, the buildings described in this policy were destroyed by fire. Appellant having refused payment under the policy, this suit was begun in the Circuit Court of Sangamon County. To the declaration, which is in the usual form, the defendant pleaded the general issue, and five special pleas. The first of these alleged that the building was vacant and unoccupied, contrary to the terms of the policy. The second set up a clause in the policy whereby a forfeiture was declared in case the interest of the assured was not truly set out in the policy. The third set up a clause declaring a forfeiture in case the interest of the assured was other than that of unconditional and sole ownership. The fourth set up a clause forfeiting the policy in case of fraud or false swearing,

and alleging that the plaintiff swore falsely in making proofs of loss on the occasion of a previous fire, by which another building included in the policy had been destroyed. And the fifth was a formal plea of set-off, under which the defendant proposed to recover back the money paid to plaintiff on the former loss, because of the alleged false swearing in making the proofs, as averred in the fourth plea. Replications were filed, and the issues were submitted to the court, a jury being waived. It appears from the evidence: That the plaintiff was, at the time he made the application, in possession and control of the property. That he then resided upon an adjacent tract of land, which had also been placed in his possession and control by his father, who held the legal title. The father, desiring that the plaintiff should have as much land as his brother, had bought the property in question at a master's sale a few days before the application was made; and, though he had not then received a deed from the master, he caused the plaintiff to be then possessed. That possession continued thereafter, it being the understanding between the father and the plaintiff that the latter was to have the property. The father so provided in his will, which was made, as the evidence tends to show, previous to this application. It was the understanding between the father and the appellee that this land, as well as the other tracts, was to be the appellee's, and he had full control of the same, and treated it as though he had the absolute title thereto. The facts as to his interests were stated to the agent through whom the insurance was effected, and he was not misled as to the condition of the title. Appellee had entire possession, with the exclusive use and enjoyment, and a reasonable expectation of becoming the owner in fee. The building burned was occupied by a tenant whose term was to expire on March 1st, and appellee had rented it to another tenant, who was ready to enter. The old tenant held over until Friday afternoon, March 2d. The next day the new tenant went into the house, and did some cleaning; and on Monday he placed some of his furniture in the house, put up a stove, and made a fire therein, but, by reason of rain, did not complete his move that day. That night the fire occurred. In the trial before the circuit court, ten propositions of law were submitted by appellant, some of which were held, and some refused. The court found the issues for plaintiff, and rendered judgment for \$1,500. On appeal to the appellate court this judgment was affirmed, and from that judgment this appeal is prosecuted to this court.

PATTON, HAMILTON & PATTON, *for Appellant.*

CONNOLLY, MATHER & SNIGG, *for Appellee.*

PHILLIPS, J. (after stating the facts.)

Three propositions are presented and argued by appellant, urging the reversal of the judgment of the appellate court: (1) That appellee had no insurable interest in the property burned at the time the policy was issued; (2) that the premises were vacant, within the meaning of the clause in the policy relating thereto, at the time they were destroyed; (3) that appellee, in making proofs of loss as to a fire which occurred about four years previous, falsely swore that he was the owner in fee of the premises, wherefore, under the policy, he is barred of recovering in this case. All these propositions are ably argued by counsel for appellant, and any one of them, if sustained, would defeat a recovery under this policy.

At the time of the issuance of the policy herein, the eighty acres of land on which these buildings were located had been purchased by the father of appellee at a master in chancery sale in partition; but the twenty days provided by our statute to intervene between the filing of the master's report and the confirmation thereof had not elapsed, so that no deed had been issued. The presumption, however, is that the father of appellee had complied with the usual decree entered in such cases, and paid to the master a part or the whole of the purchase money, as the decree might provide, and at the expiration of twenty days, if no exceptions were filed to the report, he would receive a deed from the master. Meanwhile, if the buildings burned, the loss would fall on him. His title, it is true, at the time was one in expectancy, but, under certain conditions, was sure to ripen into one absolute. Where the title of one is such though not in fee, that he would suffer a loss or damage by the destruction of the premises, he may protect his interest, whatever may be the nature of it, by insurance, and thus it follows that an insurable interest is not always a fee-simple title. It appears from the evidence in this case that the father bought the land for appellee, and so at once informed him. He placed appellee in possession, so that he received the rents and profits, and at once informed him that he had made a will devising these premises to him. Appellee took possession as an heir expectant, and paid taxes, and exercised all acts of ownership over the land. The father had two sons. The other son, by the will, was devised two hundred and forty acres, and this eighty was intended by the father to make both sons equal, so that appellee had a reasonable expectancy of inheriting and becoming the owner in fee. In *Wood, Ins.*, § 266, it is said: "It is not necessary that the insured should have either a legal or equitable interest, or indeed any property interest, in the subject-matter insured. It is enough if he holds such a relation to the property

that its destruction by the peril insured against involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re*, nor *jus ad rem*." Again, in section 268, the same author says: "The interest need not be vested. It is sufficient if it exists at the time of the insurance and loss, though contingent, and liable never to attach or be perfected by occupancy or possession," and, quoting from a leading case, he adds that: "The contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them,—not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those, also, who, in consequence of such events, may have intercepted from them advantage or profit which but for such events they would acquire, according to the ordinary and probable course of things." In the language of Mr. Justice Gray, in the case of *Eastern R. Co. vs. Relief Fire Ins. Co.* (98 Mass., 423): "By the law of insurance, any person has an insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has any title in, or lien upon, or possession of the property itself." May, on Insurance, says that: "While the earlier cases show a disposition to restrict it [insurable interest] to a clear, substantial, vested, pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition. It sometimes exists where there is not any present property,—and *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." May, *Ins.* (2d Ed.), pp. 82, 76. In *McLaren vs. Insurance Co.* (5 N. Y., 151), property was sold at foreclosure sale; and it was held that the purchaser instantly acquired an insurable interest therein, although no deed had been executed, and that the subsequent execution of the deed had relation back to the time of purchase. In the case of *Insurance Co. vs. Miers* (5 Sneed, 139), it was held that where a person bid off real estate at execution sale, although no deed had been executed, or money paid thereon, he acquired an insurable interest in the property. "Generally, persons charged, either specially, by law, custom, or contract, with the duty of caring for and



protecting property in behalf of others, or having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to, estate in, or lien upon, or possession of it, have an insurable interest. That the person may suffer loss is a sufficient foundation for his claim to an insurable interest:" May, Ins. (2d Ed.), pp. 87, 80. A person having a direct pecuniary interest in the property destroyed, so as to be damaged by its destruction, has an insurable interest: *Insurance Co. vs. Wagner*, (Pa. Sup.), 7 Atl., 103. The assured need not be an owner, if he be so circumstanced with respect to the property that he will derive some pecuniary benefit from the safety of the thing, or its continued existence, and injury from its destruction: *Murdock vs. Insurance Co.* (W. Va.) An interest, to be insurable, does not depend, necessarily, upon the ownership of the property. It may be a special or limited interest, disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If by a loss the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest: *Insurance Co. vs. Hyman* (Neb.), citing cases; Phil., Ins., § § 175, 342, 346; and Fland., Ins., p. 342.

We are referred in this case, by counsel for appellant, to a number of authorities which, it is urged, hold the rule to be other than as above stated. We are not inclined to adopt a rule different from that stated. Especially is this true in view of the fact that the agent of the insurance company was fully informed of the condition of the title, and the extent of the interest of the insured, at the time the policy was issued. At the time the insurance was taken out and the policy issued, it clearly appears that the local agent of the appellant company was fully informed as to the condition of appellee's title; that appellee was in possession, paying taxes, and receiving the rents and profits, and, from the knowledge and information given him by his father as to the contents of the will, expected to be the owner of the fee. Of these facts, and of the extent of appellee's title, the agent of appellant was fully informed. This court has said in *Insurance Co. vs. Hart* (149 Ill., 513): "The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this state, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from

insisting upon a forfeiture for causes within the knowledge of the agent." In *Insurance Co. vs. Stocks* (149 Ill., 319), where the insured did not have a fee-simple title to the premises insured, but it appeared that in the application it was described as a title in fee simple, though the insured was not informed regarding the meaning of such term, and the agent was fully informed as to the nature and extent of the title of the insured, this court said: "If, when the assured applies to an agent, he discloses the source and nature of his title, and the agent undertakes, or is permitted by the assured, to fill out the application, and, instead of writing the title as given and disclosed, may insert in lieu thereof conclusions of his own, the insurance company may be permitted to insist that the words of the agent, and not of the assured, are warranties, rendering the policy void, the door will be opened to the perpetration of unlimited fraud,—especially so upon that large class of property-owners who are unfamiliar with the methods of business pursued by insurance companies." "This rule, generally declared by text writers, has been almost uniformly adhered to by the courts of this state, and it is now recognized by the courts generally as the correct rule." In the case here presented, appellee did not have a title in fee, but he had such an interest that pecuniary loss would have resulted to him in case of destruction of the premises by fire. The interest he had, such as it was, was fully disclosed to the agent of appellant. Appellant cannot now insist upon a forfeiture for the reason that the title of appellee was not as conditioned in the policy, when the full condition of this title was known to the insurer, through its agent. In *Insurance Co. vs. Shimer* (96 Ill., 580), this court held that, even though the property destroyed by fire was at the time used for a purpose different from that stated by insured in his application, yet if the agent of the company, when receiving the application and granting the policy, had full knowledge of the manner and purposes for which the property was used at the time of the application, the action would not be barred. In substance, notice to the agent of such condition was held to be notice to the company. We hold: There was an insurable interest in appellee; that his title need not be one in fee. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him. It need not be an existing *jus in re*, or *jus ad rem*. And if his interest was fully disclosed to the agent of the company and he has suffered a loss, his action is not barred because the agent inserted a different title from that stated.

It is also urged by appellant, as reason why there should be no recovery under this policy, that the premises were vacant, within

the meaning of the clause of the policy in relation thereto, and which is as follows:—

Or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to or consent of this company in writing, or the risk shall be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this company indorsed thereon, \* \* \* then and in every such case this policy shall be void.

The house in this case was rented by a tenant whose term was to expire March 1st. Appellee had already rented it for the new year to Douglass, who was waiting to go in so soon as the old tenant vacated. The old tenant kept possession, and his things in it, until Friday evening, March 2d. Meanwhile appellee had sued him for the rent, and the suit was for trial Monday, March 5th. The tenant was not on good terms with appellee, and therefore did not tell him when he would give up the house, and so appellee kept sending Douglass, the new tenant, over to see when it would be vacated; and not until Saturday morning did they find the house vacant, and the key left on the window sill. The tenant had left the premises in bad order, and the new tenant took possession Saturday morning, and cleaned out the house preparatory to moving in his family Monday from Ashland, some five miles distant. Monday the new tenant, with the aid of appellee, moved one load of the tenant's effects into the house, consisting of a stove and some household goods, and would have had his family in also, had it not rained. The tenant made a small fire in the stove, to dry it off, and then went to attend the trial of the appellee against the former tenant, as his witness. He intended bringing his family to the house the next day, the 6th, but that night (the 5th), about eleven o'clock, the place was totally consumed by fire. The old tenant still had some goods in the smokehouse, a few steps from the house, and some trifling articles still in the house when the fire occurred. Under these circumstances, the question was one of fact as to whether the premises were vacant. "What is meant by the term 'vacant and unoccupied,' in a policy of insurance, is a question of law; but whether the building was at the time of the loss vacant and unoccupied, within the meaning of the policy, is a question of fact." *Insurance Co. vs. Storig*, 137 Ill., 646; *Insurance Co. vs. Tucker*, 92 Ill., 64; *Assurance Co. vs. Mason*, 5 Ill. App., 141. In this case the appellate court have found, as a question of fact, that the premises were not vacant. Such finding precludes any further discussion of the question by this court.

The point thirdly and lastly urged in the brief of appellant is that the plaintiff, in making proofs of loss as to a fire which occurred

more than four years before that which caused the present loss, falsely swore that the building then destroyed belonged to him in fee simple, and therefore, under a provision of the policy that

All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy,

the plaintiff was barred of recovery. This question also is one solely of fact, and has been settled adversely to appellant. The appellate court, in its opinion, says: "It appears that the proofs of loss upon which this defense is predicated were prepared by the adjuster, who knew the condition of the title; and the evidence strongly tends to show that the plaintiff, although he signed and swore to the document, which was very lengthy, did not know that it contained the statement in question. Admitting that the plaintiff was negligent in not reading and fully comprehending all that was in the proof of loss before he signed it, still there is no reason to believe that he intended or attempted to commit fraud upon the company. Nor was any such fraud committed." This is conclusive of this question. In our view of the case, the judgment of the circuit court could not have been different from that entered, and there was no error in refusing or modifying the propositions of law complained of.

The judgment of the appellate court is affirmed. Affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

DIXON

vs.

NATIONAL LIFE INS. CO. (CARR ET AL., Interveners).\*

A life policy was assigned bona fide and absolute in form to a party who again assigned in absolute form to another. In an action by the first assignee in which the original beneficiary and the second assignee were made parties.

*Held*, That the assignee need not have an insurable interest, and the second assignment could be shown by parol to be given only for security as a mortgage.

*Held*, That after the payment of the debt to the second assignee, the first was entitled to the remainder.

F. E. DUNBAR, *for Intervener* (Erskine).

B. D. O'CONNELL and W. F. COURTNEY, *for Intervener* (Maria L. Carr).

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\* Decision rendered, Feb. 26, 1897.

HOLMES, J.

This is an action on a policy of life insurance on the life of one William M. Carr, brought by an assignee of the policy. The defendant admitted its liability, and paid the money into court. Upon its petition the excepting parties, Maria L. Carr, the original beneficiary of the policy, and Charles M. Erskine, an assignee from the plaintiff, were summoned in as claimants. The case was tried by a judge without a jury, and he found that the first assignment was absolute and bona fide, that the second was by way of security, and that the plaintiff was entitled to receive what was left after payment of the debt secured to Erskine.

Maria L. Carr excepted to the refusal of rulings as to the absence of insurable interest in the plaintiff. The short answer to these exceptions is that, upon the record and findings of the court, it was not necessary that the assignee should have an interest in the life insured, either as between herself and the company, which takes no objection, or as between her and her assignors: *Insurance Co. vs. Allen*, 138 Mass., 24. A ruling requested on the hypothesis that the assignment to the plaintiff was for security only was made immaterial by the finding of the judge.

The assignment to Erskine was absolute in form, like the earlier one, and he excepted to the admission of evidence of an oral agreement that it was given only as collateral security. It is plain that St. 1886, c. 281, in allowing a defendant in an action at law, "when it appears that such amount is claimed by another party than the plaintiff," to compel the claimants to interplead, does not exclude equitable claims, any more than interpleader proper: *Underwood vs. Bank*, 141 Mass., 305, 306. The plaintiff stands as a claimant of the residue in equity, and in equity she has a right to prove by parol that the assignment, although seemingly absolute, in fact was a mortgage or pledge: *Newton vs. Fay*, 10 Allen, 505; *Campbell vs. Dearborn*, 109 Mass., 130; *Stevens vs. Wiley*, 165 Mass., 402, 406.

Exceptions overruled.

## SUPREME COURT OF MINNESOTA.

REYNOLDS

vs.

ATLAS ACC. INS. CO., OF BOSTON.\*

1. An accident-insurance policy provided that, "in consideration of the warranties and agreements contained in the application indorsed hereon," the company accepted him as a member, "subject to all the conditions indorsed hereon." One of the conditions indorsed on the policy was that "the application for membership is made a part of this contract, and printed thereon." *Held*, That attaching a copy of the application to the back of the policy with mucilage or some similar substance, and delivering the same to the insured, constituted an "indorsement" of the application upon the policy, within the meaning of the contract.
2. The answer to a question required to be answered categorically was indistinctly written in the original application, appearing to consist of the letter "n" and a part of the letter "o," but in the copy attached to the policy and delivered to the insured the answer was clearly and distinctly written "No." The insured retained this for over three years, and until his death, without objection, and without suggestion that it did not correctly state his answer to the question. *Held*, That there was no error in refusing to submit to the jury the question what the answer actually was; that, even if the answer as written in the original application was illegible, the insured, by retaining the copy of the application attached to the policy without objection, must be held to have approved of it, and accepted it as containing his answer to the question.

MORSE & SWEETSER, *for Appellant.*SMITH & PARSONS, *for Respondent.*

MITCHELL, J.

In April, 1893, the defendant issued to George L. Reynolds an accident-insurance policy, whereby, "in consideration of the warranties and agreements contained in the application indorsed hereon," it accepted him as a member of the company, "and subject both to the conditions, agreements, and limitations herein contained, and to all conditions indorsed hereon," insured him against the effects of bodily injuries caused solely by external, violent, and accidental means in various sums, according to the nature and extent of the injury, in case it did not result in death; but

If such injury alone shall result in the death of the insured, within ninety days thereafter the company will pay \$5,000 to Eva T. Reynolds, his wife, if surviving.

Among the conditions printed on the back of the policy were the following:—

The application for membership is made a part of this contract, and printed thereon. Fraud or concealment in obtaining membership \* \* \* shall

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\* Decision rendered, June 23, 1897. Syllabus by the Court.

make this contract and insurance void. The provisions and conditions aforesaid \* \* \* are conditions precedent to the insurance hereof, and to its validity and enforcement.

Reynolds' application for membership, signed by him, stated that: "Membership to be based upon the following statement of facts, which are warranted by me to be true and complete." This application was all printed, except Reynolds' answers to the questions propounded to him, and his signature. It contained seventeen questions to be answered by the applicant, five of which required categorical answers of "Yes" or "No." The sixteenth question was, "Have you ever had paralysis, or fits of any kind, or are you subject to or affected by any bodily or mental infirmity, or have you suffered the loss of a limb?" It appeared that the answers were all in the handwriting of an agent of the defendant who took Reynolds' application, but who had no personal recollection of the transaction at the time of the trial. The answers to the questions requiring categorical answers, including the sixteenth, were indistinctly written, all of them appearing to consist of the letter "n" followed by a part of the letter "o." None of them had any resemblance to the word "Yes," and, as suggested by the trial judge, we think "an inspection of the application would satisfy any disinterested person that there was no ambiguity as to the answer to the inquiry about fits,"—that it was clearly intended for the word "No," although indistinctly written. This application was forwarded to the company, which executed the policy, and attached to the back thereof, with mucilage or some similar substance, a copy of the application, and forwarded the same to the insured, the original application being retained by the company. The instrument attached to the back of the policy was an exact copy of the original application, except that the categorical answers to the five questions referred to, including the sixteenth, were very clearly and distinctly written "No." The policy, with this copy of the application attached, was retained by the insured in his possession, without objection, so far as appears, until his death, over three years afterwards. About the last of April, 1896, the insured, while driving a team attached to a load of lumber along a country road, from some cause that can only be conjectured, fell off the wagon, and was run over by one of its wheels, and thereby received injuries from which he died almost immediately. His widow, as the beneficiary, brought this action on the policy. One of the defenses interposed by the defendant was misrepresentation and concealment of the deceased in obtaining membership, and especially misrepresentation and falsehood in his answer to the sixteenth question in the application already referred to. The evidence

is uncontradicted that the deceased was, at the time he made the application for insurance, and for some years before had been, and up to the time of his death continued to be, subject to quite severe epileptic fits at longer or shorter intervals. Upon the foregoing state of the evidence, when plaintiff rested, the court, on motion of the defendant, dismissed the action.

1. The first and main contention of the plaintiff's counsel is that the application for membership was not "indorsed" upon the policy as therein provided, and therefore it is no part of it, and the defendant cannot claim by way of defense the benefit of anything contained in the application. His claim is that "attached" is not "indorsed;" that the latter word means written or printed upon the back of the same paper upon which are written or printed the terms of what is popularly called the "policy." We cannot agree with counsel. The word "indorsed," as used in this policy, is not to be construed in the technical sense in which it is used in the law merchant as applied to bills of exchange or promissory notes, where it means written on the bill or note itself, but in the more primitive and popular sense of something written or printed upon or attached to a document, upon the opposite side of which something else had been previously written or printed. Where an application is made a part of the policy, provisions in the policy for incorporating the application into the policy or attaching it thereto, or statutes requiring this to be done, have for their object the protection of both the insurer and the insured against controversies growing out of alleged fraud or mistake in the statements made in the application. These applications are usually filled up by an agent of the insurer. Although correctly filled up according to the answers given by the applicant, yet, when a loss occurs, the insured or his beneficiaries may claim that correct answers were given, but not correctly inserted in the application. On the other hand, although correct answers may have been given, they may have been, by mistake or fraud, incorrectly stated in the application, and after the death of the insured his beneficiaries may be confronted with it as a ground of avoiding the policy, when it is no longer possible to prove its inaccuracy. But if a copy of the application is in some way attached to or inserted in the policy delivered to the insured, he may always, by reference to it, fully ascertain its contents, and all the terms and conditions of his contract, and, if any of his alleged answers are incorrectly stated, he may repudiate them, and demand their correction. On the other hand, if he retains the policy without objection, he will be deemed to have approved of it, and accepted it as correctly stating his answers, so that neither he nor his beneficiaries



can say that the answers were inserted incorrectly, and without his knowledge. Hence the important and essential thing is not how, or in what particular manner, the application is attached to or contained in the policy, but that it shall be contained in or attached to it so as to furnish to the insured full knowledge of its contents by reference to the policy and the documents physically connected with it. Therefore in statutes, as in Pennsylvania, Iowa, and Wisconsin, containing provisions having this same general object, we find the expressions, "contain copies," "attach to such policy or indorse thereon," and the like, used indiscriminately, indicating that the particular manner of attaching the application to the policy was deemed unimportant so long as it was in fact attached to, indorsed upon, or contained in it. We are, therefore, of opinion that attaching the copy of the application to the back of the policy was a substantial compliance with the provisions of the policy, so as to make the former a part of the latter.

2. It is contended that, in any event, the court erred in dismissing the action; that the answer in the original application was so far illegible as to render it ambiguous, and that the court should have left it to the jury to determine as a question of fact what the answer was as written. Conceding, for the sake of argument, that the answer in the original application was so far illegible as to leave in doubt what it was, the defendant had translated or interpreted it to the insured in the copy which it attached to the policy, and delivered to him. He retained it for three years without objection or suggestion that it did not contain his true answer to the question; and by so doing he must be deemed to have approved of it, and accepted it as his answer. The consequences of that approval and acceptance cannot now be avoided after his death. To permit this to be done would be to defeat, so far as the insurer is concerned, the very object of the provision for indorsing or attaching the application to the policy. Upon the evidence there was no question of fact to submit to the jury. It was conclusively established that the answer of the deceased that he was not subject to fits was untrue, and there can be no doubt that the matter of the misrepresentation was material, and increased the risk of loss, and therefore avoided the policy. The action was properly dismissed on that ground. It therefore becomes unnecessary to consider the other questions discussed by counsel. Order affirmed.

## SUPREME COURT OF MINNESOTA.

HAMBERG

vs.

ST. PAUL FIRE &amp; MARINE INS. CO.\*

Plaintiff's evidence on the trial, and his examination before a notary, taken after a loss, pursuant to the terms of the insurance policy, related to the same matters, and most of the statements made on the one occasion are mere repetitions of those made on the other, but there were several material contradictions and discrepancies. Defendant offered in evidence the whole written examination, which was very long, and, when the offer was refused, proceeded to offer separately each question and answer, which was refused. *Held* no error; it was the duty of counsel to pick out and offer only those portions which contradicted in some degree the evidence so given on the trial.

Expert evidence as to whether a certain quantity of goods in a certain room could have burned up without destroying the floor, *held* incompetent.

Evidence *held* sufficient to sustain the verdict.

A provision in an insurance policy, providing for submitting the amount of loss to arbitration, is valid; but *held*, the insurer waived this provision by denying its liability, and telling the insured, in substance, that if he got any insurance money he would have to recover it in court.

The policy provided that it should be void if the insured misrepresented material facts, or was guilty of fraud. *Held*, the court properly refused defendant's request to charge, in effect, that the slightest possible exaggeration of the amount or value of the property destroyed, made knowingly and willfully in the proofs of loss, avoided the policy.

The policy provided that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after loss. *Held*, such willful false swearing as to a material matter, on such examination of the insured after the loss, forfeited the whole sum due, and not merely the amount due on the particular item of damage, or for the loss of the particular article to which the false statement related.

The defendant pleaded, and gave evidence tending to prove, certain complete defenses. *Held*, the court erred in charging the jury that plaintiff was, in any event, entitled to recover a certain sum.

PALMER & DICKINSON, *for Appellant.*

C. D. & T. D. O'BRIEN, *for Respondent.*

CANTY, J.

This is an action on a fire-insurance policy to recover for a loss by fire. Plaintiff had a verdict, and from an order denying a new trial defendant appeals.

1. On the trial, defendant offered in evidence the two written examinations of plaintiff, each taken after the loss, at the instance of defendant, pursuant to provisions in the policy, and signed by the plaintiff before a notary public. The court, on plaintiff's objection, rejected the offer. Then defendant offered each written examina-

\* Decision rendered, May 24, 1897. Syllabus by the Court.

tion separately, and, this being refused, proceeded to offer separately each question and answer in each document. These offers were also refused, and all of these rulings are assigned as error. We are of opinion that the court was justified in refusing all the offers. The examinations in question were very long, and the statements taken thereon are largely a mere repetition of the evidence which plaintiff had already given on the trial. There are a number of discrepancies and contradictions between some of plaintiff's evidence as given on the trial and some of his statements made on these examinations, and defendant was entitled to introduce in evidence these particular statements, not merely for the purpose of impeachment, but as original evidence, for these statements are material admissions made by the plaintiff himself, which tended to contradict his evidence given on the trial. It was the duty of defendant, not of the court, to pick these statements out of the large amount of immaterial matter offered, and defendant could not evade that duty by offering separately each question and answer that appear on the thirty-four pages of the paper book covered by said examinations. Defendant's course was wholly unreasonable.

2. One of the firemen who was present at the fire was called as a witness by defendant, and asked the following question: "Q. I will ask you whether, in your opinion, based upon your experience as a fireman, that quantity of goods which is mentioned on those two pages there could have burned in that one room, without destroying the floor. \* \* \* I mean burned beyond recognition, without destroying the floor." The court sustained plaintiff's objection to this as incompetent. There was one hole burned in the floor, and it was otherwise injured. We are of the opinion that the matter was not a proper subject for expert evidence. So much depends on where the fire originated, the draft, the comparative inflammability of the floor and the articles in the room, the character of the carpet which protected the floor, and many other conditions too numerous to mention, that no expert should be allowed to answer the question asked.

3. The evidence is sufficient to sustain the verdict. The defendant did not object to plaintiff's giving in evidence the original cost price of the goods when purchased, instead of their value at the time of the loss. On none of the grounds stated by appellant can we hold that the evidence was not sufficient to make a case for the jury.

4. The policy provides that in case of a disagreement as to the amount of the loss the parties shall submit that matter to arbitration, one arbitrator or appraiser to be selected by each, the two to

select a third; and that no action shall be maintained on the policy until after full compliance with this provision. Neither party attempted to comply with this provision, and plaintiff contends that the same has been waived by defendant. Plaintiff testified that after he furnished proofs of loss, and submitted to said examination, he asked defendant's adjuster if it was going to settle up now, and he answered, "No; I ain't going to pay you any money till you go in the court and fight us;" that he told plaintiff to go ahead and sue. We are of the opinion that this is sufficient evidence of waiver: 2 Bid., Ins., § 1175. The adjuster was called as a witness for defendant, and denied that he had ever made any such statement as testified to by plaintiff as aforesaid. At the close of the evidence the defendant requested the court to charge the jury that plaintiff could not recover unless defendant had in some manner waived said provisions of the policy providing for such arbitration. The court refused the request, and, in effect, charged the jury that plaintiff is entitled to recover regardless of the existence of such provisions. This was error. These provisions of the policy are valid and binding unless waived: *Gasser vs. Sun Fire Office*, 42 Minn., 315; *Powers Dry-Goods Co. vs. Imperial Fire Ins. Co.*, 48 Minn., 388; *Mosness vs. Insurance Co.*, 50 Minn., 341.

5. The policy further provides:—

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstance concerning this insurance, or the subject thereof; \* \* \* or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Defendant requested the court to charge as follows:—

(4) If you find from the evidence that the plaintiff knowingly and intentionally, in the proofs of loss furnished by him to the defendant company, overstated or exaggerated either the amount or value of the goods and property which were destroyed or damaged by the fire, then your verdict must be for the defendant.

The refusal to give this request is assigned as error. According to this request, the slightest possible exaggeration of the amount or value of the property so destroyed or damaged would be sufficient to defeat plaintiff's claim. If plaintiff so exaggerated to the amount of a fraction of a cent, he cannot recover. Such is not the law.

6. Defendant's fifth request to charge is as follows: "(5) If you find from the evidence that the plaintiff knowingly and intentionally, in either of his examinations under oath taken before the notary public, Thompson, swore falsely to any facts which related to the amount of his loss, or the amount of his claim against the company, then, and in that case, your verdict must be for the de-

fendant." The court not only refused to give this request, but also charged the jury that if plaintiff on his said examination swore falsely as to one article covered by the insurance policy, it would not prevent him from recovering for other articles. This was error. Such willful false swearing avoids the whole policy: *Clafin vs. Insurance Co.*, 110 U. S., 81. The answer does not allege any such defense, and plaintiff urges that therefore this part of the charge is error without prejudice. There is evidence which would support a finding that plaintiff, on said examinations, did knowingly swear falsely as to material matters, with intent to deceive defendant; but, as this evidence was competent for other purposes, it is doubtful whether, up to the close of the evidence, plaintiff had, by his conduct consented to litigate any such issue. However that may be, the court, in its charge, submitted the question to the jury without objection from plaintiff. Then we must hold that plaintiff consented to litigate such issue; and when the question is submitted to the jury at all it must not be submitted by propositions of law which are in themselves erroneous.

7. The court also charged the jury that in any event plaintiff is entitled to a verdict for \$200. This is error. The defendant did not anywhere, either in the pleadings or evidence, concede anything of the kind. True, the defendant, in its answer, denied that plaintiff's damage by the fire exceeded the sum of \$200, but it alleged, and gave evidence to prove, other defenses on which it was entitled to have the jury pass, and which, if found in its favor, constitute a complete bar to plaintiff's recovery. This disposes of all the questions raised having any merit. The order appealed from is reversed, and a new trial granted.

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## SUPREME COURT OF KANSAS.

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ROCKFORD INS. CO. }  
vs. }  
WINFIELD.\* }

J., the agent of an insurance company, was the cashier of one bank, and the president of another. W., a dealer in grain and seeds, was indebted to the banks in an amount exceeding the value of the property in store, and she issued warehouse receipts to them, covering substantially all of it. J. wrote for W. a policy of fire insurance upon said property, and duly notified the company, but gave no information touching the relation of himself and the banks to the insured property. The risk was declined for

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\* Decision rendered, Jan. 8, 1897. Syllabus by the Court.

other reasons, and J. was so notified by mail, but he did not receive the notice until two or three days before the destruction of the property by fire, and he did not notify W. until after such destruction. W. had not actually paid the premium, but it was advanced by J., and, on the declaration of the risk, was passed to his credit by the company, and afterwards returned to him. *Held*, That on account of the dual relations of J., whereof W. had knowledge, the policy cannot be enforced against the company.

W. made only informal proof of the loss, and it is *held*, that, upon the facts stated, there was no waiver of formal proof by the company. Martin, C. J., dissenting.

Statement of facts by MARTIN, C. J.

On February 19, 1892, M. A. Winfield filed her petition against the Rockford Insurance Company, to recover \$2,000 and interest on a policy of insurance of date December 4, 1891, alleging the loss of the insured property by fire, January 23, 1892. The insurance in favor of M. A. Winfield was described in the policy as being

On her stock of implements, buggies, spring wagons, sewing machines, separators, steam engines, horse-power and machine fixtures, baled broom corn, baled hay, grain and seeds of all kinds, and such other merchandise as is usually kept in a grain and implement store and warehouse, her own or held by her in trust or on commission, or sold, but not delivered, all contained in the first story of the one and two-story stone and brick, metal-roofed building, situated on lot 1, block 35, New Chicago (now Chanute), Kansas: \$3,500. Other concurrent insurance permitted.

The policy was signed by the president and the secretary of the insurance company, and countersigned at Chanute, by J. O. Johnston, agent. Johnston was at the same time cashier of the Bank of Chanute, and president of the First National Bank of Erie. M. A. Winfield was largely indebted to said banks, and, to secure the claims, certain notes were deposited as collateral security, but the banks relied mainly upon certain warehouse receipts of the form following:—

No. ———. Chanute, Kansas, Nov. 3, '91. Received in warehouse at Chanute, Kansas, from the First National Bank of Erie, Kansas (or the Bank of Chanute, Kansas), five thousand bushels of prime flax seed, No. 1, subject only to the order hereon of the said bank, and the surrender of this receipt. No charges are to be made for the storage of this property, and it is understood that it is absolutely the property of the said bank, to be disposed of at their will and pleasure, and it is only in our possession for storage and safe-keeping. Loss by fire or heating at our risk. M. A. Winfield.

These receipts covered nearly all the grain and seeds in the warehouse at the time of the fire, and the indebtedness to the banks was in excess of the value of such grain and seed. Charles F. Prange was a dealer in agricultural implements, separators, horse-power, and machine fixtures, and for some years past he had kept his goods in the one-story part of the building, paying storage thereon to M. A. Winfield, and she insuring the property, as in this

instance, without any mention of the real ownership. Johnston did not advise the insurance company as to the nature of this business, and he made no mention of the fact that the banks of which he was an officer substantially owned all the grain and seeds in the warehouse. On the day that the policy was issued, Johnston made a report thereof to the company in the usual manner, and on December 24th he remitted to it the premiums on this and certain other policies, less his commissions. The risk was declined by the company December 21st, in a notification to the agent, who was credited with the premium, and ordered to cancel the policy without delay; but the direction upon the envelope was to "Joe Johnston, Agt., Chanute, Kansas," and this misdirection probably led to its detention, for a time, in the post office at Chanute, for Johnson had not received it on January 6, 1892, when he started on a trip East; but the letter followed him to New York City, where it was delivered to him by the Chemical National Bank on January 20th, or 21st. He opened it hastily, with other mail there, and testifies that he put it into his pocket, and forgot it, until he was on his way back as far as Kansas City, about the last of January, when he heard of the loss of the property by fire. Soon after his arrival at Chanute, and about February 1st, he was called upon by special agents representing the Rockford Company and two others, which had issued policies amounting to \$2,500, in addition to that held by the Rockford Company. These special agents made partial inquiry as to the loss, and went away, but returned again about two days thereafter, and their investigation was resumed. They requested from S. Winfield, the husband and agent of M. A. Winfield, an itemized statement of the property destroyed. He explained to them that all his books of account, weigh-books, etc., had been destroyed by the fire, and that it was impossible to make an exact statement, especially as to the grain and seeds. They then told him that the company was not liable for the Prange property, and that they would not consider the loss as to the grain and seeds, unless it was eliminated. At length, on or about February 6th, Winfield delivered to them a written document, directed to them, containing an itemized statement of the quantity and value of the different kinds of grain, seeds, machinery, and property destroyed by the fire; the amount for grain, seeds, etc., being \$2,721.95, and that for the machinery being \$2,977.27, or a total of \$5,699.22. This list, after the direction to the several companies, was headed by the following words:—

Gentlemen: I hereby submit to you the following itemized statement of my loss of property insured by you, which occurred by fire January 23, 1892.  
[Signed] M. A. Winfield.

The document was not verified, and there was no certificate of a magistrate or other officer that he verily believed the assured had, without fraud, sustained loss of the property insured to an amount certified by such magistrate, as required by the terms of the policy, and the foregoing was the only proof of loss made by the assured. On the night of February 6th, said special agents wrote a letter, of which the following is a copy:—

Chanute, Kansas, February 6th, 1891. To M. A. Winfield, Chanute, Kas.: You are hereby notified that the statement presented by you through Samuel Winfield (who represents himself to be your attorney in fact), and purporting to show a claim against the companies represented by us, is not sufficient, and cannot be accepted by us. From it we are unable to ascertain from what source or to what extent in amount your purchases have been, or what the amount of your sales or consignments were at any time during the year 1891, and prior to the date of the alleged fire, you having alleged that everything in the nature of data relating thereto for the year 1891, and up to and including the date of the alleged fire, has been destroyed. We are not in a position to admit or deny liability at this time. You are hereby requested, as required by the printed conditions of our policies, to produce certified copies of all bills or other evidence of your purchases, either for cash or on credit, or of any property consigned to you on commission from any and all parties with whom you have transacted business during the year 1891, and up to and including the date of the alleged fire, and alleged to have been destroyed or damaged; also, certified copies of all shipments, or consignments, or sales made by you during the year 1891, and up to and including the date of the alleged fire; also, certified copies of your general banking account with any bank or banks, showing the amounts drawn by you, by checks or otherwise, for the purchase of any property during the year 1891, and up to and including the date of the fire; and any other data or evidence which you have or can procure, bearing upon your alleged claim. In making these requests, it is understood we waive none of the conditions of our policies, but shall expect a strict compliance with the printed conditions thereof on your part. The Liverpool & London & Globe Ins. Co., by M. W. Van Valkenburg, Sp. A. The Milwaukee Mechanics' Ins. Co., by M. W. Van Valkenburg, Sp. A. Rockford Ins. Co., by F. T. M. Wenie, Sp. A.

This letter was brought by one of the special agents to Topeka, whence it was forwarded to M. A. Winfield, by registered mail, and she received it February 8, 1892. Her husband and agent testified that a compliance with the request contained in said letter was impossible, because the grain and seeds were purchased in small quantities, from a great number of persons, residing in several counties, and that all accounts of these transactions were destroyed by the fire. On April 27, 1892, each of said banks commenced an action against M. A. Winfield upon said indebtedness, and they proceeded by garnishment against said insurance companies; and in July, 1892, the Bank of Chanute recovered a judgment for \$3,069.31, and the First National Bank of Erie obtained a judgment for



\$1,189.50. This cause was tried before the court and a jury at November term, 1892, and the plaintiff recovered a judgment for \$2,092. A motion for a new trial being overruled, the defendant insurance company prosecutes its petition in error in this court.

JONES & MASON, *for Plaintiff in Error.*

J. L. DENISON, *for Defendant in Error.*

MARTIN, C. J. (after stating the facts.)

1. When the policy was written, J. O. Johnston was the agent of the insurance company, the cashier of the Bank of Chanute, and the president of the First National Bank of Erie. The assured was indebted to these banks in a sum exceeding the value of all the grain and seeds in store, and these were substantially covered by the warehouse receipts held by the banks. This condition of affairs was not disclosed to the insurance company by its agent. So far as it related to the grain and seeds, the policy was issued for the use and benefit of these banks. It is an elementary doctrine, subject to certain exceptions not applicable here, that an agent cannot, in the same transaction, represent two principals whose interests are conflicting or antagonistic. The law has too much regard for the infirmities of human nature to sanction such a double relation. When an insurance company employs an agent to solicit business for it in a particular locality, it has a right to expect that he will act only in its interest in that business. He would not be authorized to write a policy upon his own property, for as to this he would not be the agent of the company, and it would not be bound thereby, unless, being fully informed of the facts, the principal officers of the company should accept the risk: Story, Ag., §§ 10, 210; May, Ins., § 125. In *New York Cent. Ins. Co. vs. National Protection Ins. Co.* (14 N. Y., 85, 91), it is said: "It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud." The purpose of the doctrine is to remove the temptation to fraud and imposition on the part of those occupying fiduciary relations, by divesting them of the legal power to make such fraud or imposition effective. In this case the insurance company declined the risk, but the assured was not advised of the declination until after the loss, and this may have been the result of the negligence of the company in misdirecting the letter. Had Johnston been the agent of the company, in fact and in law, as to this transaction, the result of the delay in notification should have been visited upon the company; but, as to this insurance, Johnston did not sustain that

relation, and the company, not accepting, but declining, the risk, was not bound by the terms of the policy. See, further, *Bentley vs. Insurance Co.*, 19 Barb., 595; *Spare vs. Insurance Co.*, 19 Fed., 14; *Zimmermann vs. Insurance Co.* (Mich.)

2. It was the duty of the assured, under the policy, to make proofs of her loss substantially as prescribed therein; and this she failed to do, although she had ample time after the receipt of the letter of date February 6th, and before the expiration of the thirty days from the loss. Indeed, she brought suit within less time, although the policy provided that the loss should be payable sixty days after the proofs should be received at the office of the company. The letter distinctly informed the assured that the statement presented was not sufficient, and could not be accepted, and that the special agent waived none of the conditions of the policy, but would expect a strict compliance with the printed conditions thereof; yet the assured did nothing further towards a compliance with the terms of the policy and the demands of the insurance company. The reasons assigned by the assured for noncompliance are deemed insufficient by a majority of this court, although the evidence tends to show, and, for the purpose of sustaining the judgment should be held to prove, that the special agent declined to consider the loss, unless the claim for the Prange implements and machinery should be detached or eliminated; and a compliance with the requirements specially pressed in the letter was impracticable, if not entirely impossible. The writer is of opinion that the claim of the assured ought not to be defeated on this ground. The special agents called to investigate and adjust the loss within little more than a week after the fire, and before they had any right to expect formal proofs of loss. They then required an itemized statement, which was made during the investigation. It was not verified, and there was no certificate of a local magistrate. If the assured had been able to give the information requested in the letter as to purchases and shipments for 1891, and up to the time of the fire, yet this would have been of no value without knowing the quantities and the kinds of grain and seeds in the warehouse at the beginning of 1891. The ultimate fact was the amount of each kind of grain and seeds in store at the time of the fire, and not when or how it was placed there, and partial information as to the facts requested would tend to obscure, rather than to disclose, the truth. In respect to the verification and the certification, the statement of loss was informal; but as the special agents had investigated the matter on the ground during the greater part of a week, and, in writing the letter, made no special objections for these reasons, but, on the contrary,

required information which the assured could not give, and as they refused to consider the loss unless the claim for the greater part of it was abandoned, the writer is of opinion that formal proofs should be held to be waived, and that the rights of the assured ought not to be sacrificed upon a technical insistence, devoid of substantial merit. The judgment must be reversed, and the cause remanded for a new trial.

Johnston and Allen, JJ., concurring. Martin, C. J., dissenting from second proposition of the syllabus, and from the corresponding portion of the opinion.

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## SUPREME COURT OF NEBRASKA.

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OMAHA FIRE INS. CO. }

vs. }

CRIGHTON.\*

In a suit on a fire-insurance policy to recover the value of a large number of insured articles destroyed, the court permitted jurors during the trial to make memoranda of such articles, and the value placed thereon by the evidence. *Held*, That the court did not abuse its discretion.

The insured was unable to read and write, and the representations made by him to obtain the insurance were reduced to writing by the agent of the insurance company. *Held*: (1) Whether the insured made the representations written in the policy was a question of fact for the jury; (2) That the insured was not bound by any representation written in the application which he did not make.

Evidence examined and *held* to sustain the finding of the jury (1) that the insured did not represent that his household goods were, at the date of his application for insurance, in the building mentioned in said application; (2) That there was no representation in the written application that said goods were at said time in said building.

W. H. THOMPSON and J. FAWCETT, *for Plaintiff in Error*.

W. A. PRINCE, *for Defendant in Error*.

RAGAN, C.

This is an action on a fire-insurance policy, brought to the District Court of Hall County, by Elias Crighton against the Omaha Fire Insurance Company (hereinafter called the "Insurance Company"). Crighton had a verdict and judgment, and the insurance company prosecutes here a petition in error.

1. Of the errors assigned by the insurance company, we notice the following: On the trial of the case, at the request of counsel

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\* Decision rendered, January 8, 1897. Syllabus by the Court.

for Crighton, the court permitted the jurors to make memoranda of the various articles testified to have been destroyed by the fire. This is the first assignment argued which we notice. We cannot say that this action of the court was prejudicial to the insurance company. A large number of articles were testified about. The number of these articles, and the values placed upon them, it would be almost impossible for the average man to remember without a memorandum; and we think that it was a matter resting in the discretion of the trial court to permit, or not, the jurors in this case to make the memoranda complained of. We are aware that in *Cheek vs. State* (35 Ind., 492), it was held that a jurymen must register the evidence on the tablets of his memory, and not otherwise. But that was a murder trial, and during its progress two of the jurors made notes of the evidence. To this the defendant on trial objected at the time, and the jurors were instructed by the court to desist from making notes. This they refused to do, and the supreme court said that their conduct was sufficient to entitle *Cheek* to a new trial; but the case was not reversed because of this conduct of the jurors. But in *Railroad Co. vs. Miller* (71 Ill., 463), it was said that a juror, of his own motion, might make memoranda of evidence, or of points in the argument, but the court said that a juror should not do this at the instance of counsel. We do not lay down any rule upon the subject, but content ourselves with holding that in this case the district court did not abuse its discretion in permitting jurors to make memoranda of articles testified about during the progress of the trial.

2. Crighton made a written application to the insurance company for the policy issued. This application, so far as material here, was as follows:—

Application of Elias Crighton ..... for insurance against loss or damage by fire or lightning ..... according to the specifications below for the term of five years from the 23d of May, 1893 :—

On one-story, shingle-roof frame building occupied by insured as dwelling.....	Nothing
Household furniture while in said dwelling.....	\$300
Farm machinery while on farm.....	480
Horses and mules, wherever they be.....	600
Hay and grain on cultivated land.....	25
Hay press and horse power on premises.....	175

—situate on the southwest quarter of section nine (9), township ten (10), range eleven (11).

As a defense to the action, the insurance company pleaded that, by this application, Crighton represented to it that he was the owner of the one-story frame, shingle-roof building situate on the land described, and that the household goods insured were then in said

building; that such representations were false, made by Crighton for the purpose of deceiving the insurance company, and were believed in and relied upon by it. The reply of Crighton met this defense by denying that he represented that he was the owner of the building situate on the property described, and denying that he represented to the company that the household goods were then in said building, but alleged that he was illiterate and unable to read and write; that the agent of the insurance company wrote the application; and that he (Crighton), told him at the time that the household goods were then in some tents, but that in a few days he intended to move them into the house on the piece of land mentioned. On this issue the court instructed the jury to the effect that, since the oral statements of the application for insurance were reduced to writing by the agent of the insurer, parol evidence was admissible to show that the application did not correctly recite the oral representations made. The giving of this instruction is the second assignment of error argued here. The court did not err in giving this instruction. In *Insurance Co. vs. Jordan* (29 Neb., 514), it was held that where the insured was unable to read and write, and the application was made out by the agent of the insurance company, if the agent wrote in the application statements different from those made by the insured the latter was not bound thereby.

3. A third assignment is that the court erred in giving paragraph No. 6 of its instructions. The substance of that instruction was that if the insurance company's agent had knowingly written in the application statements not made by the insured, and was now insisting upon these representations as a defense to the policy, the insurer's conduct amounted to an attempted fraud, and it was a question of fact, for the jury to determine from all the facts and circumstances in evidence, whether the application contained the representations made by the insured. The criticism made upon this instruction is that there was no evidence in the case to which it could be applied. But this is a mistake of counsel. The evidence is undisputed that the insured was unable to read and write; that he made his representations and statements orally to the agent of the insurance company; and that such agent made out the application already alluded to; and the insured testified positively that he told the insurance agent that the household goods insured were at that time in tents, and not in the building mentioned in the application, but that he intended, in a few days, to remove such household goods into that building. The evidence further shows that he did remove his household goods into that building, and that they were there long before the fire occurred, and the application shows on its face

that the insured did not ask or obtain any insurance on the building; and it would require a strained construction to make the application a representation of the insured that he owned that building, or that the household goods were then in it. The language of the application is that the insured desires insurance upon the household goods while they are contained in the building, but there is in the entire application no express representation either that the insured owned the building, or that the goods were then in it.

4. Another argument is that the verdict of the jury is contrary to instruction No. 1 given by the court at the request of the insurance company. There is no merit whatever in this contention. By that instruction the court told the jury, in substance, that if they found from the evidence that the insured, in his application, represented to the insurance company that his household goods and furniture were then in the building, and that the building was then occupied by him, and that he made these representations for the purpose of obtaining the insurance on the household goods and other insured property; that the insurance company believed in and relied upon these representations; and that they were false,—then they should find for the insurance company. By its verdict the jury found that the insured did not represent in his application that he was the owner of the building, and did not represent that the household goods were then in the building, and the evidence supports this finding. The instruction properly submitted the issue to the jury, and its finding is not contrary either to the evidence or the instruction.

5. The insurance company requested the court to instruct the jury as follows: "You are instructed that the application and policy introduced in evidence should be considered together, as forming the contract sued on in this case." The court modified it as follows: "And should be both considered together, in arriving at your verdict, in connection with all the other evidence in the case,"—and, as thus modified, gave the instruction. This action of the court is assigned for error. We do not think it was. If the court had given the instruction without the modification, it would have been error, as it would, in effect, have told the jury that they should determine what contract existed between the insured and the insurer by considering only the policy and the written application, whereas one of the issues in the case was whether the application signed by the insured was the one he made,—whether the representations in that application were the representations he made.

6. Another argument is that the court erred in instructing the jury as follows: "To constitute fraud, a knowledge of the misrep-

representations must rest with the party making it, and the representations must be made with the intention that the other party shall act upon it, and it must also appear that the other party did act upon it, to his injury." The criticism upon this instruction is directed to the last three words in it, to wit, "to his injury." We think the criticism without merit. In order for the representation to be actionable, it must have been made with reference to an existing fact; it must have been false; the party must have relied and acted upon it. The words "to his injury" add nothing to the instruction, as applied to the facts in this case. If the representations made by the insured in this case were false, and if they were relied and acted upon by the insurance company, they were acted upon to its injury, because by acting upon them it issued the policy, which it would not have issued had it been aware of the falsity of the representations.

7. Finally, it is insisted that the verdict is not supported by sufficient evidence. We think it is, and we further think that the entire defense to this action is technical, in the highest degree. The whole defense is predicated upon the fact that at the time the policy was issued the household goods insured were not at that moment, or that day, in the dwelling mentioned in the application. The evidence shows that these household goods were not destroyed by fire. They are not the subject-matter of this action, and long before the fire occurred the household goods insured were placed in the house mentioned in the application, and the literal interpretation of the application and the policy is that the insurance company insured these household goods only while in the building. The judgment of the district court is right, and is affirmed. Affirmed.

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SUPREME COURT OF SOUTH DAKOTA.

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ANGIER ET AL.

vs.

WESTERN ASSURANCE CO.\*

The statute of South Dakota provides that all defects in proofs of loss which the insured might remedy and which the insurer fails to specify to him without unnecessary delay, are waived.

*Held*, That a delay of eighteen days after their receipt and five days after they were due when unexplained is a waiver of the defects of proofs of loss.

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\* Decision rendered, June 16, 1897.

The fire resulted from carelessly pouring kerosene oil into a stove to start a fire already lighted. The company wrote that under such circumstances, if true, the company denied all liability.

*Held*, That this was a waiver of further proofs of loss.

*Held*. That such careless use of kerosene in a single instance was not a violation of a provision voiding the policy if the hazard were increased without knowledge of the insured.

Where there was no request to submit the facts to a jury, but a motion to direct a verdict, the party making the same cannot complain that the facts, which seemed undisputed, were not submitted.

T. T. FAUNTLEROY and C. S. PALMER, *for Appellant*.

U. S. G. CHERRY, *for Respondents*.

CORSON, P. J.

This is an action upon a fire-insurance policy. A verdict was directed for the plaintiffs, and the defendant appeals. The complaint is in the usual form, and contains, among other things, the following allegations: "That on or about the 24th day of April, 1895, the said defendant, by and through his duly-authorized officers and agents, denied and disclaimed all liability whatsoever under said policy, and refused to pay the same, or any part thereof. \* \* \* That, immediately after said fire and destruction of said property, the plaintiffs gave said defendant due notice, and thereafter made, executed, and delivered to the defendant due and regular proof of said fire and loss, which proof was made and delivered on the 8th day of May, A. D., 1895, and was in words and figures following, to wit:" The answer of defendant admits that proofs of loss were furnished, but denies that the plaintiffs complied with the terms and conditions of said policy; and it alleges that, upon receipt of proofs of loss, "it immediately objected to the same, and notified the said plaintiffs that they were insufficient, and did not comply with the terms of the said policy, in that they did not state the knowledge and belief of said insured as to the origin of said fire, and that the plaintiffs refused and neglected to furnish other proofs. And, for a second defense to said cause of action, the defendant alleges, in effect, that the plaintiffs caused the loss of the building by using kerosene oil in making a fire upon the insured premises, and that, by reason of said unlawful acts of the said plaintiffs, the hazard and damages to said property, being destroyed by fire, was greatly increased by said means and acts, and that it was by reason of such unlawful acts that the building was destroyed by fire. It will thus be seen that the defendant bases its defense to plaintiffs' action upon two grounds, namely, failure to furnish proper proofs of loss, and increase of hazard by reason of the use of kerosene oil on the premises in the manner detailed in the answer. The two questions will be considered in the order above named.



The proofs of loss were forwarded within the proper time, and stated that "a fire occurred on the 24th day of March, A. D., 1895, \* \* \* and originated as follows, viz.: Caught from stove." The policy provides that proofs of loss shall state "the knowledge and belief of the insured as to the time and origin of the fire." Appellant contends that this statement was insufficient. Plaintiffs make three answers to appellant's contention: (1) They insist that the statement in the proofs of loss was sufficient. (2) That the plaintiffs had, prior to the proofs of loss being forwarded, made a full and complete statement of all the facts relating to the origin of the fire to the duly-authorized agent of the defendant. (3) The defendant had waived proofs of loss by the declaration of their authorized agent, that the company absolutely refused to pay the loss, and by failure to notify the plaintiffs, within a reasonable time after the receipt of the proofs of loss, that the defendant objected to them. The building was destroyed by fire, as will be seen, March 24, 1895, and the proofs of loss were forwarded by mail May 8, 1895, and were received by the defendant May 10th. The defendant made no objection to these proofs until May 28th, eighteen days after their receipt, and five days after the expiration of the sixty days in which proofs were to be furnished. Section 4178, Comp. Laws, provides: "All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived." There was no evidence offered to explain the delay in making the objection to the proofs in this case, and a delay of eighteen days, unexplained, must be held to be unnecessary delay. The defect, if any, in the proofs, was waived, and the proofs were properly admitted in evidence. Again, it clearly appears, both from the evidence of plaintiff Stevens and the letter calling for a more specific statement as to the origin of the fire, that the authorized agent of the defendant had denied the liability of the defendant for the loss. In the letter of May 28th, Mr. Crandall, writing for the company, says:—

You are further advised that if the verbal statement made to me, in the presence of Mr. Allen and his clerk, regarding the origin of the fire, is true, to wit, "that it originated by pouring kerosene oil into the stove in which a fire had been started," then and in that case this company denies any and all liability under said policy, and you can commence your action to recover as soon as you think best.

The company, therefore, had full knowledge of the origin of the fire, and also, by its denial of liability, waived further proofs of loss.

The second defense is based upon the following stipulation in the policy:—

This entire policy shall be void \* \* \* if the hazard be increased by any means within the control or knowledge of the insured, \* \* \* or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, \* \* \* phosphorus or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for light, and kept for sale, according to the law), but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light.

Section 4175, Comp. Laws, provides:—

An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.

The facts in regard to the origin of the fire are thus stated by the plaintiff Stevens on cross-examination, and are undisputed: "I took a tomato can, maybe two-thirds or half full of kerosene oil, and put some of the oil on the kindling. I turned to strike a match to set it afire. I had on a pair of celluloid cuffs, and the flame caught on my cuffs, and in a moment they blazed up. I had the can in my left hand, and it fell on the floor, and the fire caught in the stove the same time. I rushed out and tried to get my coat off. Q. And the whole thing caught fire, and burned up? A. Yes. Q. How much oil would that tomato can hold? A. A pint or so. \* \* \* Q. You put the oil on the wood, and struck a match, for the purpose of lighting this coal oil? A. Yes, sir. Q. And it fell on your celluloid cuff you say? A. Yes, sir. Q. And that set fire to the cuff, and the fire fell down on the oil in the stove? A. Yes, sir." As will have been observed, there is no clause in the policy prohibiting the plaintiff from keeping kerosene oil upon his premises, to the extent of five barrels, United States standard, and there is no evidence that the oil used by plaintiff was below the prescribed standard. The quantity on hand at the time of the fire was less than one gallon. In view of the stipulation in the policy, the provisions of the statute, and the evidence, it is somewhat difficult to comprehend the theory of the defendant. It seems to be contended that the kerosene oil, used in the manner testified to by the plaintiff Stevens, increased the hazard, and therefore relieved the defendant from liability. Undoubtedly, the use of the kerosene in the manner detailed by the witness was a careless and negligent act, but it was not such an act as is understood by the term "increase of hazard." The stipulation of the policy is that "the entire policy \* \* \* shall be void \* \* \* if the hazard be increased by any means within the control or knowledge of the insured." Keeping kerosene upon the premises in no manner violated the stipulations of the parties, and

could not therefore be held to constitute an increase of the hazard, within the meaning of the policy. The term "increase of hazard" denotes an alteration or change in the situation or condition of the property insured which tends to increase the risk. These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void, under the stipulations therein contained: *First Congregational Church vs. Holyoke Mut. Fire Ins. Co.*, 158 Mass., 475. In that case the Supreme Court of Massachusetts held the use of naphtha (the use or keeping of which on the insured premises was prohibited by the policy) for a period of a month, in burning paint from the outside of a wooden church, and causing the burning of the church, constituted such a change or alteration, and was sufficiently long continued to be deemed a change in the situation or circumstances affecting the risk. In *Lyman vs. Insurance Co.* (14 Allen, 329), three weeks was held sufficient.

In the case at bar the contention of counsel for appellant that the use of kerosene at only one time, in the manner detailed, constituted an increase in the hazard, in the sense in which that term is used in the policy, is not tenable. It, as we have said, constituted negligence on the part of the plaintiffs, but did not increase the hazard in the sense that the term is used in the policies of insurance. But as we have seen, under the provisions of our statute, neither the negligence of the insured, nor of his agents or others, exonerates the insurer from liability: *Comp. Laws*, § 4175. This section of the Civil Code, as appears from the revisor's notes to the corresponding provision of the Code prepared for the State of New York, is based largely upon *Mathews vs. Insurance Co.*, 11 N. Y., 9; *Gates vs. Insurance Co.*, 5 N. Y., 469; *Walker vs. Maitland*, 5 Barn. & Ald., 171; *Waters vs. Insurance Co.*, 11 Pet., 213. In the latter case the Supreme Court of the United States, speaking by Mr. Justice Story, says: "This question has undergone many discussions in the courts of England and America, and given rise to opposing judgments in the two countries. As applied to policies against fire on land, the doctrine has for a great length of time prevailed that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies, and, as such, recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies containing special exceptions, and not excepting this; or it may have been, and more probably was, founded upon a more general ground, that, as the terms of the policy covered risks by

fire generally, no exception ought to be introduced by construction, except that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect, or inattention of the members of the family." In *Gates vs. Insurance Co.*, supra, the Court of Appeals of New York use the following language: "But another question arises upon the evidence offered, namely, whether a loss occurring from the gross carelessness and negligence of the insured, his servants, or others, is within this policy. There can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence as that of his servants and others; and therefore the simple fact of negligence in either, however great in degree, has never been held to be a defense in such a policy." The case of *Insurance Co. vs. Glasgow* (8 Mo., 713), was a case closely analogous to the one at bar. The sixth plea interposed to the declaration was as follows: "The sixth plea avers that, just before the loss in the declaration mentioned, the plaintiffs, their servants and agents, caused the said steamboat to be put on a dock by means of which dock the boat was raised out of and above the surface of the river, and so continued until the loss; and, while the boat was in that situation, the plaintiffs, their servants and agents, caused a fire to be made and kept in a stove on the deck of the boat, and caused large quantities of picked oakum to be placed and spread upon the deck of the boat, about and near the fire so made and kept by the plaintiffs, their servants and agents, whereby and by means whereof the peril and danger of consuming, burning, and destroying said boat by fire was enhanced and increased, without the knowledge, privity, or consent of the defendants, contrary to the tenor and effect, true intent and meaning of the policy." In one or more of the other pleas it was alleged that the oakum so placed near the stove caught fire, and thereby caused the burning of the boat. The court held that the facts stated in the several pleas constituted no defense to the action. In that case the prior decisions were fully reviewed in a very able and exhaustive opinion. Since the decision of *Walker vs. Maitland*, supra, in England, in 1821, and *Waters vs. Insurance Co.*, supra, in this country, in 1837, the doctrine laid down in those decisions, as applied to fire insurance, has been regarded as the law: *Billings vs. Insurance Co.*, 20 Conn., 139; *Perrin's Adm'rs vs. Insurance Co.*, 11 Ohio, 147.

The facts in the case at bar were undisputed, and we think the court properly directed a verdict in favor of the plaintiff. The defendant suggests that, upon the question of whether or not there was an increase of hazard, the case should have been submitted to the jury, but we are of the opinion that there was no evidence to submit to the jury upon this question. If, however, we are wrong in this conclusion, there was no request on the part of defendant that the case should be submitted to the jury; and, having moved the court to direct a verdict in its favor, it submitted the case to the court upon both fact and law, and it cannot now be heard to say that there were facts to be submitted to the jury: *Yankton Fire Ins. Co. vs. Fremont E. & M. V. R. Co.* (S. D.); *Grigsby vs. Telegraph Co.*, 5 S. D., 561. The judgment of the circuit court and order denying a new trial are affirmed.

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SUPREME COURT OF IOWA.

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GREENLEE ET AL.

*vs.*

NORTH BRITISH & MERCANTILE INS. CO.\*

Mechanics' liens, filed before the policy was issued, were afterwards reduced to judgment and the property sold, but the redemption period had not expired at the time of fire.

*Held*, That they still remained mere liens, and there was no change of interest within the policy, nor is such sale an increase of hazard.

McVey & McVey, *for Appellant*.

J. J. Mosnat, *for Appellees*.

DEEMER, J.

The property insured was a store and opera house building and fixtures, situated in the city of Belle Plaine; and the policy contains these, among other, conditions:—

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the hazard be increased by any means, within the control or knowledge of the insured, \* \* \* or if the interest of the insured be other than unconditional and sole ownership, \* \* \* or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured take place in the interest, title, or possession of the subject of

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\* Decision rendered, May 25, 1897.

insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise.

At the time the policy was issued, a mechanic's lien had been filed against the property by Robert Smith, who claimed \$622.60, and another by J. F. Atkinson, who claimed \$9,473.68. Thereafter, and before the loss, these mechanics' liens were reduced to judgments, and foreclosure decrees and an execution had issued upon the Atkinson judgment, and the property was advertised and sold, and a certificate issued to Atkinson as purchaser. The period for redemption had not expired, however, at the time of the fire. The defendant pleaded that these foreclosures and the sale of the property to Atkinson constituted a breach of the conditions of the policy above set out. By the terms of the policy, the loss, if any, was made "payable to J. F. Atkinson, as his interest may appear."

Appellant claims in argument that the judgment and decree of the court foreclosing these mechanics' liens, and the sale of the property under the Atkinson decree, come within the express terms of the policy, forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise." Now, it is clear that the judgment and foreclosure proceedings did not change either the title or possession of the property. During the period for redemption, Greenlee, who was the owner of the property, held both the title and the right of possession, and was entitled to the rents and profits thereof. Did these proceedings change the interest of the assured? The word "interest," as used in the policy, means the share, portion, or part that the assured had in the property; and, in order to determine whether or not there was a change by the proceedings complained of, we must see whether there was any change in his right. What share or portion had the assured in the property before the foreclosure proceedings and sale thereunder that he did not have afterwards? If the mechanics' liens were in fact liens upon the property at the time the policy was issued, the judgments and the sale under execution were no more. If they created no title, neither did the judgments, nor the sale on execution. In other words, neither the judgments nor the sale on execution created any new interest or estate. At most, a mere lien, which was uncertain in amount, was made certain and conclusive, and an indefinite period of redemption was made certain and definite. But neither of these things changed in any respect the share or part that the assured had in the property. In the case of *Curtis vs. Millard* (14 Iowa, 128), we said, in speaking of the estate created by a sale under execution: "Now, the courts have frequently declared that the pur-

chaser of lands on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid and interest. During the time allowed for redemption, he acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts. It is simply an inchoate or conditional right to an estate, liable to be defeated any time within one year by the payment of the purchase money and interest." So, also, in the case of *Stanbrough vs. Daniels* (77 Iowa, 567), we said that one who held a certificate of purchase upon foreclosure proceedings is, during the year allowed by law for redemption, only a lienholder. Atkinson, then, was a mere lienholder at the time the fire occurred. He was also a lienholder for the same amount when the policy was issued, for the record shows that he bid no more than the amount of his judgment for the property. True, the amount was not ascertained and fixed until the judgment was rendered, but the lien existed for the true amount before as well as after judgment. The fixing of the period for redemption did not change the interest or portion or share that the assured had in the subject of the lien. In a certain sense, Greenlee had nothing but an equity of redemption in the property, uncertain as to time within which it should be exercised before judgment, certain and fixed afterwards. It appears to us that there was no substantial violation of the conditions of the policy above referred to. In the case of *Wood vs. Insurance Co.* (149 N. Y., 382), the court, in construing a like condition in a policy, said, in speaking of the effect of a sale upon execution: "At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute (which is much like ours) had operated to postpone the effect of the sale upon the interest, title, or possession of owners until the expiration of the period for redemption." We held that an interest in real estate is something more than a right to a remedy against it, and a lien therefore, whether special or general, is not an interest in lands: *Andrews vs. Burdick*, 62 Iowa, 714. As the sale upon the execution gave to Atkinson nothing more than a lien, or at most an inchoate or conditional right to an estate, he acquired no interest in the property; and, if he acquired no interest in the property, Greenlee lost none. We do not overlook a statement made in the case of *Shimer vs. Hammond* (51 Iowa, 401), to the effect that a purchaser at execution sale holds the equitable title to the property. But it is manifest that such statement was not essential to the determination of the controversy, and should therefore be regarded as dictum. It will be noticed that the conditions of the policy sued upon in this case do not avoid the policy in the event that the

property should be incumbered by judgment, as did the provisions in the policies involved in the cases of *Insurance Co. vs. Schmidt* (Pa. Sup.), and *Hench vs. Insurance Co.* (Pa. Sup.), relied upon by appellant. Hence these cases are not in point. Neither is the case of *Hicks vs. Insurance Co.* (71 Iowa, 119), for the reason above stated, and for the further reason that it is expressly held in *Lodge vs. Insurance Co.* (91 Iowa, 103), that a judgment is not an incumbrance, within the meaning of that term as used in insurance policies, explaining and distinguishing the *Hicks* Case. To avoid the policy in this case, the judgment or other proceedings must change either the interest, title, or possession of the subject of insurance. As we have seen, they did neither.

Appellant further contends that the judgments and execution sale violated the condition of the policy as to increase of hazard. We do not think this is so. The amount of the liens was in no manner increased, except, it may be, to the extent of the costs taxed in the case; and there was no evidence offered or introduced which tended to show that any increase of hazard resulted from the proceedings to enforce the mechanics' liens. We cannot presume that there was any such increase: *Russell vs. Insurance Co.*, 71 Iowa, 69; *id.*, 78 Iowa, 216; *Martin vs. Insurance Co.*, 85 Iowa, 643; *Runkle vs. Insurance Co.* (Iowa); *Wood, Ins.*, § 243. Moreover, the condition last referred to does not apply to immaterial changes, which do not increase or enhance the risk. Mere changes in the form of an existing lien will not, as a matter of law, amount to an increase of hazard: *Wood, Ins.*, § 245. And the insurer has the burden of proving an increase of risk. Proof of a change in the risk, without more, does not make out the defense. It must also appear that the change increased the hazard: *id.*, § 260. It is clear that the condition with reference to foreclosure and sale of the property under any mortgage or deed of trust was not violated. As none of the conditions of the policy were broken, the district court was right in directing a verdict for the plaintiff, and the judgment is affirmed.



## SUPREME COURT OF WISCONSIN.

BUTERO

vs.

TRAVELERS ACC. INS. CO., OF HARTFORD, CONN.\* }

The policy provided that it did not cover intentional injuries inflicted by the insured or any other person. The insured was shot at night while working in a coal shed, with a light near him, by some person from behind, and so near that the powder burned his clothes.

*Held*, That this was sufficient proof that the insured was intentionally murdered, and the policy was not liable.

*Held*, That a preponderance of evidence in favor of murder instead of accident was all that was necessary to release the policy from liability.

H. W. CHYNOWETH, *for Appellant*.

L. H. MEAD, *for Respondent*.

PINNEY, J.

The contract upon which the action is founded is that the insurance provided by it

Does not cover accident or death resulting, wholly or partly, directly or indirectly, from \* \* \* intentional injuries, inflicted by the insured or any other person.

In view of the facts in evidence, and about which there is really no dispute, the question is whether the legal presumption invoked by the plaintiff, that the injuries the deceased received were accidental or unintentional, is not wholly repelled or overborne by the evidence. The presumption in question properly applies where there is no evidence to show the circumstances and manner in which the injuries were inflicted. The defendant is not liable if the injuries which caused the death of the insured were intentionally inflicted by himself or any other person. While this is a defense, and the burden of proof is ordinarily upon the defendant, yet, if it appears upon plaintiff's evidence, or upon the entire case, that such injuries were intentionally inflicted, the legal presumption is overthrown. The defense may be established by facts and circumstances, and the inferences properly to be drawn from them, sufficient to satisfy the jury of the truth of the defense with reasonable certainty. It is beyond question or dispute that the insured came to his death by external and violent means. The legal presumption is that his death was not caused by his own suicidal act. The evidence clearly shows that the external and violent means of his death

\* Decision rendered, June 11, 1897.

proceeded from some person unknown. The inquiry is as to the question whether the shooting that caused his death was accidental or intentional, and with the design of effecting his death; and this question is to be determined from the facts proved, the manner of his death, and all the attending circumstances. If the killing was accidental as to the insured, in that he anticipated or expected no injury, but was intentional as to his assassin, then, according to the plain language of the provision of the policy, there can be no recovery: *Insurance Co. vs. McConkey*, 127 U. S., 661-667; *Mallory vs. Insurance Co.*, 47 N. Y., 52. The case of *Button vs. Association* (92 Wis., 83), was upon a provision materially differing from the one in question, and this case is, therefore, not in point. It is necessary only that the evidence of intentional killing preponderate against the presumption of accident: *Cronkrite vs. Insurance Co.*, 75 Wis., 119; *Johns vs. Association*, 90 Wis., 335; *Bachmeyer vs. Association*, 87 Wis., 337, 338. The plaintiff's counsel relies upon *Hutchcraft vs. Insurance Co.* (87 Ky., 300), in which it was held that one assassinated comes to his death by accidental means; but in that case there was not, as there is in this, a provision to the effect that the policy of insurance did "not cover accident nor death resulting, wholly or partly, directly or indirectly, from \* \* \* intentional injury inflicted by the insured or any other person," and it is not in point. Nor is *Accident Co. vs. Carson* (Ky.), which did not contain the same or a similar provision. The same is true of *Insurance Co. vs. Bennett*, 90 Tenn., 256. The killing was clearly the result of intelligent human agency. Was it accidental or intentional? The assured went, at 6 o'clock in the afternoon, from his supper table, to his employment as a coal heaver in the coal shed, where he was to spend the night with his companion in hoisting coal. The night was a very dark one. It thundered and lightened and rained, particularly at the time he received the fatal shots. They worked continuously until about 11 o'clock, with their backs towards the railway track, upon which the coal shed opened, with two lighted lamps near them, and with the upright hoist between them, operated by cranks, one working on either side. When they had partly raised a bucket of coal, and, so far as it appears, when they were utterly unaware of the presence of any human being, they were startled by a pistol shot, which sent a bullet crashing through the brain of the insured, and he fell dead where he had stood; and two other shots, either of which would have proved fatal, were fired in rapid succession into vital parts of his body. His companion, Dominique, instantly fled, and ran about a block to the station. He had seen no one about there during the evening, and had heard no one, and

there is nothing to show that the assured had, or that he uttered any word or exclamation. He was presently found dead, where he fell, and the evidence tends to show that one of the shots was fired with the weapon so near his body as to discolor his clothing with the burning powder. The shots could have proceeded only from the open side of the shed next to the railway track, and it was lighted with two lamps as stated. The hour and the night was one in which honest men are not likely to be abroad with firearms. The time, place, and circumstances were suited to criminal purposes. It seems impossible for persons of reasonable intelligence to be deceived, in the presence of these pregnant facts, pointing unmistakably to only one conclusion. If it were possible to conclude that the first shot was fired accidentally, what are we to think in respect to that question, when it was instantly followed by two other shots, evidently aimed at vital portions of the body of the insured, and which took effect, inflicting fatal wounds? How many shots are we to believe were accidentally thus fired in rapid succession upon and into vital parts of the body of the insured, and under circumstances so favorable for assassination, at a time when firearms would be mainly in requisition or use for criminal purposes? It is contended, however, that there is no evidence that the assassin, at the time he inflicted the wounds, intended to inflict them on the body of the insured,—that is to say, that there is no evidence to show that he knew, at the time he inflicted them, that he was inflicting them upon the body of Butero, the insured; and that, in the absence of such proof, the killing must be regarded as accidental, and covered by the provisions of the policy. The case of *Utter vs. Insurance Co.* (65 Mich., 545), is confidently relied on. In that case the provision of the policy was that the insurance “should not be held to extend \* \* \* to any case of death or personal injury, unless the claimant under this policy shall establish, by direct and positive proof, that said death or personal injury was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person.” In that case the testimony was conflicting as to the circumstances of the killing; that of the plaintiff tending to show that the officer knew the insured, and demanded his surrender as a deserter, and shot him in self-defense, while that of the defendant tended to show that the shooting was reckless, and that the officer did not know the deceased, nor that he had shot him, until after the killing. It was held that the case should have been submitted to the jury, and that the design mentioned in the policy must be considered as a design to kill the insured, and, if such design did not exist when he fired the shot, or if

he did not know that the man he was shooting at was the insured, then the plaintiff might recover on the policy. The present case is clearly distinguishable. Here there is evidence sufficient to show that the assassin intended to shoot Butero, the insured, and that when shooting he knew that he was shooting him, and intended to kill him. It is true that no witness has testified to this effect in so many words, but this is the just and proper result of the facts and circumstances given in evidence, and in respect to which there is no conflict or dispute. It cannot be expected that the assassin would expressly declare his recognition of his victim, either immediately before or at the time of firing repeated fatal shots in and upon his body. All this is ordinarily to be left to inference, from a variety of facts and circumstances proved before the jury. Here the assassin went to the place, at the late hour of 11 o'clock at night, when a violent storm was prevailing, where Butero worked with his companion, approaching him from behind, when there were two lights burning near him. He did not direct his fire against Dominique, but at once selected his victim, and sent a bullet through his head, from which he fell dead, and he followed it by two other shots, evidently aimed with murderous intent, inflicting wounds either of which would have been fatal, and at a time when the evidence tends to show that he stood near enough to his victim to quite touch him with his extended hand. Had the first shot been fired through accident, and not intentionally, it is not reasonable to suppose it would have been followed at once by others. Is it not a just and reasonable conclusion that the assassin recognized, and had no doubt of the identity of, his victim, and followed the first shot by two others to certainly execute his deadly purpose? There is no evidence, fact, or circumstance tending to show, or even suggest, that the death of Butero, the insured, was accidental, within the meaning of the policy. The facts admit, we think, of but one conclusion: "*Res ipsa loquitur*." We think that the evidence was sufficient to show with reasonable certainty that Butero was murdered, and that his murderer knew his victim when he fired the fatal shot, and that he fired it with intent to kill him. The court erred, in our judgment, in refusing to set aside the verdict and grant a new trial. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

## SUPREME COURT OF MINNESOTA.

PLACE ET AL.

vs.

ST. PAUL TITLE INSURANCE &amp; TRUST CO.\* }

*Held*, That the phrase, "Tenancy of the present occupants," stated in a title-insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued.

*Held*, Further, that a condition precedent to a right of action upon the policy, which prohibited a recovery unless the insured had contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy, has no application to a case where the land is held by another party in actual adverse possession, and the insured has lost it absolutely by reason of a defect in the insured title.

STEVENS, O'BRIEN, COLE & ALBRECHT, *for Appellant.*GILFILLAN, WILLARD & WILLARD, *for Respondents.*

COLLINS, J.

Two questions only, are presented by this appeal, both dependent upon the construction to be placed upon language used in a title insurance policy issued by defendant company to plaintiffs as mortgagees of certain real property. The contract, as stated in the policy, was, among other things, to indemnify, keep harmless, and insure plaintiffs from all loss or damage, not to exceed a stated sum of money, sustained by reason of defects in the title of the mortgagors in the mortgaged estate, excepting such as were set forth in an attached schedule, and subject, also, to the stipulations and conditions made a part of the policy. In the schedule an item, stated as "Tenancy of the present occupants," was mentioned as a defect in or objection to the title against which the company did not insure; and among the stipulations and conditions of the policy was one that "no right of action shall accrue under this policy unless the insured, or those claiming under him as aforesaid, shall have been actually evicted under an adverse title not mentioned or referred to in the above Schedule B, or unless there has been a final judgment upon a lien or incumbrance not mentioned or referred to in said Schedule B, under which the title of the insured will be divested by

\* Decision rendered, January 7, 1897. Syllabus by the Court.

sale under judgment or foreclosure, or unless the insured has contracted to sell the estate or interest insured, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under this policy." From the complaint it appeared that, at a foreclosure sale of the mortgaged premises, the plaintiffs purchased the same for the full amount due on the debt; that no redemption had been made within the statutory period; that, at the date the mortgage was delivered, and when the policy was issued, the mortgagors were not the owners, in fee or otherwise, of a portion of the mortgaged premises, nor were they in possession, but, to the contrary, said portion was then, and ever since has been, owned and in the actual adverse possession and occupancy of other persons; and that, prior to the issuance of the policy, the mortgagors had been evicted therefrom.

1. It is the position of defendant's counsel that, from the allegations of this complaint, it appears that the case in hand was expressly excepted from the policy because of the words in the schedule, "Tenancy of the present occupants." If we are to give these words their broadest signification, and construe them without regard to the object or purpose of the contract, or the language used elsewhere, the position would be quite easily sustained; for the broad definition of a "tenant" is one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. The persons mentioned in the complaint as having been, and as still continuing, in adverse possession, are certainly tenants, within this comprehensive definition. But, when we read the entire policy, and consider its object and alleged purpose,—that it purported to be a contract to indemnify plaintiffs, as mortgagees, against loss or damage sustained by reason of defects in the mortgagors' title; that, if the construction contended for by counsel for the defendant should prevail, it would apply in cases where the entire premises were in the adverse possession of another, as well as those, like the present, where only a part is held adversely, leaving the policyholder remediless when he has actually bought and paid for protection; that, if the design of the defendant was to exclude from its policy all liability as to the title "of the present occupants," it could have said so by simply changing one word of the phrase, "tenancy of the present occupants," which, at most, is ambiguous only; that, where an expression in an insurance policy is of such a character, the ambiguity is to be construed against the insurer, and in favor of the insured; that the word "tenant" is generally used in a popular sense, and, as mentioned in this sense, according to

Webster, "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord;" and also that, without a provision of this import, the insurer would probably incur a liability if there were outstanding leases, and the insured could not obtain possession at any moment,—we are decidedly of the opinion that the tenancy mentioned in the schedule was that which has arisen through the occupation or temporary possession of part or all of the premises by those who were tenants, in the popular sense in which that word is used. See *Caplis vs. Insurance Co.* 60 Minn., 376.

2. As the complaint fails to allege the occurrence of any of the conditions precedent, hereinbefore quoted, as found in the policy, counsel for appellant urge this as another reason why the general demurrer should have been sustained. A final judgment upon a lien or incumbrance certainly has no reference to a case like this. And counsel practically concede that the condition requiring actual eviction under adverse title has no application, for the defect upon which plaintiffs base their cause of action is inability to obtain possession, and entire want of title, and nothing else. It is really admitted by counsel that, if any of these conditions precedent stand in the way of a recovery upon the present complaint, it must be that which prohibits recovery unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy. If this condition was intended to apply to a case of this character, it demands of plaintiffs that, with full knowledge of a total want of title to a part of the premises, they find some one upon whom they can impose by entering into a contract to sell that which they do not own, or that they enter into a sham contract of sale, have the vendee refuse to perform, bring a suit against him, and then go through the form of an action which is fictitious from start to finish, and a fraud upon the court in which it is prosecuted. They are either compelled to perpetrate a fraud upon the innocent vendee, or a fraud upon the court in which they bring the action. We cannot believe that the defendant company ever intended the condition in question to cover a case like this, but, rather, that it was designed to guard against actions for nominal damages, instituted by persons who had ascertained that defects existed in their titles, but whose possession remained undisturbed, and who had suffered no loss. It was an adaptation of the law relating to covenants in a deed, that actual loss must precede actual compensation, to the title insurance business. None of the conditions found in the quoted

language apply to a case where not only does another party hold possession of the land adversely to the insured, but the latter has lost it absolutely by reason of a defect in the insured title.

Order affirmed.

## COURT OF APPEALS OF NEW YORK.

REDMOND

vs.

INDUSTRIAL BENEFIT ASSOCIATION.\*

The sworn statement of the attending physician, furnished as a part of the required proofs of loss, stating the disease for which he treated insured, is not conclusive against the claimant. Proof of the same fact personally by attendant physician is privileged and not admissible.

The by-laws provided that the premiums should be accumulated bi-monthly in a pool, and claims maturing during such period should be paid out of the pool then forming, if approved, but if contested and won by plaintiff, then out of the pool contemporary with the judgment.

*Held*, That the last provision was void. All claims were entitled to be paid out of the pool where they belonged, regardless of any contest.

WM. F. BEUTLER, *for Appellant*.

FRANKLIN M. DANAHER, *for Respondent*.

BARTLETT, J.

The plaintiff is the beneficiary under a policy of insurance issued by the defendant on the life of his mother, Catherine Redmond. The defendant seeks to avoid liability on the ground that the deceased made false representations in the application for insurance as to her age and physical condition. It appears that, just prior to making her application for this policy, Mrs. Redmond had been insured in the Flour City Life Association, and had lost her insurance by the failure of that corporation. The plaintiff was solicited by the agent of the defendant to have his mother's insurance transferred to the defendant. Plaintiff said it was immaterial whether a new policy was taken or not, and that he desired the defendant's physician to make an examination of his mother, as he "wished everything straight." The agent filled out the application in presence of plaintiff, writing the answers to the various questions in the absence of Mrs. Redmond. The plaintiff, in reply to a question, stated to the agent that his mother had no disease he knew of, except rheumatism. Plaintiff took the application, obtained his mother's signature, and returned it to defendant. Dr. Babcock, the

\* Decision rendered, Oct. 6, 1896.



defendant's physician, subsequently furnished a certificate to the effect that he had known Mrs. Redmond for three years, and recommended her as a first-class risk. The by-laws of the defendant require, upon the decease of a member, that the proofs of death shall contain, among other things, a statement, under oath, of the attending physician, made upon a blank furnished by the company. The application and policy were dated October, 1891, and Mrs. Redmond died in April, 1892. Proofs of death were duly furnished; and among them was the sworn statement of Dr. Boyd, the attending physician of Mrs. Redmond, wherein he stated that in January, 1891, he treated her for renal calculi. The defendant contends that this is a binding admission on the part of the plaintiff that the insured was suffering from a disease of the urinary organs in January, 1891, and is conclusive proof as to the falsity of the representation contained in the application for insurance made the following October, to the effect that for five years prior thereto Mrs. Redmond had no disease of the urinary organs. The defendant offered to prove the same fact at the trial by Dr. Boyd, but the evidence was properly excluded as incompetent, under section 834 of the Code.

The manner in which the learned trial judge submitted this case to the jury renders it unnecessary to consider many of the points discussed on the argument. The defendant's counsel has little reason to complain of the charge to the jury, as in most respects it is very favorable to the defendant. The trial judge refused to charge, on plaintiff's request, that defendant was estopped by the certificate of its own doctor made at the time of the application. He also refused to charge, without qualification, that the proof of renal calculi in January, 1891, was not proof of disease of the urinary organs in October, 1891, but stated it was proof upon the subject, but not conclusive. This was proper, in view of Dr. Boyd's answer, in his sworn statement, to the question asking him to state the disease of which the insured died, that it was "disease of the lungs, of liver, of kidneys, or nephritis, and enlargement of liver; also had pneumonia." It was fairly submitted to the jury whether, in view of all the evidence, including Dr. Babcock's certificate, there was a false representation as to the physical condition of the insured. It is unnecessary to decide whether Dr. Boyd's sworn statement in the proofs of death was binding as an admission of the plaintiff. It would seem that the attending physician of the insured did not represent the plaintiff, and the furnishing of his sworn statement was in no sense the voluntary act or admission of the plaintiff, but was made a condition precedent to his recovery on the policy by the contract of insurance. The defendant, however, was given the full

benefit of the sworn statement of Dr. Boyd, subject to the qualification that it was not conclusive evidence. There was no error in this ruling of which the defendant can legally complain.

The other question of fact litigated before the jury was whether the insured made false representations as to her age in the application upon which the policy was issued. On this point there was a sharp conflict of evidence, which was properly submitted to the jury. The judge charged, substantially, that all of the answers of the insured contained in her application were warranties, and, if any of them was false, plaintiff could not recover. We are of opinion that the two defenses interposed by the defendant were fairly submitted to the jury, and the verdict is conclusive.

The remaining questions in the case are whether the plaintiff was entitled to a money judgment, and whether the evidence to sustain the amount of the verdict was competent and sufficient. The defendant is not an assessment company, but the insured pay a regular bi-monthly premium. The aggregate of these premiums paid in each two months constitute what is termed a "pool," there being six pools formed in each year. Catherine Redmond was constituted a member of Class B of the defendant, and her death occurring within the first year entitled her beneficiary to eight shares in the pool out of which the policy was payable, the maximum value of the shares being \$2,000. The by-laws provide as follows: "All claims shall be paid with the pool of the month in which the proof of death maturing the same is approved by the association. In case the payment of any claim is contested by the association, and a judgment is rendered in favor of the claimant, said claim shall be placed in, and paid pro rata with, the claims of the pool then forming." The contention on behalf of the defendant is that the by-laws contemplate that only approved claims shall go into a pool, and that when a claim is rejected, the courts appealed to, and a judgment rendered, the judgment must direct the claim to be placed in, and paid pro rata with, the claims of the pool then forming, in pursuance of the by-law just quoted. We are unable to assent to this construction of the by-laws. In the case at bar, had the defendant duly approved the plaintiff's claim, it would have been paid out of the March and April, 1892, bi-monthly pool created by the April premium No. 5, which was collected to pay the losses of these two months. The plaintiff, having been compelled to resort to the courts, is, in the event he succeeds, entitled to a money judgment for the sum that he would have realized had his claim been approved, and paid out of the proper pool raised for that purpose. The provision of the by-law that a judgment in favor of a claimant

shall be placed in, and paid pro rata with, the claims of the pool then forming, is merely a mode of raising the money when a final judgment is rendered against the defendant. The rights of a successful plaintiff are not affected by this provision, as the amount of his final recovery was determined by the premiums and liabilities of the pool out of which his claim became payable, as fixed by the death of the insured.

The other question is whether the plaintiff sustained the burden of proof under which he rested, and gave evidence sufficient to support the verdict of the jury. This court held in the case of *O'Brien vs. Society* (117 N. Y., 319), that where an assessment had not been made, and it was impossible for the plaintiff to show precisely what amount would have been produced, he was bound to give such evidence as the nature of the case permitted, bearing upon the question of damages, and legitimately tending to prove their amount. In the case at bar the plaintiff produced the defendant's official statutory reports, on file in the office of the superintendent of insurance, and proved that the amount collected for the pool raised to pay the death losses of Catherine Redmond and others was \$16,047.75; that only 80 per cent of this, or \$12,838.20, could be used, under the by-laws, to pay death claims; and that plaintiff's eight shares, coming in, and sharing pro rata with other claims, amounted to \$777.68. The court charged the jury that if they found for the plaintiff he was entitled to recover \$777.68, and interest from the commencement of the action. The evidence is amply sufficient to sustain the verdict. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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GIBSON

*vs.*

IMPERIAL COUNCIL OF ORDER OF UNITED FRIENDS.\* } -

A benevolent society of another State may contract in Massachusetts with a citizen of that State, naming a beneficiary not a relative, if allowed under the laws of such other State, though not permitted to a Massachusetts society.

*LINUS M. CHILD, for Plaintiff.*

*HOLLIS R. BAILEY and D. F. KIMBALL, for Defendant Mary E. Southwick.*

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\* Decision rendered, May 21, 1897.

FIELD, C. J.

As the association is ready to pay the sum of money named in the benefit certificate to the person whom the court shall adjudge to be entitled to it, the principal question is whether or not Mary E. Southwick, the beneficiary designated in the certificate, is entitled to it. Mary E. Southwick is a stranger in blood to Emma L. Gibson, and was not dependent upon her. The association is a corporation organized under the laws of the State of New York, and had a place of business in Massachusetts, and Mary E. Southwick was and is a resident of Massachusetts. The certificate was issued on December 15, 1882, in Massachusetts, to Emma L. Gibson, who was a resident of Massachusetts. The justice who heard the case has found as a fact that the designation of Mary E. Southwick as the person to whom the sum should be paid on the death of Emma L. Gibson "was valid by New York law, and under the laws of the corporation;" and this is, in effect, admitted. The contention is that as, at the time when the certificate was issued, such a designation in the certificate of a Massachusetts fraternal benefit association was invalid, the same law governs in this case, as the certificate was issued in Massachusetts to a resident citizen thereof: Pub. St., c. 115, § 8. The association on October 17, 1888, appointed the insurance commissioner of this commonwealth its attorney upon whom all processes might be served, pursuant to St., 1888, c. 429, § 13; and it made reports to the insurance commissioner annually, "with a few omissions," as required by sections 11, 12, *id.* We are of opinion that the question of law raised in this case was, in effect, decided in *United Order of the Golden Cross vs. Merrick*, 165 Mass., 421.

It is contended by the plaintiff's counsel that the association was authorized under the laws of New York to do what is considered in Massachusetts an accident and life insurance business, as well as the business done by fraternal benefit associations, and that the contract shown in this case is one of life insurance. But, even if this certificate should be regarded as a policy of life insurance, the contract was valid at the time when it was entered into, although the association had not complied with the requirements of Pub. St., c. 119. See Pub. St., c. 119, § 200; *Insurance Co. vs. Sawyer*, 160 Mass., 413. See St., 1887, c. 214. The first statute of this commonwealth relating to fraternal beneficiary corporations organized under the laws of other States is, so far as we know, St., 1888, c. 429, § 11 *et seq.* The amount due should be paid to Mary E. Southwick. The details of the decree may be settled by a single justice. So ordered.

## COURT OF APPEALS OF NEW YORK.

WEHLE ET AL.

vs.

UNITED STATES MUT. ACC. ASS'N, OF CITY OF NEW YORK. }

The body of the insured, under an accident policy, was found floating in the water near where he had been bathing shortly before. The company was at once notified and the body was buried five days later. Ten days after the burial the company demanded to examine the body. The policy insured against death by external, violent, and accidental means, provided for immediate notice of any accident, and for proof of death within six months; also, that it should be permitted to examine the body as a condition precedent.

*Held*, That the cause of death was for the jury.

*Held*, That in the absence of any reason for the delay, it was too late after the burial and unreasonable to demand the right to an examination, and its refusal would not defeat the policy.

The policy provided among other things, that "Any medical adviser of the association shall be permitted to examine the person or body of the insured in respect to any alleged injury or cause of death when and so often as he requires, on behalf of the association, and, in case of any post mortem examination by or on the part of the insured's representatives or beneficiaries, the association shall be given opportunity to attend and participate." The further facts sufficiently appear in the syllabus.—*Ed. Ins. L. J.*

DAVID MURRAY, *for Appellant.*

CHARLES WEHLE, *for Respondents.*

PER CURIAM.

It is our judgment that the order of the general term was correct in ordering the verdict directed by the trial court to be set aside, and that a new trial should be had. The decision of the case at the trial turned upon the one question whether the plaintiffs had shown themselves entitled to recover the amount of the insurance claimed by reason of the death of their testator within the operation of the policy, which provided for a liability in the event of death resulting from personal bodily injuries through external, violent, and accidental means. The plaintiffs were entitled to have the jury say whether the deceased died from the action of the water; in which case, as that would be a death from external violence, within the meaning of the policy, they would be entitled to a verdict: Paul

\* Decision rendered, May 14, 1897.

vs. Insurance Co., 112 N. Y., 472; Trew vs. Assurance Co., 6 Hurl. & N., 845. One of the issues raised by the pleadings was as to the cause of the death, and upon that question the jury should have been permitted to pass. The view of the trial judge, however, was that an express provision of the insurance contract had not been complied with by the plaintiffs. That provision was the one which permitted the medical adviser of the defendant to examine the person or body of the insured in respect to any alleged injury or cause of death. As there was no post-mortem examination on the part of the representatives of the insured, the balance of that provision need not be considered. The provision as to the examination of the person or body of the insured was not only expressly assented to by the insured when he made application for the insurance, and therefore should be given effect as his express agreement, but it was a reasonable provision, and quite necessary in accident insurance, as affording a protection against fraud. Its meaning is that, in case of an injury, or of a death, the defendant shall be authorized, through its medical adviser, to make an examination, either of the person with respect to the alleged injury, or of the body to ascertain the cause of the death, as the case might be. It was the agreement between the insurer and the insured that there should be a strict compliance with the provisions and conditions of the policy, and, accordingly, the plaintiffs did give the immediate notice, which was one of the conditions; and that fact was not only admitted by the answer, but, being stated in open court, and with the president of the defendant upon the witness stand, received no contradiction. The effect of the giving of immediate notice was to impose upon the defendant the obligation immediately to make such investigation of the occurrence as to enable it to decide whether to insist upon its right to an examination of the body in order to satisfy itself as to the cause of the death. It was not at liberty to wait indefinitely, or for any unreasonable length of time. The provision, though not, as before observed, of an unreasonable nature, nevertheless was one which, in the nature of things, called for prompt action on the part of the insurer. Although no time is specified within which the permission to examine may be availed of, still a due regard for the sentiments of the family and friends of the deceased, if not public policy, required as immediate an exercise of the option to examine as was possible. Conditions in insurance policies, as in all other contracts, should be construed strictly against those for whose benefit they were reserved: *Paul vs. Insurance Co.*, 112 N. Y., 472. It was an unreasonable delay on the part of the insurer to wait until after the body of the deceased had

been interred; and nothing appears in the evidence to show any excuse for it, if it was deemed that an examination of the body was necessary. From September 4th until September 9th an opportunity was afforded for an examination of the body, and, in the absence of evidence to the contrary, we must assume that the immediate notice conceded to have been given of the death left an ample margin of time for such an examination. We do not think that there was any ambiguity with respect to the permission to examine the person or body of the insured, and if it should appear in any case that at some subsequent date, after the interment of the body, circumstances or facts coming to the knowledge of the insurer warranted a reasonable belief that death was occasioned by means or causes excepted from the contract of insurance, a reasonable construction of this provision would authorize the insurer to insist upon an exhumation of the body and upon a dissection of it. But in this case there was nothing in the evidence to show that the defendant had reason to believe in the existence of any excepted cause of death. In fact, the proofs of an accidental death from drowning were such that a verdict to the contrary could not be said to have been justified.

We hold, in this case, that the provision authorizing an examination of the body of the insured should have been availed of immediately upon the receipt of the notice of the death, which was conceded to have been immediately given, and that the delay in the demand for an examination of the body was, as matter of law, so unreasonable, in the absence of any facts or circumstances excusing it, as to deprive the defendant of any defense to the action upon that ground. Inasmuch as it does not appear that an examination of the body was denied to the association, it is immaterial to consider the question as to whether the demand for it was made upon the proper person. The permission was, in fact, given by the insured himself through the insurance contract, and if it had been attempted to be availed of, with the result of an opposition on the part of those having a legal right to make it, the question would then be open for consideration whether it was such as to have brought about a forfeiture of the policy. For these reasons, the order of the general term appealed from should be affirmed, and judgment absolute should be ordered in favor of the plaintiffs and against the defendant corporation and its receiver, with costs. All concur, except Vann, J., not sitting.

Order affirmed, and judgment accordingly.

## SUPREME COURT OF MICHIGAN.

EARLY

vs.

STANDARD LIFE &amp; ACCIDENT INS. CO.\*

Death due to shock from taking, by mistake, a burning liquid, aqua ammonia, is death from poison within the policy.

Where the policy insured against injuries from external, violent, and accidental means, but excepted death caused by poison, it did not cover death from poison accidentally taken.

GEORGE H. PRENTIS, *for Appellant.*

KEENA & LIGHTNER, *for Appellee.*

LONG, C. J.

This action is upon a policy of insurance upon the life of Michael Early, the husband of the plaintiff. The policy was made payable to the plaintiff in case of the death of the insured. It is undisputed that the policy was to be in force from October 18, 1892, to October 18, 1893. It appears that on August 29, 1893, Michael Early, feeling slightly unwell, went into a drug store in Detroit, and asked the proprietor to give him something to relieve the pain, and the proprietor, by mistake, gave him some aqua ammonia. It burned his mouth very severely, but he lived from that time to September 13, 1895 (some fifteen days), when he died from the effects of the potion taken. Due proofs of death were made, and the defendant refused payment on the ground that the death was caused by means specially exempted in the policy. It was the contention of the plaintiff that death was caused by shock, and not by the poisonous substance. The court directed a verdict in favor of the defendant. Plaintiff brings error.

Counsel for plaintiff bases his contention upon the testimony of Dr. John J. Mulheron, who was called as a witness for plaintiff. He testified substantially that on August 29th he was called to attend the insured. He was asked: "Q. What was his condition? A. I examined him, and found him suffering from a shock, and in a very weak condition of the pulse. On examining his mouth, I found that he had taken into it some irritant poison. His throat and mouth showed the effects of something of that nature. The irritation had extended to his lips, and they were also irritated. It was a burn such as would be caused by aqua ammonia, and the shock was what we would naturally expect from an irritant poison of that nature.

\* Decision rendered, May 25, 1897.



Q. On the 13th of September, I think, he died? A. It was about that date. Q. From the effect of this shock? A. Yes; indirectly. Q. What, in your judgment, had he taken? A. Aqua ammonia. Q. In sufficient quantities to cause that trouble? A. Yes, sir." To state the contention of counsel for plaintiff more specifically, it is that Mr. Early did not die from poison (that is, he was not poisoned, but died from the effect of the shock); that his whole nervous system was affected by the shock which he received when he found he had taken something he should not have taken, and that it was this that caused his death some time thereafter; that the aqua ammonia burned, and this produced the shock; that aqua ammonia is not what is considered by unprofessional persons as a poison; that his death was due to an accident, and not to poison. The policy provides insurance

Against the effect of injuries to the body caused by external, violent, and accidental means, within the meaning of this policy, its agreements and conditions printed herein or on the back hereof.

On the back of the policy it is provided that the policy is accepted subject to the following conditions:—

This insurance does not cover \* \* \* disablement occasioned directly or indirectly by any natural illness, bodily infirmity, disease, or disorder, unless it can be proved to be the direct result of an accidental injury sustained after this policy shall have taken effect, nor injuries of which there is no visible mark upon the body, nor death, nor injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes, or conditions, or when affected by any such acts, causes, or conditions, or under its influence. \* \* \* From any of the following causes: Intoxication \* \* \* poison, contact with poisonous substances, etc.

It is admitted on the part of the defendant that Mr. Early's death was caused by an accident (that is, that the taking of the aqua ammonia was accidental); and it is claimed, therefore, that the case is clearly within the exception to the policy which excludes from its terms death caused by accidental means resulting wholly or partly, directly or indirectly, from poison. It is further contended by counsel for defendant that the policy excepts death due to poison without reference to how the poison causes the death, and without reference to any motive in the taking of it, or whether it is taken intentionally, voluntarily, or whether it is taken by oneself or administered by another person. There can be no question, under the testimony in this case, that aqua ammonia is a poison. Dr. Mulheron expressly states it to be. The deceased then came to his death, in our opinion, by poison. It was accidentally administered, supposing it to be another substance. This could not take the case out of the exception, but rather brings it within the exception. The great

weight of authority is in favor of the proposition that it is not necessary that the poison be taken with intent to produce death, in order to defeat a claim flowing from the right of membership. In *Cole vs. Insurance Co.* (61 Law T. [N. S.], 227), the policy provided that the insured

Shall not be entitled to make any claim under this policy \* \* \*, that this insurance shall not extend to death by suicide \* \* \* or to any death arising from disease, or by poison, etc.

It appeared that the insured by accident drank a poisonous mixture or liquid in mistake for medicine which he was in the habit of taking, and shortly afterwards died from the effect. Verdict was directed for the defendant. On motion for new trial, Mr. Justice Mathew, speaking for the court, said: "It is true that the policy in this case was intended to provide against accidental injury, but we must not treat that as all that the policy contains. The terms of the provisos must be given their due effect." After reciting the proviso above quoted, the learned justice said: "This is a clear and intelligible phrase. We are asked to insert after the word poison, 'unless accidentally taken or intentionally administered to the assured.' The only case of death from poison which would then be left in which the company would not be liable is that in which the assured intentionally took poison, but that is covered by the proviso as to suicide." It was held that the accident came within the proviso. In *Pollock vs. Association*, (102 Pa. St., 230), the policy insured against injuries effected through external, violent, or accidental means, provided that it should not extend to any bodily injury for which there should be no external or visible sign, or to any bodily injury caused directly or indirectly by the taking of poison. The assured being present in a store where a salesman was offering for sale a sample of birch oil, and mistaking it for milk of birch, first tested, then took a drink of it, from the poisonous effects of which he died within twenty-four hours. It was admitted in a case stated that the deceased mistook the birch oil for milk of birch, which he had been in the habit of drinking; it being a harmless beverage, which closely resembled, in color, smell, and taste, birch oil. In an action by the beneficiary to recover the sum insured, it was held that the terms of the policy did not extend to that cause of death, and the judgment below was not disturbed. In *Hill vs. Insurance Co.* (22 Hun., 187), the policy in suit was almost in the exact form as in the present case; but the words used in the exception read, "by taking of poison," while the exception in the present one is "by poison" (that is, any death caused by poison). There it was held that the provision excepting from insurance a death caused "by the

taking of poison" was not limited to cases of intentional self-poisoning, but included all cases in which the death was so caused. Cooke, Life Ins., § 56, lays down the same rule. In *Batchelor vs. Association*, reported in 34 Weekly Law Bulletin, page 239, published at Cincinnati, Ohio, the policy was in the exact form as in 22 Hun., 187. The insured died from an overdose of morphine. The case in the circuit court was ruled for the defendant, and on appeal to the supreme court the judgment was affirmed. In *Paul vs. Insurance Co.* (112 N. Y., 474), the court said: "If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says it meant by the present phrase, and there could have been no room for doubt or mistake."

We have not overlooked the cases of *Healey vs. Association*, 133 Ill., 556; *Association vs. Tuggle*, 39 Ill. App., 509; and *Insurance Co. vs. Dunlap* (Ill. Sup.) But in the present case the expression is "death by poison." We know of no case which goes to the extent of holding that such an expression in the exception contained in the policy does not avoid it. The court below properly held that no recovery could be had in the case.

The judgment is affirmed. The other justices concurred.

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## COURT OF APPEALS OF KENTUCKY.

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ROBINSON ET AL. }  
vs. }  
ÆTNA INS. CO.\* }

The policy stipulated that it should become void in case the house remained vacant and unoccupied for more than ten days prior to the fire. The house, with the knowledge of the owner, had been vacated by the tenant, only a few trifling articles remaining, and was fired more than ten days thereafter by an incendiary.

*Held*, That the policy was void.

R. H. TOMLINSON, *for Appellants.*

WM. HERNDON, *for Appellee.*

HAZELRIGG, J.

To a suit against it by the owners of a small house in the village of Kirkville, which it had insured for the sum of \$400, and which had been destroyed by fire, the appellee company answered that the house had become vacant and unoccupied, and so remained for more

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\* Decision rendered, Jan. 16, 1897.

than 10 days prior to the fire, and relied on a clause to that effect in the policy of insurance as releasing it from liability. The proof showed that the house had been occupied by a stonemason, as tenant, with a wife and child; that the husband went off in search of work, and the wife went to live with her brother, carrying her bed and bedding with her; she lived at her brother's, her husband providing provisions for her; she also sent back to the house and got her wearing apparel. It appears that the owner or his agent knew all this, and, while they may have expected the tenant to return, no steps were taken to have the house occupied or watched over. Only a naked bedstead, and a few articles of very small value, remained in the house, belonging to the tenant. The fire originated in the house some 15 or 20 days after it became unoccupied, and was the work of an incendiary, or of the carelessness of loose characters, who, as the proof conducted to show, infested the place after night. Under these circumstances, the court properly instructed the jury to find for the defendant company.

Judgment affirmed.

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## SUPREME COURT OF NEBRASKA.

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NORTHERN ASSURANCE CO., OF LONDON, }

vs.

HAMILTON ET AL.\* }

A fire-insurance agent issued policies on behalf of his principal, the premiums of which amounted to \$——. Learning that his agency was, or was about to be, revoked, he cancelled such policies, and issued in lieu thereof others, on behalf of insurance companies of which he was also agent. He did not cancel any of said policies at the request of his principal, at the request of the insured, nor because an exigency had arisen which made it necessary for him to cancel them for the protection of his principal's interest. His principal sued him for the premiums collected, and he interposed the cancellation of the policies as a defense. *Held*, That the defense was untenable, and that the agent was liable for the premiums of the policies cancelled.

MONTGOMERY & HALL, *for Plaintiff in Error.*

JOS. R. CLARKSON, *for Defendants in Error.*

RAGAN, C.

The Northern Assurance Co., of London (hereinafter called the "company"), brought this suit, to the District Court of Douglas County, against John R. Hamilton and the sureties on his bond as the company's agent, to recover a sum of money which the company alleged Hamilton had collected as premiums for insurance risks

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\* Decision rendered, Jan. 7, 1897. Syllabus by the Court.

placed by him, and not accounted for. The defense of Hamilton, so far as the same need be noticed, was that he had liquidated the sum sued for by cancelling policies issued by him as agent of the company, the premiums for which policies equaled the sum sued for, and that he made such cancellations in pursuance of a usage and custom existing among insurance men in the city of Omaha, where he resided, and in other parts of the United States. Hamilton had a verdict and judgment, and the insurance company brings the case here for review on error.

There is little or no conflict in the evidence, which shows: That the company appointed Hamilton its agent in August, 1891, to solicit and write insurance for it in Omaha and vicinity; to collect the premiums paid; to transact generally on its behalf the business of a local insurance agent. That it revoked his agency on the 25th of November, 1891. And that he owes the company the sum sued for, unless he has liquidated it by cancelling its policies, as pleaded by him. Hamilton's method of liquidating the debt sued for by cancelling its policies may be illustrated thus: On behalf of the company, Hamilton issues policies to A., B., and C., the premiums for which amount to \$1,000. Deducting Hamilton's commissions, there remain in his hands \$700, premiums, belonging to the company. He remits to the company \$300 of this sum. He then learns that his agency has been, or is about to be, revoked, and, without the request of the insured, he cancels the policies issued to A., B., and C., and, instead of refunding to them the premiums they had paid, he places their risks in other insurance companies, of which he is also agent; and when sued for the \$400, he sets up as a defense the cancellation of the policies of A., B., and C. This is a novel way of paying a debt. The insurance company made Hamilton its agent for the purpose of building up and extending its business, and for the purpose of taking insurance risks, not for the purpose of destroying it; and the law required of Hamilton that, as the company's agent, he should act in good faith with it, and do what he could to extend its business. We do not say that an agent of an insurance company may never cancel a risk issued by him on behalf of his principal, but we do say that he has no right to cancel such a risk, without the request of his principal or the request of the insured, unless an exigency has arisen which makes it his duty to cancel the risk in order to subserve the interests of his principal. We do say that he has no right to cancel a risk solely for the purpose of furthering his own ends, and in his own interest and against his principal's interest. Hamilton did not cancel these risks at the request of his principal nor at the request of the insured, nor did he cancel them because an

exigency had arisen which made it necessary for him to cancel them in order to protect his principal's interest. He cancelled them solely because he knew that his agency was revoked, or was about to be revoked, and for the purpose of having these risks carried by companies for whom he was agent. In doing this he was working against the interest of his principal. Counsel for the insurance company have furnished us a brief, and cited numerous authorities to show that Hamilton's conduct in this case was indefensible. We have no doubt the authorities sustain counsel's view. We have not examined them. No authorities are necessary. On the broad principles of common sense and fair dealings, Hamilton cannot be allowed to liquidate his debt to the insurance company in the manner attempted in this case. No evidence was introduced on the trial to sustain the plea of Hamilton that he made these cancellations in pursuance of a custom, and it is not suggested, either by pleading or evidence, that he cancelled these risks in good faith, for the purpose of protecting his principal, or that he did so at the request of either his principal or the insured. Nor can the judgment be sustained upon the ground of a ratification of Hamilton's acts by the company. The judgment is wrong. It is reversed, and the cause remanded. Reversed and remanded.

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## SUPREME COURT OF MINNESOTA.

PIONEER SAVINGS & LOAN CO.,

*vs.*

ST. PAUL FIRE & MARINE INS. CO.\*

1. Where a policy of fire insurance insuring the mortgagor, loss, if any, payable to the mortgagee, was issued, and it provided that, if the property is sold, or any change takes place in the title, use, or occupation, without written permission in the policy, the same shall be void; and also provided that, as to the mortgagee, the insurance shall not be invalidated by any act or neglect of the mortgagor, nor any change in title or possession, provided the mortgagee shall notify the insurer of any change of ownership which shall come to the mortgagee's knowledge, and have permission therefor indorsed on the policy; during the term of the policy, the mortgagee foreclosed the mortgage, and acquired title to the property; thereafter, and during such term, a loss occurred,—*held*, the provisions of the policy as to a change of title which should come to the mortgagee's knowledge have reference to a change or transfer of title or possession to a third person, not to one from the mortgagor to the mortgagee by a foreclosure.
2. Depositions were taken on a stipulation which waived all objections, except to the competency, relevancy, and materiality of the testimony. The parties appeared, examined and cross-examined the witnesses, and

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\* Decision rendered, May 7, 1897. Syllabus by the Court.

took and had noted certain objections to the testimony. *Held*, A party could not, on the trial, take other objections to other parts of the testimony.

MCDONALD & FAUNTILERoy and OTTO KUEFFNER, *for Appellant*.

GEORGE D. EMERY, *for Respondent*.

CANTY, J.

1. Action on a fire-insurance policy. Decision for plaintiff. From an order denying a new trial, defendant appeals.

Plaintiff held a mortgage on a certain tract of land to secure the payment to it of \$400, due it from the mortgagor. A policy of insurance was issued by the defendant insurance company, insuring the mortgagor against loss by fire of the building on the mortgaged premises; loss, if any, payable to plaintiff. The policy provides that if the property, or any part thereof, be sold or transferred, or if any change takes place in the title, use, occupation, or possession, whether by legal process, judicial decree, voluntary act, or otherwise, without written permission in the policy, the policy shall be void. It further provides that, as to the interest of the mortgagee, the insurance shall not be invalidated by any act or neglect of the mortgagor, nor by any change in title or possession, whether by legal process or voluntary conveyance, provided the mortgagee shall notify the insurer of any change of ownership which shall come to the knowledge of the mortgagee, and have permission for such change of ownership indorsed on the policy; and that, whenever the insurer shall pay the mortgagee any sum or loss under the policy, and shall claim that, as to the mortgagor, or owner, no liability therefor existed, it shall at once, to the extent of the payment, be subrogated to the rights of the mortgagee, under any and all securities held by him on the property, for the payment of his debt, but such subrogation shall be subordinate to his claim to be paid the balance of the debt so secured. Default was thereafter made in the mortgage, the same was foreclosed, the plaintiff became the purchaser at the foreclosure sale, the time to redeem expired, no redemption was made, and plaintiff became the absolute owner of the property. Thereafter, and during the term of the policy, a loss by fire occurred. No notice of the change of ownership through such foreclosure was given to the defendant, and it claims that by reason of the failure to give such notice, and have permission for such change indorsed on the policy, the policy is void. This point is disposed of by the case of Washburn Mill Co. vs. Fire Ass'n of Philadelphia, 60 Minn. 72. The fact that in that case the mortgagee itself paid the insurance premium, while in this case the mortgagor paid it, does not, as appellant seems to contend, change the meaning of the language of the contract. We held in that case

that "the proviso that the mortgagee should notify the defendant of any change of ownership which should come to its knowledge, evidently has reference only to changes resulting from the acts of the mortgagor or owner of the equity of redemption." The proviso has reference to a change or transfer of title or possession to a third person, not to one from the mortgagor to the mortgagee through a foreclosure.

2. The only other point worthy of consideration is the overruling of defendant's objections to certain portions of the depositions taken on behalf of the plaintiff, and read on the trial. These depositions were taken pursuant to stipulation, in which it is provided that "all objections to the same are waived except to the competency, relevancy, and materiality of such testimony." Both parties appeared at the taking of the deposition, the witnesses were examined and cross-examined again and again, and a number of objections were taken by each party to questions and answers, and noted by the notary taking the depositions. But, on the trial, defendant objected to other portions of the testimony to which it had noted no objections at the time of taking the depositions. We are of the opinion that, under the circumstances, these objections came too late, and the court did not err in overruling them; that by their course of procedure the parties waived all objections which were not made at the time the depositions were taken. Section 5,690, Gen. St. 1894, does not apply to the case.

The order appealed from is affirmed.

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## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### WARRANTY IN PASTER.

Following the policy clause stating that it insured the following property while located and contained as described, and not elsewhere, was a paster describing the property insured and the amount, and containing a warranty known as the iron-safe clause, and concluding with this statement signed by the local agent, "attached to and forming part of the policy," it was held in the case of *Allred et al. vs. Hartford Fire Ins. Co.*, decided by the Court of Civil Appeals of Texas, Oct. 7, 1896, that the warranty was a part of the policy. It



was further held that where such iron-safe clause required the books to be kept in a fireproof safe, and the inventory constituted a part of the same, and had been accustomed to be so kept, but on opening the safe it was not found, nor evidence of its having been destroyed there, and such inventory was never found, that this was a breach of warranty.

#### A BICYCLE ASSOCIATION NOT AN INSURANCE COMPANY.

In the case of *Commonwealth vs. Provident Bicycle Association*, decided by the Supreme Court of Pennsylvania, in 1896, it was held that an association which contracts with its members for a stipulated annual payment to repair bicycles and to replace such as may be destroyed by accident or loss by theft, is not an insurance company within the meaning of the statute providing for the incorporation of such companies, but is a corporation such as is provided for under a general corporation act, permitting incorporation for the maintenance of a society for protective purposes to its members from funds collected therein. While an insurance company may issue a contract agreeing to repair or replace, and specifying no definite sum to be paid, it does not follow that every corporation which agrees to repair or replace without fixing a moneyed limit to its obligation is doing an insurance business. As usually understood, replacement or repairs are subsidiary features of the ordinary insurance contract.

#### INSURABLE INTEREST OF CREDITOR.

Where a debtor procures insurance on his life for the benefit of a creditor to whom the policy is payable and both join in signing the application while the premiums are paid by the creditor, it was held by the Supreme Court of Texas, in the case of *Goldbaum et al. vs. Blum et al.*, decided Feb. 20, 1891, that the creditor is entitled only to the amount of his debt and expenditures, the balance belongs to the heirs or representatives of the debtor.

#### AUTHORITY OF AGENT'S ASSISTANT.—KNOWLEDGE OF INCUMBRANCE BY AGENTS.

In the case of *Hartford Fire Ins. Co. vs. Josey*, decided by the Court of Civil Appeals of Texas, Feb. 22, 1894, it was held that a denial of liability was a waiver of the stipulated time granted to the company to determine whether the loss should be paid. It was further held that an agent authorized to contract and to countersign and deliver policies and collect premiums may act through an assistant, who thereby becomes a representative of the company. It was further held that where the agent knew of the vendor's lien on the premises this was a waiver of a policy stipulation, rendering it void in case of incumbrance.

#### NONPAYMENT OF PREMIUM NOTE.

In the case of *Imbrie vs. Manhattan Life Ins. Co.*, decided by the Supreme Court of Pennsylvania, Oct. 5, 1896, the policy stipulated that the premium must be paid in cash before it should be binding and that its provisions could only be waived by written agreement signed by the president or secretary. The agent accepted the insured's note in payment of premium, and the company, with knowledge of the fact, took the note in settlement with the agent, and forwarded it, indorsed for collection. Part of the note was paid and the balance was charged to the agent, who accepted a renewal of the note from the insured for such balance. When the next annual premium became due, the company notified insured that unless the next premium was paid up

to a certain date the policy would be void. Insured died before the second premium was due. It was held that the company, having ratified the action of the agent in accepting the premium note, could not claim that the policy was forfeited because the premium was not paid in cash.

#### WARRANTIES IN APPLICATION.—MISSTATEMENTS AS TO VALUE.

In the case of *Liverpool & London & Globe Ins. Co. vs. Stern et al.*, decided by the Court of Civil Appeals of Texas, Feb. 7, 1895, it was held that where the policy provided that representations in the application should constitute warranties, and the company refused to ratify the act of the agent who issued the policy in consenting to a removal of the goods unless a special application was made by the insured for the same, that the representations in such special application were not warranties. It was further held that a provision, that the company should only be liable for a certain portion of the actual loss, renders false representations as to value and the time inventory was made immaterial in the absence of fraud.

#### ACTION ON WRITTEN CONTRACT.

In the case of *Martin vs. Insurance Co. of North America* the Supreme Court of New Jersey, on March 4, 1895, furnished the following syllabus :—

A policy declared that it should be void "if the subject of insurance was a building on ground not owned by the insurer in fee simple." In his declaration the insured set up that the agent of the insurer fraudulently inserted this clause, and knew at the time that plaintiff did not own the ground on which the building stood. *Held*, That an unambiguous written contract, when sued on in a court of law, is unalterable.

*Held*, also, that a declaration in a written contract is bad if it set up matter which, if true, has the legal effect of destroying the contract sued on.

#### EXTENSION OF PAYMENT OF PREMIUM NOTE.

In the case of *Michigan Mutual Life Ins. Co. vs. Custer*, decided by the Supreme Court of Indiana, April 7, 1891, the policy stipulated that it should not be liable while a note given for the premium was overdue and unpaid. It was held that an allegation that before the maturity of the note the time had been extended, and that prior to its expiration the insured had died, stated a sufficient cause of action, and that there was sufficient consideration for the keeping of the policy in force. The property was purchased by insured at sheriff's sale under agreement to pay to other parties in interest who had contributed to the purchase money their pro rata shares of the proceeds on the sale of the property. When asked by the agent, who knew of this mixed-up ownership, "Who was the title in?" insured replied, "The title is in me. I have the deed." The policy was issued simply in the name of the insured. It was held by the Supreme Court of Pennsylvania in the case of *Caldwell vs. Fire Association of Philadelphia*, in a decision rendered Oct. 5, 1896, that the company was estopped from asserting a breach of the policy condition that it should be void if the interest was not truly stated therein, or was otherwise than unconditional and sole ownership.

#### BLINDNESS AS AN ACCIDENT.

In the case of *Moge vs. Societe de Bienfaigance, etc.*, decided by the Supreme Judicial Court of Massachusetts, Jan. 8, 1897, the by-law of a benevolent society provided that "a member, who shall find himself incapable of working by reason of sickness or accident, shall receive the sum of \$5 per

week. It was held that total blindness, the result of an accident to one of a member's eyes which gradually extended to the other, if not a sickness, was the result of accident, which entitled to the benefit.

**ASSIGNMENT IN CASE OF MORTGAGEE—WAIVER OF PROOFS OF LOSS.**

In the case of *Sun Fire Office, of London, vs. Fraser et al.*, decided by the Kansas Court of Appeals, Jan. 9, 1896, the following syllabus was furnished by the court:—

Where a policy of fire insurance provides that the policy shall be avoided by an assignment of it without the consent of the company, and the policy is written and indorsed for the benefit of a mortgagee, such condition will not be held to apply to the mere delivery of the policy to an assignee and subsequent holder of the mortgage; and such assignee of the mortgage, at the time the loss occurred, may claim the benefit of the insurance.

In an action brought by the insured to recover for a fire loss, where the petition alleges the performance by the insured, on his part, of the conditions of the policy which is put in issue by the answer of the insurer, and upon the trial objection is made to the sufficiency of the proofs of loss, it is proper to permit the plaintiff to show facts constituting a waiver as to any insufficiency of such proofs, although the facts constituting the waiver are alleged for the first time in the reply.

**RESPONSIBILITY OF INSURED IN APPLICATION.—TRANSFER AS BETWEEN PARTNERS.**

In the case of *Sun Fire Office vs. Wich*, decided by the Court of Appeals of Colorado, Nov. 12, 1894, it was held that an applicant for fire insurance is bound to ascertain the scope of the agent's authority, and that when an application is admitted by both parties as the one referred to in the policy, the fact that the policy failed to set out the date of application is immaterial. It was further held that where the agent fills out an application containing plainly printed stipulations that the applicant warranted the facts to be true and that the application is his own act, the applicant is responsible for signing such application without reading, if able to read, and all such statements relative to the use or character of the property are warranties. It was further held that a transfer of property between partners is not a sale or transfer within the policy. It was further held that a failure on the part of the insured to place fair and reasonable values on the property when such statements are made warranties renders the policy void.

**WAIVER OF ARBITRATION.—VACANCY AND INSURABLE INTEREST.**

In the case of *Wainer vs. Milford Mutual Fire Ins. Co.*, decided by the Supreme Judicial Court of Massachusetts, Feb. 27, 1891, the policy provided for arbitration in case of dispute, as a condition precedent. The company denied liability, claiming that there was no loss, but offered to compromise. The insured then proposed in writing to arbitrate, which was refused on the ground of no liability. It was held that this was a waiver of the right of the company to demand arbitration, and the company could not allege the legal insufficiency of the request for submission as a denial of the waiver. The application was filed with the agent, and the insured afterward, upon being notified that his policy was ready, paid the premium. It was held that where there was no agreement that the policy should take effect prior to such payment, the time preceding the payment of premium could not be considered in estimating the time of vacancy contrary to the provisions of the policy. It was further held that under the Massachusetts Statute providing that the application should

not be considered a warranty or part of the contract unless incorporated in the policy, and there is nothing in the policy requiring a specification of title, a failure to do so will not render it void if an insurable interest exists. Where such interest exists in the entire property by virtue of the purchase of the insured, a tenant in common, of the interest of his co-tenant, and the payment of the consideration therefor, though no deed has been passed nor any written agreement, the insured has an insurable interest in the entire property.

#### PLEADING IN CASE OF IRON-SAFE CLAUSE.

In the case of *Western Assurance Co., of Toronto, vs. McGlathery*, decided by the Supreme Court of Alabama, April 16, 1897, it was held that an allegation that the insured did not keep his books in an iron safe as stipulated, but does not deny that they were preserved uninjured, need not be replied to. It was further held that an allegation that a set of books and complete record of the business, including purchases and sales had not been kept, is sufficiently replied to by a claim of substantial compliance and that books had been substantially kept from which the loss could be determined. Where notice of examination was simply given to husband of insured, who appeared as her agent, it is a waiver of requirement that insured should appear. An averment that books were not kept as required under the iron-safe clause which was set forth is not sufficiently answered by saying that books were kept and an offer was made to produce them, without setting forth what the books were.

#### WAIVER OF ASSESSMENTS IN CASE OF BENEVOLENT SOCIETY.

In the case of *Williams vs. Maine State Relief Association*, decided by the Supreme Judiciary Court of Maine, April 25, 1896, the following official syllabus was furnished by the court:—

In an action brought by the beneficiary under a benefit certificate issued by a mutual-benefit association, the promise to pay was conditioned upon the member being in good standing in the association at the time of his death. The defense set up that he was not in good standing at that time, and it was held that such defense had been waived.

Where assessments have been levied and paid subsequent to those unpaid, and upon which a forfeiture might have been claimed, such subsequent assessments and acceptance of money paid upon them constitute a waiver of such right to avoid a certificate for delay of payment.

An unconditional acceptance upon assessments is a waiver of all former known grounds of forfeiture.

Although an agent has no authority to bind the company by receiving payment of a premium after it is due, the company may waive it at any time. If the company receives it from their agent after it has become due, it will be held to have known when it had been paid to such agent, and, by receiving it from him without inquiry, to have waived the right to insist on delay of payment as a ground of forfeiture of the policy.

A waiver may be inferred from circumstances which show that the parties understood the payment of a premium when due would not be required, or a forfeiture claimed.

Agents, in order to bind the company, whether it be a mutual benefit or stock company, must have authority to waive a compliance with the conditions upon a breach of which a forfeiture is claimed, or to waive the forfeiture when once incurred, or their acts in waiving such compliance or forfeiture must be shown to have been subsequently ratified or approved by the company.

Such ratification or approval may be properly inferred when it is shown that the overdue premiums paid to them have been turned over to, and received and retained by, the company.

# SUPREME COURT OF THE UNITED STATES.

LONDON ASSURANCE

vs.

COMPANHIA DE MOAGENS DO BARREIRO.\*

Where a vessel fully loaded and cast off is again made fast to correct some trifling disarrangement of her machinery and is run into by a scow and damaged, but not rendered unseaworthy, she is in collision within the particular average clause.

A marine contract made by an English company in Philadelphia, to be performed in England, loss to be reported at London and paid there, and claims to be adjusted according to the usage of Lloyds, is an English contract, to be governed by English law.

The risk was "free of particular average unless the vessel be sunk, burned, stranded, or in collision." The vessel was detained by a collision, and afterwards damaged by a storm.

*Held*, That after a collision has occurred, liability attaches for subsequent loss under the English rule.

The vessel, loaded with wheat, was bound from New York to Portugal, and was forced by a storm to put in at Boston, where the wheat was found so damaged that by agreement of the parties it was sold, and the voyage ended. Damaged wheat was unsalable in Portugal.

*Held*, That the sale must be treated as for the benefit of all concerned, and the insurer was liable as for a salvage loss, for the difference between the amount realized and the valuation named in the policy.

## Statement of facts by PECKHAM, J.

The respondents herein duly filed their libel in admiralty against the appellant, the London Assurance, in the United States District Court for the Eastern District of Pennsylvania, in a cause of marine insurance, to recover upon a policy of insurance issued by the company upon some 33,000 (being part of a cargo of about 80,000) bushels of wheat, of which the respondents were the owners; the 33,000 bushels being valued in the policy at \$40,887. The policy was dated December 8, 1890, was issued for \$20,000, and covered the wheat when shipped on board the steamer Liscard, at New York, bound for Lisbon, Portugal. There was another policy upon the same wheat as that covered by the policy in suit, issued by another company, for \$29,887; the total of the two making up the value of the wheat as mentioned in the policy. The policy now before the court contained the usual language as to the adventures and perils the assurers were contented to bear; among them being

Perils of the seas, \* \* \* and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, or any part thereof.

\* Decision rendered, May 10, 1897.

VOL. XXVI.—53.

As representing the policy, the insurers issued what is termed "its certificate" or "memorandum," wherein it was stated that the certificate

Represents and takes the place of the policy, and conveys all the rights of the original policyholder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy, direct to the holder of this certificate.

It certified that on the 8th of December, 1890, the corporation insured under policy No. 427, for Lawrence Johnson & Co. (who were the agents for the libelants), \$20,000 in gold on 33,000 bushels of wheat, valued at \$40,887, shipped on board the steamship *Liscard*, at and from New York to Lisbon, Portugal. In the body of the certificate, and directly under the subject of the insurance (33,000 bushels of wheat), stamped in red ink, are the words:—

Free of particular average unless the vessel be sunk, burned, stranded, or in collision.

On the face of the certificate, and on the right-hand side thereof, and at a right angle with the body of the certificate, the following language is printed:—

It is hereby understood and agreed that in all cases of loss or damage to the interest insured under this certificate the same shall be reported to the corporation in London as soon as known or expected, and be paid in sterling at the offices of the corporation, No. 7 Royal Exchange, London, at the rate of four dollars and ninety-five cents (\$4.95-100) gold to the pound sterling. Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Immediately underneath, and also printed in red ink, is the following:—

Notice.—To conform with the revenue laws of Great Britain, in order to collect a claim under this certificate, it must be stamped within ten days after its receipt in the United Kingdom.

The certificate is signed by the agents of the company at the Philadelphia agency.

The cargo was received on board the steamship in New York harbor, and the loading of the vessel had been completed, and she was ready on December 12, 1890, to proceed on her voyage. The lines had been cast off, and the steamer would have then left the dock, but that at the last moment some little derangement to her machinery occurred, and she was temporarily delayed in order to remedy the difficulty, which was accomplished in a very short time,—some few hours. While thus fully loaded and in readiness to proceed on her voyage, a collision occurred, which is thus described by the chief officer, and entered in the log book by him:—

"At 8:15 p. m. a lighter, being towed out of the dock by the tug *George Carnie*, ran into us, breaking two plates in the bulwarks, bending stanchions, starting main rail, etc. Anchor watch kept all night."

The two plates referred to were of iron half an inch thick. The damage to the ship was surveyed before she left New York, by one of Lloyds' surveyors, who made a written report in regard to it. The break in the bulwarks caused by the collision was on the port side of the steamer, about abreast of her mainmast. As described by a witness: "The break was of an irregular shape, and eleven feet six inches long, where the measurements followed in the line of the break. The break was a continuous one in two of the iron plates of the bulwarks." "It began a little above a fore and aft line, half way between the deck and the top of the bulwarks, and descended to about eight inches above the deck at its lowest point. For the first two feet, beginning from the forward end of the break, it showed an opening of from one-half an inch to one inch; for the next three feet the break was open one and a half inches; for the next four feet the break was open from one-half to one and a quarter inches, and the after-end of the break for one foot and six inches was open but slightly. A spur extended from about the middle of the break upwards for one foot."

Another witness said: "The broken plates showed signs, at the time I examined them, of having been pressed, driven, or pounded together in such a way as to reduce the size of the opening, and the carpenter of the ship stated to me at the time that such had been in fact done. The collision break was in the bulwarks of the vessel, and, in my opinion, as the deck of that ship is arranged, the bulwarks form an important and essential part of the hull of the steamer. In some cases the bulwarks are dispensed with, and an open rail used; but those are cases of flush-deck vessels, the entire length of whose deck stands well out of the water. Such vessels have, as a rule, but a comparatively small portion of their houses, engine rooms, galleys, etc., above deck; but in the case of a vessel like the *Liscard*, where all her houses are upon the deck, and her main deck is, comparatively speaking, low,—and I mean low as compared with the upper deck of flush-deck vessels,—the bulwarks form an important part of, and a protection to, the ship in keeping the water off the decks, and protecting the houses and seamen. \* \* \*

Among other things, a large quantity of water in a gale accompanied by high seas would go through the break in the steamer's bulwarks which I inspected, and with the break open to the extent shown in the survey and drawing made by Mr. Candage, many seas which would not be high enough to go over the rail would send a large quantity of water through this break; and, if the storm were extraordinarily severe, would overtax the capacity of the scuppers to relieve the deck. Except in such case of extraordinary weather,

the break would be unimportant; it would not render the ship unseaworthy."

Other witnesses called by the company gave their opinion that the bulwarks were sometimes a detriment to the ship in relation to her safety, as they kept the water on the deck longer than would be the case in their absence; and sometimes that might be a very serious occurrence.

There seemed to be a general agreement, however, among the witnesses that in steamers built as the *Liscard* was the bulwarks were necessary in heavy weather for the safety of the crew that was working her. The bulwarks are a part of the hull of the vessel, and are built by the shipwright in constructing the hull, and are a part of the design of the vessel when she is modeled. In the class of vessels to which the *Liscard* belonged the testimony seems to show that the bulwarks are indispensable.

A claim for damages to the amount of \$250 was made by the captain of the *Liscard*, and paid by the offending vessel.

The steamer was detained by reason of the collision, and sailed a couple of days thereafter. She encountered very heavy gales soon after leaving port. The seas continuously swept over her, and finally started the seams in her decks, washed off the tarpaulins which had been placed over the hatches and battened down, and resulted in great damage to the wheat from the sea water pouring over it through the deck seams and hatches of the ship. Her seams opened on account of the excessive straining of the ship, caused by the heavy gales of wind. Some of the water that came on her decks came through the cracks in the plates constituting a portion of the bulwarks already mentioned. After experiencing very heavy weather for a number of days, the high-pressure engine became disabled, and, proceeding then with the low-pressure engine, the captain decided to make for the nearest port, which was Boston. When they arrived at that port, and examined the machinery, it was found that the high-pressure piston had been bent, and the bending was caused by the excessive straining of the ship, caused by her laboring and rolling in the seas. Upon his arrival in Boston, the captain requested a survey to be made, which was done, and the cargo taken out, and a written report and recommendation made. It was found that the wheat had been damaged by sea water in all the holds of the ship; and, after considerable negotiation between the agents of the ship, the owners of the cargo, and the insurers, an agreement was made for the breaking up of the voyage at Boston, and part freight on the cargo was paid the steamer, with the written assent of the insurance company.



The cargo was sold for the benefit of all concerned, and a claim made upon the insurers under the policy, who denied any liability whatever. The owners of the wheat thereupon filed their libel in admiralty in the district court to recover for the loss sustained by reason of the facts above mentioned. The district court gave judgment in favor of the owners of the wheat (56 Fed., 44), and referred it to a commissioner to assess the damages, who adopted a rule for the adjustment of the loss, which is referred to in the following opinion. The company appealed to the United States Circuit Court of Appeals for the Third Circuit, which court affirmed the judgment of the district court: 28 U. S. App., 439, 15 C. C. A., 379. The insurance company then applied to this court, and obtained a writ of certiorari to review the judgment.

W. W. MACFARLAND, *for Appellant.*

JOHN F. LEWIS, *for Appellee.*

PECKHAM, J., after stating the facts in the foregoing language, delivered the opinion of the court.

Two questions arise in this case in regard to the liability of the insurers upon the policy in suit,—the one being whether what took place before the vessel left her berth in New York amounted to a collision within the meaning of the policy; the other being whether, in case there was a collision, the company is liable for a subsequent loss which did not in any way occur by reason or arise out of the collision.

As to the first, we think that the vessel was "in collision," within the meaning of the language used in the certificate, which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If, while anchored in the harbor, a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. We see no distinction, so far as this question is concerned, between a vessel at anchor and one at the wharf, fully loaded, and in entire readiness to proceed upon her voyage, with steam up, simply awaiting the regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, we should certainly, in the ordinary use of language, say that she had been in collision. How important or material were the results of the collision in regard to the condition in which the vessel was left would be a matter of further and more detailed description. The ordinary meaning of the words

"in collision," when applied to a vessel, does not require that the result of the impact shall be so far-reaching as to impair her seaworthiness. Very serious results, in the matter of expense of repairing, at least, might follow from the impact, wherein the seaworthiness of the vessel would not be at all impaired, and yet no one would doubt that, within the ordinary meaning of the words, such a ship had been in collision.

It is impossible, as we think, to give a certain and definite meaning to the words "in collision," or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy. The difficulty of limitation or description is much the same in kind as that pertaining to another expression in the same memorandum in regard to when a vessel is "burned." It is, however, obvious that a vessel would be said to have been in collision when the effect upon the vessel, or the evidence of such collision, might be very much less than would be necessary to exist in a case of fire before one would describe a vessel as a burned vessel. In the case of *The Glenlivet* [1893] Prob. 164; same case on appeal [1894] Prob. 48, the question arose as to whether the vessel was "burned," within the meaning of this language in the memorandum. There had been a fire on three several occasions among the coals in the bunkers of the ship, and some small damage to the ship by fire took place on two voyages, and the question was whether, under the circumstances, the ship was burned, within the meaning of the memorandum. Lord Justice Smith, in the court of appeals, in the course of his judgment, said:—

"Suppose the cabin curtains were burnt, he should have told the jury that that did not constitute a 'burnt' ship. But suppose the afterpart of the ship was burnt altogether, and the forepart was not burnt at all, I think he should have told them that they might, if they liked, find that was a 'burnt' ship, although there was only a partial burning. It seems to me impossible to lay down absolutely in the affirmative or the negative as to whether a partial burning does constitute a 'burnt' ship or not within this policy. It may or may not, according to the actual facts appertaining to the partial burning."

Further on in the course of his judgment, in speaking in regard to the directions to be given to the jury, he said:—

"My own view is that you would have to tell the jury what I have already said about partial burning, and then you would have to tell them that a partial burning may, under some circumstances, constitute a 'burnt' ship, and may not, under other circumstances; and,

having given that direction, you would have to ask them: Has the fire been such as to bring the ship to such a condition that you consider her a 'burnt' ship within the ordinary meaning of the English language? This, in my judgment, is the nearest direction which can be given as to what is meant by a 'burnt' ship in the memorandum. It is not possible to lay down any hard and fast rule upon the subject."

Lord Justice Davey said:—

"Counsel for the plaintiffs says that the clause applies if a fire breaks out in any part of a ship or stores, although it is got under before any great amount of damage is done to the ship. I cannot bring myself to think that any person would, either in the accurate use of language or in ordinary parlance, say that in such a case as that the ship has been 'burnt.'"

The learned judge also said: "I think that it is really a question to be answered by the jury. Has the ship, in the circumstances of this case, been burnt?"

The English court took the view that, as to a burned vessel, it must be such a burning as would constitute the vessel a burned vessel within the ordinary meaning of the English language. The language is used in regard to the vessel as a whole. "The company is to be free from average unless the ship be burned." That language would seem clearly to indicate some essential burning of the vessel itself, and not such a case, as put by one of the judges, of the burning of the cabin curtains. The case is referred to for the purpose of showing that the English court held the expression was to be defined according to the ordinary meaning of the English language. This leaves each case to be decided with reference to its own peculiar facts.

We perceive the same difficulties which confronted the English court, in the case mentioned, in defining and in accurately and precisely limiting the meaning to be given to the words "in collision," and we agree with those judges that the words contained in the memorandum are intended to be used, as Davey, L. J., said, "in accordance with the ordinary use of language," or, as said by Lord Justice Smith, "within the ordinary meaning of the English language." Taking the meaning of the words in that sense, while we cannot state in advance and in all cases what shall amount to a collision, but must leave each case for determination upon its own facts, yet it seems to us there can be no doubt that the vessel in this case had been in collision, although her seaworthiness was not impaired in the slightest degree as a result thereof. Being run into by another vessel, as a result of which cracks were made from half

an inch to an inch and three-quarters wide in the iron plating of her bulwarks (which were half an inch thick) for a distance of eleven feet, certainly shows a somewhat serious impact,—what would be called in plain English “a collision.” It shows that there was no mere “grazing,” but that a force sufficient to crack iron half an inch thick was exerted upon the hull of this steamship, and that it was sufficiently serious in its nature to cause the captain to have an examination of it made, and a claim for damages asserted, resulting in the delay of the vessel in proceeding on her voyage of two days, and the payment of \$250 as damages occasioned by such collision. In the ordinary use of the English language, would it not be proper and appropriate to describe the results to the steamship as “arising from a collision?” We think it would.

So in relation to the use of the word “stranded,” in the same memorandum. It is said that if a ship “touches and goes,” she is not stranded (*McDougle vs. Assurance*, 4 Camp., 282); but, if she “touches and sticks,” she is,—that is, in places in which she, in the ordinary course of her navigation, is not suffered to touch. A distinction between what is regarded as a stranding and what is held not to be a stranding has been in many cases held to be a very narrow one.

In the above-cited case, decided in 1815, where a ship, in the course of her voyage in going out of the harbor of New Grimsby, with a pilot on board, struck upon a rock about a cable and a half's length from the shore, and remained there on her beam end for a minute and a half, Lord Ellenborough held that it was not a stranding, and added: “There has been a curiosity in the cases about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily.”

Taking what seems to us to be the common-sense view, we should say that this steamer had, as a matter of fact, been in collision, although the consequences of the collision were not serious enough to affect the seaworthiness of the steamship. It is enough if, within the ordinary use of language, the circumstances could be fairly described as amounting to a collision. We think this is the case here. If anything more than that is required,—if it must be a collision of so serious a nature as to impair the seaworthiness of the vessel, or such as might naturally lead to further injury to the ship or cargo,—it is at once seen how large and broad is the field of investigation in order to determine whether the vessel has in fact been in collision within the meaning of the policy. If this be its true meaning, it is neither fairly nor reasonably expressed by the words used. It leaves open for construction in each case a question that may require

long and expensive investigation to determine whether it be covered by, or is outside of, the policy. If the company, by the use of the expression found in the policy, leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company: *National Bank vs. Insurance Co.*, 95 U. S., 673.

In the case cited, Mr. Justice Harlan, in delivering the opinion of the court, uses this language at page 679: "The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

If a serious collision only were meant, the company could say so. We do not think it did intend to so limit the meaning of the words. We solve the problem, therefore, in regard to the construction to be given to the language used in the policy by holding that within the fair meaning of that language the steamship was in collision after the risk had attached under the policy.

The next question is whether the subsequent damage to the wheat caused by the perils of the sea, and in no wise resulting from the collision, can be recovered from the insurers under this policy.

Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story, in his work on *Conflict of Laws* (section 280), says: "But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance. This would seem to be a result

of natural justice. \* \* \* The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said that the general principle in relation to contracts made in one place to be executed in another was well settled; that they are to be governed by the law of the place of performance."

The case referred to in the above section is *Andrews vs. Pond*, (13 Pet., 65), in which Mr. Chief Justice Taney, in delivering the opinion of the court, said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In *Bell vs. Bruen* (1 How., 169), a letter of guaranty was written in the United States, and addressed to a house in England, and this court held that "it was an engagement to be executed in England, and must be considered and have effect according to the laws of that country;" citing *Bank vs. Daniel*, 12 Pet., 54, 55.

In *Scudder vs. Bank* (91 U. S., 406), the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of the performance of a contract regulated matters connected with its performance, and that matters bearing upon the execution, interpretation, and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyds. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & G. W. Steam Co. vs. Phoenix Ins. Co.*, 129 U. S., 397, 446, 453.

It appears in evidence also that there were in use two well-known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, "Free of particular average unless caused by stranding, sinking, burning, or collision;" the other clause reads, as in this case, "Free of particular average unless the vessel be stranded, sunk, burned, or in collision." The clause in use in this certificate was termed the "English clause." Many agents of

English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the "caused by" clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case.

Referring, then, to the English law upon the question as to the meaning of this language, the English courts, many years ago, decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, "free of particular average unless the vessel be stranded," meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy.

Lord Mansfield, in one or two decisions, at nisi prius, had stated that it meant that the loss should arise out of the stranding. These cases were subsequently referred to in the leading case in the King's Bench of *Burnett vs. Kensington*, decided in 1797, and reported in 7 Term R., 210. The case was as much considered as almost any in the books. It was four times tried, and upon the last occasion of its appearance in the court in banc judgments were delivered by Lord Chief Justice Kenyon, Mr. Justice Ashhurst, Mr. Justice Grose, and Mr. Justice Lawrence. The chief justice referred to the case of *Cantillon vs. Assurance Co.*, tried in 1754, where the jury was formed of merchants, and the trial was presided over by Lord Chief Justice Ryder. In that case it was held that if the ship stranded the insurer was let in to claim his whole partial average loss, without regard to the fact that the loss was not occasioned by the stranding. It was said that the great insurance companies in London altered the form of their policies in consequence of the decision in the *Cantillon Case*. Subsequently the words were restored. The chief justice, in the course of his judgment in the *Burnett Case*, continued: "If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty. They would have said, 'unless for losses arising by stranding.'" And he held, and the court agreed with him, that the meaning of the memorandum, "free from average unless general, or unless the ship be stranded," was that, in case the ship were stranded, the insurers were to be answerable for the average loss, although the loss did not occur in the slightest degree by reason of the stranding.

Mr. Justice Ashhurst stated that the memorandum was certainly couched in doubtful words, and that it was difficult to determine when the ship was stranded, or whether or not the damage to the

cargo arose from the stranding, or how much the damage was owing to that cause, and he said that: "It seems as if this memorandum were introduced to avoid that inquiry, and that when the ship had been stranded the underwriters consent to ascribe the loss to that cause. \* \* \* Those authorities having decided the point, there is now not only no reason to upset them, but a very strong reason to induce us to support them, namely, that this construction of the policy will tend to prevent litigation."

Mr. Justice Grose said: "And that brings it to the true construction of the memorandum, and of the exception to it, whether the underwriters be or be not liable for an average loss where there is a stranding, though no part of the loss arise from the stranding of the ship. I have had great difficulties in bringing my mind to decide this, because the consequence of considering this as an exception to the memorandum, as the words import, is this: that if a ship be stranded, and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather, and the cargo sustains an average loss of 90 per cent, the underwriters are answerable for the whole of that average loss when it is admitted that no part of it happened in consequence of the stranding. \* \* \* If we were to determine that the assured could only recover for the loss that happened by the stranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it seems to me best to decide this case on the plain import of the words, notwithstanding the absurdity which I at first pointed out will follow. Besides, if the parties had intended that the insurers should not be liable to the average loss unless part of the loss happened by the stranding, they would have added words to this effect: 'unless part of the loss happen by the stranding;' and the omission of such words strongly induces me to determine strictly according to the words that are inserted in the memorandum."

Mr. Justice Lawrence said that: "In a case where the words of the policy are inaccurate, and where there are inconveniences attending each construction, if the case has ever been decided, I think that we ought to be guided by it." He then refers to the case of *Wilson vs. Smith* (3 Burrows, 1550-1556), in the King's Bench, in which Lord Mansfield considered that the loss must arise by reason of the stranding, and he said that Lord Mansfield in that case went beyond the facts of the case then before the court. Continuing his judgment, he referred to the case already mentioned of *Cantillon vs. Assurance Co.*, in which the point had been decided, and he said, in conclusion: "Therefore, as the very question has once been decided, I think it ought to govern our decision in this case, especially



as the question arises on the construction of an instrument so inaccurately penned as a policy of assurance."

It thus appears that the learned judges of the Court of King's Bench a hundred years ago deliberately decided that the damage need not be the result of the stranding of a vessel. It also appears from the report of the case that they were fully alive to what Mr. Justice Grose called the absurd result of the construction in one aspect of the case; and, while appreciating the fact, they held that, taking all things into consideration, the true meaning of the language of the memorandum permitted a recovery, provided there were a stranding, though the loss was not occasioned by it.

Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, "Free of particular average unless the vessel be sunk, burned, stranded, or in collision." The same rule applies to all; and, if the vessel be either sunk, burned, stranded, or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom.

In *Harman vs. Vaux* (3 Camp. 429), Lord Ellenborough held that the stranding is a condition precedent, and, when that is fulfilled, the warranty against particular average ceased to have operation.

In *Barrow vs. Bell* (4 Barn. & C. 736), decided in 1825, the insurer was held liable, although the cargo was not injured by the stranding, the injury having resulted from striking upon an anchor in the harbor. *Abbott, C. J., and Bayley, Holroyd, and Littledale, JJ.,* held the case of *Burnett vs. Kensington*, above cited, as entirely controlling, and that the insurers were liable.

In *Kingsford vs. Marshall* (Com. Pl., 8 Bing. 458), decided in 1832, although the court held that in that case there was no stranding, yet *Tindal, C. J.,* recognized the general rule, and said: "The question is whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum by reason of the ship being stranded; inasmuch as it has long been settled that the words 'if the ship be stranded' are words of condition, and that, if such condition happens, it destroys the exception, and lets in the general words of the policy. \* \* \* For if the ship was stranded in *Dunkirk harbor*, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time, or any other place, in the course of the voyage insured." And he referred to *Burnett vs. Kensington* as authority.

In *Thames & Mersey Marine Ins. Co. vs. Pitts* [1893] 1 Q. B. 476, the court, in giving judgment, said: "It is clear that it is im-

material whether the actual mischief can be traced to the stranding. \* \* \* If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average, whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but is abundantly supported by authority." And he quotes from the judgment of Tindal, C. J., in *Roux vs. Salvador* (1 Bing. N. C., 526), in which the chief justice said: "The general principle laid down in *Burnett vs. Kensington*, that, if the ship be stranded, the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed. The policy, after the stranding, must be construed as if no such warranty had been written on the face of it."

In the *Thames & Mersey Case*, *supra*, however, the court decided that where the stranding took place before the cargo was laid and the risk commenced, and the loss occurred after the loading, the insurer was not liable. In other words, the court held that the stranding must take place in the course of the adventure, and that where it occurred before the goods were loaded, and when the cargo was not at risk in the ship, the insurer was not liable.

In *The Glenlivet* [1894] Prob. 48, the rule as stated by the former cases is recognized, but the court held that the clause referring to a burned ship meant that the injury by fire was such as to constitute a substantial burning of the ship as a whole.

The English text writers on marine insurance recognize the rule to be as above stated. See 1 Marsh., *Ins.* (2d Am. from 2d London Ed.), pp. 222, 234; Lown., *Ins.*, §§ 317, 319; McArthur, *Ins.*, p. 245.

It is further urged in argument that such a collision as occurred in this case ought not to be held as included in the words of the memorandum, because, if it were, the greater and more serious the collision might be, extending possibly so far as to render the vessel unseaworthy, the more certainly it would appear that the company would be liable for the subsequent loss, and hence the underwriter might be held for a loss happening by reason of the unseaworthiness of the vessel existing at the time she commenced her voyage, which would overturn the well-settled rule in such case. The answer to this argument is that the warranty that the ship is seaworthy applies to every insurance for a voyage, including insurance on cargo, notwithstanding the owner of the cargo has no power to make the ship seaworthy. The warranty is absolute, and a breach of this implied condition makes the policy wholly void, so that it is immaterial whether the loss claimed was in any way connected with the unsea-

worthiness or totally independent of it: Lown., Ins., § 170; McArthur, Ins., p. 24; Marsh., Ins., pp. 153, 160.

From this review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are, by the law of England, liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision; and, but for the collision, would have been within the exception contained in the memorandum, and free from particular average as therein provided. It is not material now to inquire as to the course of reasoning by which this construction of the language of the memorandum was reached. Having decided, more than a hundred years ago, what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use under such circumstances shows that they have adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word "stranding," but subsequently, and at different times, the words "burned, sunk, or in collision" were added to it, and they must all be given the same construction, as an exception that has been given to the word "stranding," and, if any of them occur, the memorandum is struck out, and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question.

Our conclusion is that the underwriters are liable for the loss, under proper rules of adjustment.

The remaining question relates to the correctness of the method for the adjustment of the loss which has been adopted by the courts below. This depends upon the special facts, which will now be referred to in some detail. The cargo consisted of about 80,000 bushels of wheat, all owned by the libelants. Of that total, the underwriters named in this action had insured 33,000 bushels, as already stated. After the arrival of the vessel at the port of Boston, in distress, the wheat was discharged into lighters for examination. A formal survey was made, and the wheat was found badly damaged by sea water, and unfit for reshipment in its then condition. The owners of the cargo gave notice of abandonment to the underwriters, which was not accepted by them, and the care of the cargo was assumed by the owners. A second survey was made on the

16th of January, 1891, and after it was made it was recommended that none of the grain be reshipped in its then condition; and it was also recommended that, as there were no facilities for reconditioning the grain at the port of Boston, it ought to be promptly sold for the benefit of all concerned. Nevertheless arrangements were entered into with persons at Boston, and such of the grain as was capable of being so treated was cleaned, separated, and generally reconditioned, so far as possible; and a survey made on the 21st of February showed that as the result of this treatment the wheat had been considerably improved, and saved from further deterioration, making it of greater market value than before the treatment. On February 28th, another and last survey was held on the cargo, from which it appeared that about 50,000 bushels were in fair merchantable condition, though slightly damp, and having a slight smell. About 17,000 bushels were slightly damp, and had a smell caused by slight mixture of damaged grains. The opinion of the surveyor was that "constant care is required to keep the property from further deterioration; therefore, should a shipment to Lisbon be contemplated, would advise that the above-mentioned lots be kept in separate holds or bins while in transit, and think by so doing would carry to Lisbon without further deterioration."

From the time of the arrival of the ship at Boston negotiations had been carried on between the agents of the libelants and the agents of the ship, and also with the insurers, for breaking up the voyage at Boston, on the theory that the disaster which had overtaken the vessel had so damaged the cargo with reference to the port of destination that the venture was practically frustrated, and that it would cost more to carry the grain to Lisbon, after being reconditioned, and paying all the charges upon the cargo, than the whole grain would be worth upon its arrival. The agents of the ship had been disinclined to permit the voyage to be broken up without full payment of freight. On February 20, 1891, all the underwriters on the cargo, including this company, agreed in writing that the payment of a certain amount of freight on the damaged cargo, and the acceptance and sale of the cargo by the owners, should be without prejudice to any of the rights or claims the shippers of the cargo might have against the insurers, and should not be considered a waiver or acceptance of an abandonment, nor should it prejudice any defense that the insurers of the cargo might have under their contract of insurance. It was also agreed that the amount of the freight agreed upon was to be a recoverable item in any claim except for general average; but that, notwithstanding, the cargo owners might demand its allowance in general average.

On the 27th of February, 1891, the agents of the ship entered into an agreement with the agents of the owners of the cargo to surrender the cargo to its owners free from liens in consideration of the payment of \$3,600 as full freight on the cargo. Some other conditions were imposed, not material.

It also appears that the condition of affairs in relation to the shipment of wheat to Portugal was very peculiar. There was a very high duty on wheat imported into that country, which apparently applied as well to damaged as to sound wheat. Damaged grain was unsalable there, and in many cases the authorities have not permitted it to be landed. It was difficult to establish a market price in Portugal, because but little wheat was sold there in open market; most of it being imported by millers to be ground into flour; and millers were only allowed to import and grind a certain fixed quantity of foreign wheat. Other ports of Europe, such as Liverpool and Antwerp, to which some of this wheat was subsequently shipped by its purchasers, were not subject to the same conditions. In them it seems that damaged grain might be disposed of, and that it possessed a market value.

Of the wheat covered by the policy issued by this particular company there were sold at Boston, for the benefit of all concerned, 32,740  $\frac{3}{4}$  bushels, the net proceeds of which amounted to \$28,554.15, which, being deducted from the value of the 33,000 bushels, as named in the policy, \$40,887, left \$12,332.85 as the amount of the loss claimed by the libelants, as covered by the two policies upon this particular wheat, about one-half of which was claimed under the policy in suit, to which were added several other charges, and then some deductions were made, making the total amount of the claim against this company \$10,451.34.

The commissioner to whom it was referred by the district court to assess the damages sustained by the libelants held, upon the facts given in evidence before him (most of which are above set forth), that it was proper to break up the voyage, and sell the cargo in Boston, and that it was also proper to adjust the loss by deducting the amount for which the wheat sold at Boston from the value as named in the policy; and he held the insurers liable for the difference, and added other items not necessary at this time to state in detail. The commissioner treated the loss as one which is technically called a "salvage loss." He found that, while it was not certain that the whole cargo, after being reconditioned, would have been seriously deteriorated, or have been wholly spoiled in a physical sense if re-shipped to Lisbon, because it had been greatly improved by the re-conditioning process, and possibly might have arrived without further

serious deterioration, yet, in consideration of the facts applicable to this case, including all the circumstances surrounding it and above stated, the cargo should in fact be regarded as wholly spoiled, in that practically it would have been almost valueless at Lisbon, owing to the peculiar laws governing that port, and he adds: "Taking the decisions of the cases and the definitions of the text writers together, a fair statement of the law applicable to this case would seem to be that, the whole cargo having been necessarily sold in Boston, for the benefit of all concerned, the underwriters are liable for the differences between the sums realized at the sale and the valuation in the policies."

The insurance company claims, if liable at all, that its liability should be adjusted with reference to the rules which obtain in cases of a particular average loss; that, although in most cases that kind of a loss is adjusted at the port of destination, yet as in this case the wheat was sold in Boston, at the urgent request of its owners, and the voyage broken up at that port, Boston should, therefore, be treated the same as if the policy had named that place as the port of destination instead of Lisbon, for all purposes of the risk; and in such case, where the port of destination has been reached, and only a part of the cargo is damaged, the rule of adjustment must be that which obtains in the case of a particular average loss.

The rule for computing a technical particular average loss has been in existence for over a hundred years, and is well known and understood. The case of *Lewis vs. Rucker* (2 Burrows, 1167), was decided by the Court of King's Bench, Lord Mansfield delivering the judgment, in 1761, and the case of *Johnson vs. Sheddon* (2 East, 581), was decided by the same court in a judgment delivered by Mr. Justice Lawrence. Those cases hold that the damaged goods, upon reaching their destination, must be at once sold for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value. See 2 Marsh., Ins. (2d Am. from 2d London Ed.), 623; Lown., Ins., § 269 et seq.; McArthur, Ins., 207.

The company also insists that the libelants, at the time they filed their libel, did not claim as for a constructive total loss, or, in other words, did not claim a salvage loss, but that in their libel they described their loss as a partial one; and the company says that it was upon such issue that the question was tried before the commissioner, and that it appeared from the evidence taken before him that it was

a case for the application of the strict technical rule adopted in the adjustment of a particular average loss.

We think there is no substantial ground for the contention that the libelants had not claimed a salvage loss in their libel. It is true that in the fourth clause of the libel filed by the libelants they describe the loss for which the company were bound to pay as a partial as well as a total loss, but in the third paragraph they allege an abandonment by them after the damage to the wheat and its arrival at the port of Boston, and the refusal to accept such abandonment by the company; and in the sixth paragraph of the libel they claim the right to recover the difference between the amount realized upon the sale of the wheat and the value of the wheat as stated in the policy, which they allege amounts to the sum of \$10,451.34; together with claims for general average and special charges as therein stated. This is, in substance, a claim as for a salvage loss. In their claim before the commissioner the libelants also showed their purpose to obtain damages upon the same theory.

In regard to these conflicting claims as to the proper theory upon which the loss should be adjusted, we think, under the peculiar facts of this case, that the method adopted by the commissioner was proper. It is not denied that if a ship at an intermediate port sells a part of her cargo which has been so injured by perils insured against as that it is unfit to be carried further, it may be sold at that port, and the loss be adjusted as a salvage loss; that is, the value of the goods stated in the policy is to be paid after deducting the amount realized on the sale of the damaged goods.

The case here presented, however, is one where the whole cargo has been sold by the assured, the cargo owner, in an intermediate port (where the voyage was broken up by common consent), and where the sale was for the benefit and with the consent of all concerned, and for the purpose of preventing greater loss. Boston cannot and ought not to be regarded as the port of destination for any purpose. It was a port of refuge, where the whole cargo was sold, instead of but a part, and it was sold in order to make the loss as small as possible. Under such circumstances, is the rule of adjustment to be the same as where a part of the cargo has been damaged, and necessarily sold at an intermediate port, or must the loss be adjusted by reference to the rule adopted in cases of particular average?

The voyage, it must be recollected, was not broken up, or the cargo delivered to its owners for their sole benefit. Very probably they were the prime movers in proceedings for its sale,—that is, in obtaining the consent of all parties interested in the cargo for its sale

at Boston,—but it is evident that the sale was in fact made for the mutual benefit of all. The peculiar law in relation to the importation of damaged wheat into Portugal, and the seeming certainty that to carry it there under the circumstances would result in a greater loss to the insurers than to sell the wheat in Boston, renders it quite clear that it was to the interest of the insurers, as well as the owners, to terminate the voyage, and sell the wheat for the benefit of all concerned at Boston.

Under these facts, it would seem to be true that this cargo, being partly damaged, was necessarily sold at the port of refuge, and that in making such sale the insurers sustained no damage, but, on the contrary, received benefits. In this state of the case we see no reason why the sale of the whole cargo should not be made upon the same principles that obtain in case of the sale at a port of refuge of that portion of the cargo which has been damaged and is unfit for transportation to the port of destination. In other words, we think a loss under such facts should be adjusted as a salvage loss. The court below, speaking by Acheson, circuit judge, in this case said:—

“We have carefully examined the evidence, and the legal authorities cited, and are not convinced that the commissioner erred either in his findings of fact or in his method of estimating the loss on the cargo. The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsalable there. The finding of the commissioner is that the Liscard's wheat would have been almost valueless at Lisbon. The evidence certainly warrants the conclusion that the loss to the appellant would have been greater had the cargo gone to Lisbon. We agree with the commissioner and the court below in the view that the adventure was practically frustrated, and hence justifiably abandoned; and that, under the special circumstances, the sale of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned. Mr. Parsons (2 Pars., Mar. Ins., 411) says that if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss. Mr. Phillips (2 Phil., Ins., § 1480) says, speaking of an adjustment as upon a salvage loss: ‘The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously ex-



pedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to the port of destination, it would be greatly diminished in value, or be of no value, on arriving there.' We think that the present case falls within the rule even as thus laid down, and that the appellant is justly chargeable with the difference between the valuation in the policy and the sum realized by the sale, and that the adjustment upon that basis was correct."

We agree with the views thus expressed, and hold that the method of adjustment pursued by the commissioner, and affirmed by both courts below, was, under the special circumstances of this case, a proper and correct one.

We have examined the other objections taken to the commissioner's report, and are of opinion that they are not well founded.

The decree must be affirmed.

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## SUPREME COURT OF MINNESOTA.

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MEE

vs.

BANKERS' LIFE ASS'N, OF MINNESOTA.\* }

The articles of defendant, a life-insurance association upon the assessment or co-operative plan, provided that all assessments for death losses should be made by resolution of the board of trustees, and a by-law had been adopted which read "until, and unless otherwise ordered by the board of trustees," mortuary assessments shall be made only on the first secular days of April, July, and December in each year, and by special resolution. On November 6, 1893, the board, by resolution, made and levied the regular December assessment for death losses which had actually occurred, and from that time on until the last day of November the secretary and his clerks were actually engaged in preparing, causing to be printed, and in preparing for the mailing of necessary notices of assessments for over 12,000 members of the association. These notices bore date December 1st, and were mailed to members November 30th. *Held*, That the articles and by-laws were substantially complied with, and that the December assessment was regularly and properly made.

On being admitted, each member was required to deposit with the association as many dollars for each certificate of \$2,000 as he was years of age, in pledge to secure the payment of all assessments occasioned by death of members made against him. *Held*, Taking into consideration the general plan of the association and the articles relating to this deposit, that a member who had defaulted in the payment of his assessments was not entitled to have his "guaranty deposit" applied in payment of such assessment.

If in negotiations or transactions with a member after knowledge of a ground of forfeiture of his membership such an association recognizes the continued validity of the certificate, or does acts based thereon, the forfeiture is, as a matter of law, waived, and such a waiver need not be based

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\* Decision rendered, July 9, 1897. Syllabus by the Court.

on any new agreement or on estoppel. The forfeiture may be waived although the maker was in ill health at the time, and could not have furnished evidence required by the association as to his continued good health.

A secret intention on the part of the association not to waive a forfeiture cannot defeat the legal effect of unequivocal and deliberate acts of its officers.

*Held*, Taking into consideration all of the circumstances appearing on the trial, that there was evidence which would have warranted a finding that defendant association, by its conduct subsequent to knowledge of a forfeiture, had waived the same, and had concluded to treat its contract as still in force.

BILLSON, CONGDON & DICKINSON, *for Appellant*.

T. T. FAUNTLEROY, *for Respondent*.

COLLINS, J.

This was an action upon two certificates of membership in defendant life-insurance association upon the assessment or co-operative plan, issued simultaneously in April, 1892, to one Edward W. Mee; the beneficiary therein named being a brother, Harry Mee. The former died April 4, 1894, and the latter died intestate soon after the institution of this action, whereupon the administratrix of his estate was substituted as plaintiff. At the trial the court below ordered a verdict in favor of defendant, and on appeal from an order denying plaintiff's motion for a new trial the principal assignments of error relate to the ruling on which the verdict was based. The defense relied upon by the association was that by reason of a neglect to pay a mortuary assessment or call made December 1, 1893, and which, according to the articles of association, had to be paid within thirty days thereafter, Edward W. Mee ceased to be a member of said association, and said certificates became null and void long prior to his decease, it being provided in said articles that default in payment should operate to terminate a membership without any further act or ceremony whatsoever. A full history of various matters which occurred in relation to and subsequent to this December assessment, and also in relation to an assessment made on April 1st following, was set forth in the answer, but the plaintiff made these matters and circumstances a part of her case in chief. So that, when the instruction we have mentioned was given to the jury, all of the facts fully appeared; those upon which the association rested its defense as well as those upon which plaintiff relied. It was conceded that the amount due upon the December mortuary call was not paid when due, and as to what transpired in reference to it we shall have occasion to allude further on, as well as to other facts.

1. The first point made by plaintiff's counsel is that the so-called December assessment was invalid for two distinct reasons: (a) Because all steps looking towards the assessment were taken prior to a

time specifically prescribed by the by-laws; (b) because no complete assessment was made by the board of trustees or by its resolution; what was relied on being largely the acts of the secretary or of some clerk under his direction. We do not think it worth while to discuss this point at length. It stood admitted that ten death losses had actually occurred when on November 6, 1893, an assessment being necessary and obligatory upon the association, the board of trustees, by resolution, made and levied the regular December assessment upon all members, to be collected according to the articles of association. From that time on until the last day of November the secretary and one or more clerks were engaged in preparing, causing to be printed, and in getting ready for mailing the necessary notices of assessment or mortuary calls for over 12,000 members. These notices were dated December 1st, and mailed on the last day of November. The articles provided that all assessments for the payment of death losses should be made by resolution of the board of trustees, and a by-law had been adopted, which read "until, and unless otherwise ordered by the board of trustees, mortuary assessments" shall be made only on the first secular days of April, July, and December in each year, and by special resolution. Although the resolution in question was adopted November 6th, it was expressly made for the December assessment. It was necessary for the resolution to be made and adopted prior to the first secular day in December, long enough before, at least, to prepare the notices for mailing, and this is what was done. That the secretary and his clerks performed a large amount of clerical work incident upon the adoption of the resolution is of no consequence whatsoever. The articles and the by-laws were substantially complied with, and the assessment regularly and properly made.

2. It is contended that, although the member failed to pay the amount of the December assessment within the specified time, and was in default, that the association had in its possession funds belonging to him exceeding the amount required, and which, by the terms of the articles of association as they stood when he became a member, were held in pledge for the purpose of meeting assessments, and for this reason the association could not treat the contract as forfeited, for there was no forfeiture. After the certificates were issued, and prior to the December assessment, the articles were amended so that as to all members subsequently joining the above claim could not be made, but the claim is that, as to members who had previously joined, these amendments did not apply. It is immaterial whether they did or did not. Article 4 of the original articles provided that each member, upon being admitted, should deposit

with and to the credit of the association as many dollars as he was years of age—counting to his nearest birthday—in pledge to secure payment of all assessments, occasioned by death of members, made against him during his life, and to be known as the “guaranty deposit.” Time might be granted to make this deposit, and it was granted in this case by the execution and delivery of a note for each membership, one for \$45, due in one year; the other, for the same amount, due in two years. The first matured April 4, 1893, and was paid. The second matured April 4, 1894, two days after the maker died. The claim we have mentioned is based on the payment of the first note. By article 7 it was provided that a member should continue and be a member only so long as he should pay all annual dues and mortuary assessments, and in case of default all moneys by him paid or pledged “shall and may nevertheless be used and applied to the purposes for which the same were so paid or pledged.” A part of article 10 was as follows:—

All amounts pledged to this company to secure payment of assessments occasioned by death of its members shall be used only for that purpose, and meanwhile the same shall be and remain invested in United States registered bonds, and shall constitute and be known as the “Guaranty Trust Fund.”

And a part of article 11 was in the following words: “All losses occasioned by the death of members shall be collected by this company from its members, and, in case of default on the part of any member, the amount of his assessment on account of such loss shall be paid out of his guaranty deposit.” There were no provisions in the articles for a subsequent payment by a member of any assessment on which he was in default, and which had been made good out of the money pledged, so that, if the claim of counsel was sustained, any member might default in payments with impunity so long as the amount pledged covered the total of the assessments made against him. Not only would he remain a member, but the amount of his deposit would be absorbed in meeting assessments without any provision for making it good at any time, either while the depositor remained a member or at his decease, through a deduction from the sum to be paid to the beneficiary named in the certificate, although it was provided that the amount due on a guaranty deposit should be deducted from the sum paid in all cases where the member died without having paid in full. We cannot construe these articles as counsel insists. The right was given to the association to appropriate the amount deposited in payment of death claims should the member so depositing default as to the assessments, but this provision was for the benefit of the beneficiaries of those who did not default, not for the benefit of the depositing and defaulting member. Such a provision did not operate to keep

alive and in force a lapsed certificate, or to continue a membership. If it could be given that effect, and it be held that membership continued so long as the amount deposited was not fully exhausted in meeting assessments, a premium would be offered to the members who declined to meet their assessments. The certificates became worthless when the membership ceased, and by the plain provision of the articles the membership ceased when annual dues or a mortuary call became due and were unpaid. From all of the articles, and taking into consideration the general plan of the association, we have no doubt as to the construction to be placed upon those portions of the articles relating to the deposit fund, and that a defaulting member has no interest therein.

3. But it is argued, even if the December assessment was valid, and a forfeiture actually took place, that the forfeiture was subsequently waived by the acts of the officers of the association. This claim makes it necessary for us to refer to some of the facts as they appeared in evidence. It was shown that a short time prior to the 1st of December, 1893, Edward W. Mee went from his home in Duluth to a remote and sparsely-settled portion of this State on business, that he was there taken sick, that he did not return to his home until late in December, and was then sick. His sickness continued until his decease, April 2d, as before stated. On February 6, 1894, after Mee's delinquency had continued more than one month, the secretary of the association wrote to him, calling attention to the fact, and advising him that if he desired to keep his insurance in force it would be necessary for him to remit the amount of the assessments, \$18, together with a health certificate, properly signed. A blank certificate was inclosed, and Mee was informed that upon receipt of the amount due, and the approval of the duly-executed certificate by the proper officers, he would be readmitted as a member. Immediately on receipt of this letter, Mee replied, inclosing his brother's check for the amount due, but omitting to send the certificate. Under date of February 7th, the association acknowledged the receipt of the check, but again insisted upon the certificate before sending a receipt. Another blank was inclosed. Receiving no reply to this letter, the secretary of the association again wrote under date of February 19th, inclosing another blank, and calling for the certificate. It was shown on the part of the association that on the 8th of March another letter of the same import was sent to Mee, in which was another blank. In March an assessment was made as of the first secular day in April, on account of the death of members, two of whom had deceased after the alleged default in payment of the December assessment. March 31st notice

of the assessment was mailed to Mee, and he was therein requested and required to pay on or before May 2d. The notice was in the usual and customary form, notifying him, among other things, that if he failed to pay on or before the day last mentioned, his rights to the benefits of membership would terminate. He was also urged to give heed to the notice, in order to avoid all possibility of terminating his membership. The association had on March 14th sent the other note for \$45, about to mature, to a bank in Duluth, for collection, and notice of this had been mailed to Mee before he died. April 2d the association forwarded to the same bank a list of its members at Duluth, with a statement of the amount due from each on the April assessment, and receipts to be delivered to each on payment, the receipts being dated May 2d. Two days after Mee's death, his brother, the beneficiary, went to the bank, informed the cashier of the death, asked him if he should pay the amount of the note and of the assessment, and was advised that the money would be received. The amount of the note was paid that day, and the money immediately remitted to and received by the association. April 12th, the beneficiary paid the amount of the assessment, receiving the receipt of date May 2d. The association returned the check sent for the December assessment on April 24th. It first learned positively of the death a day or two afterwards, and at once wired the bank to return the amount of the April assessment to the party who paid it. This was not done, but on May 2d it mailed its own checks for the amount thus paid, and for the amount paid on the note, to attorneys who were acting for the beneficiary. The latter declined to receive the sums, and the checks were returned to their maker. That the association had no knowledge and had no reason to suppose the assured to be in ill health at any time, seems to be conceded. Its officers knew nothing of his sickness until informed of his death. On these facts the question arises whether the court below was justified in holding as a proposition of law, and conclusively, as it did when it directed a verdict in favor of the defendant, that the contracts had ceased to be in force some months prior to Mee's death, had then been forfeited, and that there was no evidence from which the jury could have determined that there had been a waiver of the forfeiture. The law seems to be well settled, and has frequently been acted upon, that if, in negotiations or transactions with the assured after knowledge of the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon, the forfeiture is, as a matter of law, waived, and such a waiver need not be based on any new agreement or an estoppel: *Titus vs. Insurance Co.* (81 N. Y., 410), and cases cited. See, also,

upon the subject of waiver, *Rice vs. Society*, 146 Mass., 248; *Jackson vs. Association*, 78 Wis., 463; *Murray vs. Association*, 90 Cal., 402; *Association vs. Windover*, 187 Ill., 417; *Beatty vs. Association*, 21 C. C. A., 227, and citations. In the case of *Insurance Co. vs. Young* (86 Ala., 424), the court used the following language: "Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations with the assured which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture." To the contention that a waiver of the forfeiture necessarily involves an intention to waive, and that from the evidence of the secretary it conclusively appeared that the defendant did not intend to waive this forfeiture, it may be said that such a rule would allow a secret intention to defeat the legal effect of unequivocal and deliberate acts. The secret intention, if there was one, to consider the insurance certificates as forfeited unless the health certificate was furnished, cannot be allowed to prevail against the acts of the officers of the association. It had, upon receipt of the check for the December assessment, insisted that the assured execute and return this certificate, and it made demand for the document at different times thereafter. Its acts might clearly indicate an intention to waive a forfeiture, or merely that they were performed in anticipation that Mee would furnish the required certificate, and pay up; and were conditioned upon his doing so. But its subsequent conduct might be regarded as a waiver of the condition which it had previously imposed. It could not insist upon a forfeiture, and at the same time, by word or deed, treat the contracts as still in force. The right to insist upon and enforce a forfeiture may be effectually waived if the party entitled to thus insist and enforce, after, and with knowledge of, the default, treats the contract as in force, and deals with the other party in a manner consistent only with a purpose on its part to regard the contract as still subsisting, and not terminated by the default. Finally, the plaintiff was not concluded, as counsel for defendant insists, because the association had no knowledge of Mee's illness when it made the April assessment. It had knowledge of the default, and that in response to the requests for a health certificate none had been sent. If it desired further information on this subject, inquiry should have

been made. As was said in the Rice Case, supra, "it acted under no deception or misrepresentation, but with all the information which it cared to take the pains to acquire." Of course, if it should appear that the deceased or his beneficiary were attempting a fraud on the defendant by endeavoring to get the former restored without furnishing a health certificate, and the defendant, in ignorance of the fraud, was thereby induced to do what it did, there would be no waiver of the forfeiture. There was evidence, taking all of the circumstances into consideration, which would have supported a finding that the association had, by its conduct, waived the forfeiture, and had concluded to treat the contracts as still in force. On this question the case should have been submitted to the jury.

The verdict is set aside, and a new trial ordered.

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## SUPREME COURT OF MISSISSIPPI.

AMERICAN FIRE INS CO. ET AL. }

vs. }

STATE.\* }

Where the Code made a trust and combine a felony punishable with \$1,000 fine if its effect is to injure any person or corporation, and an indictment was tried on the theory that it was a misdemeanor, and a fine of \$500 imposed, a new trial will be granted.

It is sufficient to allege public injury without alleging injury to any specific person or corporation.

It is not sufficient to allege a deprivation of the public from the benefit of competition without alleging injury.

It is no answer that the combine was formed prior to the Code. Every act subsequent to the passage of the Code is a renewal of the combine.

An agreement among fire-insurance companies to delegate the power to prescribe rates to a tariff association is a violation of the Code, which defines such combine as an agreement to place the control of business in the hands of trustees by whatever name called.

A law provided that companies, among other things, not influenced directly or indirectly by a tariff association, should pay a lower tax, but others should pay a specified tax.

*Held*, That this did not authorize companies to act in a combine through such tariff association by paying the specified tax.

J. A. P. CAMPBELL, MILLER & BASKIN, and MILLER, SMITH & HIRSH,  
*for Appellants.*

WILEY N. NASH, Atty. Gen., *for the State.*

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\* Decision rendered, May 24, 1897



WHITFIELD, J.

Section 4437, subd. g, of the Code of 1892, defining certain trusts and combines in these words:—

A trust and combine is a combination, contract, understanding, or agreement, express or implied, between two or more persons, corporations, or firms, or association of persons, or between one or more of either, with one or more of the others, (g) to place the control, to any extent (a) of business, or (b) of the products or (c) earnings thereof, in the power of trustees by whatever name called; and is inimical to the public welfare, unlawful, and a criminal conspiracy.

And subdivision "h" defines a trust to be such an agreement,

By which any other person than themselves, their proper officers, agents, and employees, shall, or shall have the power to dictate or control the management of business.

Section 1007 of said Code provides:—

Certain Conspiracies a Felony. Every person or corporation, who shall enter into, pursue, be concerned in, or knowingly share the profits or loss of, any trust and combine, as defined by the chapter on trusts and combines [said section 4437] whether within or without this State, if it have the effect to injure any person or corporation in this State, shall be guilty of a felony, and on conviction shall be punished, if a corporation, by a fine of not less than one thousand dollars.

Section 1006 of said Code defines and provides for the punishment of conspiracies, which are misdemeanors. Section 1454 of said Code declares:—

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than five hundred dollars and imprisonment in the county jail not more than six months, or either.

The indictment in this case was found against thirty insurance companies, all but one being foreign companies. A nol. pros. was entered as to one, and twenty-eight were convicted and fined \$500 each. The indictment charges that these companies were "engaged in the business of issuing policies of insurance against loss by fire, in said county of Lauderdale and State of Mississippi; and being independent companies, each from all the others, the said defendants, and each of them, did heretofore, to wit, on the — day of —, 1896, unlawfully, wickedly, designedly, and feloniously, enter into an unlawful combination and conspiracy between themselves respectively, and with each other, and each with the other, whereby the said defendant, and each of them, did place the control of their said business of insurance, to the extent of fixing and prescribing the rates of the premiums on fire insurance to be charged the public, in said county and State, by defendants, and each and all of them, in the power of trustees, to wit, under the control of a certain

association formed or composed of Charles C. Fleming and other persons to the grand jurors unknown, called the Southeastern Tariff Association, and did unlawfully and feloniously agree with each other, and each with the other, to abide by, adhere to, and be bound by, the rates so to be fixed for such premiums by the said trustee, called the Southeastern Tariff Association, and not to vary from such rates in the issuing of policies of insurance in said county and State, thereby unlawfully and feloniously depriving the public of the benefits of competition, in the matter of fire-insurance rates," etc. This indictment was demurred to on many grounds, and the demurrer was overruled, and the trial proceeded with as for a misdemeanor, the court, in overruling the demurrer, holding that it properly charged a misdemeanor, manifestly not deeming it good as for the felony denounced by section 1007 and section 4437, subd. g.

It will be noted that the indictment nowhere charges in the language of the statute that the "effect" of the trust was to injure the public or any particular person or corporation in this State; nor does it directly and positively charge, as a fact, that the trust did deprive the public, or any particular person or corporation in this State, of the benefits of competition in the matter of fire-insurance rates, but only that the companies did place the control of their business, etc., in the power of trustees, etc., and did agree to abide by, etc., said rates, thereby, as a result, depriving, etc. It is manifest that the indictment is drawn for the felony denounced in section 4437, subd. g, and section 1007, of the Annotated Code of 1892. The first section defines the trust,—“the criminal conspiracy,”—and then declares every such trust to be “inimical to the public welfare, unlawful, and a criminal conspiracy.” The second provides that every such trust, whether “within or without this State,” shall be punishable in this State as a felony, when such trust shall “have the effect to injure any person or corporation in this State,” and fixes the punishment, in case the offender be a corporation, at a fine of “not less than one thousand dollars.” Conspiracies of this class are raised to the grade of felony, and pronounced obnoxious to the public policy of this State, and inimical to the public welfare, by reason of the great mischief they are known, of all men, to accomplish, as manifested by the course of legislation and decision the country over. Such trusts constitute one of the greatest menaces to the public welfare known to modern times, and the legislature has wisely made them felonies, and denounced this severe penalty against them. But the learned court below, in overruling the demurrer to the indictment in this case, declares that he did so, because he was of the opinion that “the indictment properly charged

a misdemeanor." And, in pronouncing sentence, he imposed a fine of only \$500. Clearly he did this on one of these theories: Either he held that this was a statutory misdemeanor for which no penalty was provided, and for which, therefore, he could impose the sentence of \$500, under section 4454 of the Code, or that the indictment charged a common-law conspiracy, without prescribing a penalty, and that hence, also, he could impose the sentence under said section 4454; or he held that the indictment was good for a misdemeanor, under some of the subsections of section 1006 of said Code. But the perfect answer to all these views is that the conspiracy here denounced is not a misdemeanor, common law or statutory, but a felony, expressly so declared, with its punishment also expressly declared, by said section 1007. The judgment is therefore erroneous in fixing the penalty at \$500. But it is further clear that the court below, proceeding on the idea upon which the demurrer was overruled, tried the cause throughout on the theory of misdemeanor, and hence it follows that the appellants have not been tried for the felony denounced by the statute, and that, in any event, they must be awarded a new trial. In order, however, that the cause may be proceeded with hereafter properly, under our view of the statutes (section 4437 and section 1007), we proceed to notice the material errors assigned.

The four principal grounds of the demurrer to the indictment are: First, that it does not name any particular person or corporation in Lauderdale County, or in this State, as having been injured; second, that it does not lay any venue; third, that the prosecution is barred by the statute of limitations; and, fourth, that it does not aver that the trust had the effect to injure either any person or corporation in this State, or the public generally. Of each of these grounds now in their order.

As to the first, the rule is that, when it is the object of the conspiracy to injure any particular person or corporation specifically, the indictment must aver the name of the particular person or corporation to be injured. But, when the object is to injure any and all persons who may come within the range of the operation of the conspiracy, it is only necessary to aver that the purpose or effect of the conspiracy was to injure the public. In such case the pleader cannot, and hence need not, aver that any particular party was to be injured. Says Mr. Bishop (2 Bish. Cr. Proc., § 243): "For a conspiracy to defraud the public, the form is substantially the same as where an individual is to be defrauded; but it does not, for it cannot, set out the names." Directly to the same point, clearly, emphatically, and in manifold variety of cases, are the following

authorities, which conclusively put at rest this proposition, arranging the cases in the order of importance: 4 Enc. Pl. & Prac., p. 726d, note 5; *People vs. Arnold*, 46 Mich., at pages 271, 272, opinion by Cooley, J.; Bish. Dir. & Forms, § 309; 2 Bish. Cr. Proc., § 210; 2 Whart., Cr. Law (7th Ed.) p. 680, § 2349; *McKee vs. State*, 111 Ind., at pages 379, 380; *Clary vs. Com.*, 4 Pa. St., at page 212; *Com. vs. Judd*, 2 Mass., at pages 329, 334, 336, and especially 337; *Reg. vs. Peck*, 36 E. C. L., at page 362; *Com. vs. Harly*, 7 Metc. (Mass.) at page 509; 2 Bish. New Cr. Law, p. 117, § 210; and 4 Am. & Eng. Enc. Law, p. 603 (2). 4 Enc. Pl. & Prac., p. 726d, in note 5, contains a very full collection of authorities. Judge Cooley says, in 46 Mich., 272: "It is necessary to permit this general form of pleading, or some of the worst and most mischievous conspiracies would escape punishment altogether, from the obvious impossibility of making the indictment specific when the purpose to defraud was general." And Mr. Bishop says (2 Bish. New Cr. Law, § 209): "Indeed, the combination would appear to be the more obnoxious, in proportion to the numbers against whom it is directed." The first ground of the demurrer is therefore untenable.

As to the second ground, it is only necessary to say that in an indictment for conspiracy the venue may be laid "either in the county of the original unlawful confederation, or in that wherein any overt act pursuant thereto transpired:" Bish. Dir. & Forms, § 281; 2 Bish. Cr. Proc., § 236. We think the venue is sufficiently laid in the county of Lauderdale, where the overt acts occurred: See clearly, to this point, 1 Bish. Cr. Proc., § 61, p. 34; *People vs. Mather*, 21 Am. Dec., at page 147; *Ex patre Rogers*, 38 Am. Rep., 654; *Noyes vs. State*, 41 N. J. Law, at page 422, 423. The second ground of demurrer is therefore untenable. It may be observed, in passing, that this objection as to the want of allegation as to venue was not specifically made by the demurrer, nor was it specifically made one of the grounds for the motion for a new trial. See, as to this, *Lea vs. State*, 64 Miss., 201, 1 South. 51.

The third ground of demurrer presents the statute of limitations as a bar. And under this it is argued—First, that if the indictment is for the original conspiracy, when the agreement to place the control of insurance rates in the control of the trustee, the South-eastern Tariff Association, was first formed, that original conspiracy was first formed more than two years before the finding of the indictment; and, second, that the offense denounced by the statutes (section 4437, subd. g, and section 1007) was complete when the conspiracy was first formed and one overt act in pursuance of it was performed, and that, in that view, the statute began to run from the

time of the performance of the said first overt act in pursuance of it, and that such first overt act was performed more than two years before the finding of the indictment. It is true that the conspiracy, to be punishable, must have the "effect to injure" the public, or, the greater including the less, some particular part of the public, as some person or corporation. Whether the phrase "effect to injure" was inserted to make corporations punishable, because the effect or result would be so to injure without regard to intent, since corporations are not ordinarily indictable, as such, for crimes requiring intent (see 2 Mor. Priv. Corp., §§ 732, 733), or to subject the offender to punishment when the effect of the mere conspiracy alone was, in its essential nature, such as, without reference to any overt act thereunder, to so injure, or whether it means that some overt act thereunder must be averred and proven, the plea of the statute of limitations must equally fail; for the well-settled doctrine is that every overt act is a renewal of the original conspiracy then and there,—a repeating of the conspiracy as a new offense. Says the Supreme Court of New York in *People vs. Mather*, 21 Am. Dec., at page 147: "If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county, without any evidence of an express renewal of their agreement. The law considers that, wherever they act, there they renew their agreement, and this agreement is renewed as to all, whenever any one of them does an act in furtherance of their common design." If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed more than two years before the finding of the indictment, the prosecution would, of course, be barred. Or if, treating this offense as composed of the original conspiracy plus the first overt act done in pursuance of it, and as completed when such first overt act is done, then, if such first overt act was done more than two years before the finding of this indictment, in that case also the prosecution would be barred. But the conspiracy presented by this indictment is a conspiracy formed in *Lauderdale County* within two years before the finding of this indictment, as manifested by overt acts committed within that time, such overt acts operating in law as a renewal, when committed, of the original conspiracy. The question is thus resolved into ascertaining whether the pleader has averred such conspiracy, thus renewed as a separate new offense within the two years; and this the indictment does. We cannot better point our view on this precise

question than by quoting the language of the Supreme Court of Pennsylvania in *Com. vs. Bartilson*, 85 Pa. St., 487-489: The date of the conspiracy should have been laid within the statutory period. \* \* \* In a recent case the doctrine was asserted that there is no such thing as a continuing offense; that it is wholly unknown to the criminal law. \* \* \* It was not intended to assert the absurd proposition that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance and other familiar instances which might be referred to. This may be done daily for an indefinite period. But a man could not be convicted of maintaining a nuisance [erecting the nuisance, that is] charged to have been committed two years prior to the finding of the bill of indictment, by proving that he had continued the nuisance day by day, to a time within the statutory period." See, as to this distinction between erecting and continuing the nuisance, *Bish. St. Crimes*, p. 246, § 260. The court proceeds: "In the sense, therefore, of tolling the statute, it cannot be said that a completed offense can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offense to have been committed within the statutory period. \* \* \* But where, in conspiracy, an overt act is done within two years, and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design, and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was part of the series, and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the latter period. And this though some of the prior acts may have occurred at a time when, as an independent conspiracy, it would have been barred by the statute; for, as before said, the overt acts are the evidence from which a conspiracy may be inferred. Hence it is that while, as a general rule in criminal cases, the venue must be laid in the county in which the offense was committed, yet, in conspiracy, it may be laid in any county in which an overt act has been done by any one of the conspirators. This rule is well settled. \* \* \* This rests upon the principle that the overt act is evidence of a conspiracy existing at the time and place when the overt act was committed. \* \* \* If the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been renewed from time to time, and overt acts committed through a series of years, and one of said acts has taken place within

two years, each renewal constitutes a fresh conspiracy, for which an indictment will lie." This reasoning is clear and conclusive: To the same effect are 4 Am. & Eng. Enc. Law, p. 625 (2), and note 6. We have been referred to a number of decisions of inferior tribunals of the United States, not entirely harmonious, in construing section 5440 of the United States Revised Statutes, making punishable a conspiracy to commit any offense against the United States, defining the offense to be the conspiracy to commit any such offense, and doing some act to effect the object of the conspiracy. But, besides the difference between that statute and our statutes, the United States Supreme Court has expressly held that the offense denounced by section 5440 "does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone." *United States vs. Britton*, 108 U. S., at page 204; *Dealy vs. United States*, 152 U. S., at pages 546, 547. These cases afford no help. The third ground of demurrer cannot therefore be maintained.

The fourth ground of demurrer presents a more troublesome question. It is that the indictment does not aver that the effect of the trust was to injure either the public, or any named person or corporation in this State, as required by section 1007. This averment, either in the words of the said section or equivalent terms, is essential to the validity of the indictment. It was perhaps the object of the pleader to comply with this requirement in making the averment that the defendant placed the control of their said business of insurance, etc., in the power of trustees, etc.; thereby "depriving the public of the benefits of competition in the matter of fire-insurance rates." In *Dealy vs. United States* (152 U. S., at page 564), it was held, construing section 5440 of the Revised Statutes of the United States, that an averment that the overt acts were "done according to and in pursuance of said conspiracy" was equivalent to an averment that they were done "to effect the object of the conspiracy;" and it is doubtless also true that, from the very nature of a fire-insurance trust as to rates, the only injury possibly predicable of its action would be the destruction of competition as to rates; and there is so much force in these considerations that we have hesitated on this point. But in view of the fundamental rule that an indictment must charge the acts constituting the offense, directly, clearly, and precisely, and not argumentatively, inferentially, or by the process of exclusion, we feel constrained to hold that this ground of demurrer is well taken, and the demurrer should, on that ground, have been sustained: 4 Enc. Pl. & Prac., p. 722.

Since the case must go back for a proper indictment to be found, and a new trial thereunder, two other propositions must be noticed.

It is insisted that an insurance trust is not within the purview of our statute (section 4437), and *Queen Ins. Co. vs. State* (86 Tex., 250), is relied on as showing this. But this decision was a construction of the Texas anti-trust act of 1889 (Laws Tex., 1889, p. 141, § 1). And it is perfectly manifest that that act did not embrace insurance trusts, for, by its plain terms (see section 1), it prohibited only trusts dealing, by way of trade or commerce, in commodities. Such are its express terms. The word "business" does not occur in it at all. The decision is therefore not in point. And, to meet that very decision, the legislature of Texas, in 1895, amended the said act of 1889 (Rev. St. Tex., 1895, p. 1090, art 5313, § 1), and prohibited any trust, the object of which was "to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws" of that State. Such is our statute (section 4437, subd. g). It prohibits any trust the object of which is to place the control of business [any business] to any extent in the power of trustees. The lawmakers wisely refrained from any specification of or attempt to enumerate the kinds of business whose control should thus be placed in the power of trustees, for the obvious reason that such kinds of business in modern life are multifarious. It therefore prohibited any trust whose object was to place the control of any business in the power of trustees, where the effect of such trust should be to injure the public or any particular person or corporation in this State. Such legislation has become very general in the United States, owing to the pernicious results of such trusts. See, for a collection of statutes and decisions, 26 Am. & Eng. Enc. Law, p. 237v; *In re Pinkney*, 47 Kan., 89; *People vs. North River Sugar-Refining Co.* (Cir. Ct.) 2 Lawy. Rep. Ann., 33, and note; *People vs. Sheldon*, 66 Hun., at page 594; *Lumber Co. vs. Hayes*, 76 Cal., 387; *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St., at page 168; 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 503a et seq., with notes; Cook, Trusts (2d Ed.) p. 51, et seq.; *Havemeyer vs. Superior Court* (Cal.) 32 Am. & Eng. Corp. Cas., p. 510 (s. c. 24 Pac., 121); *Manufacturing Co. vs. Klotz*, 44 Fed., 721. A stenographers' association was held a trust in *More vs. Bennett* (140 Ill., 69), a very striking case.

Indeed, the act of 1896 (Laws 1896, p. 68, c. 56) manifests express legislative recognition, not only of insurance as a business which may properly fall within the purview of our anti-trust statute (section 4437), looking to the nature of the business, but of the further fact, known to the legislature, that fire-insurance companies did have trusts in some parts of the country. But it is said that section 7 of that very act repealed section 4437 of the Code of 1892



so far as fire-insurance companies were concerned. A reading of that act will show that, if any such repeal is to result from it, it must be worked out by implication alone; for section 4437 is not named or referred to in it at all. But counsel misconceive section 7 and the whole act. That act and the act of 1894 (chapter 63) were amendatory of section 2330 of the Code of 1892, known as the "Valued-Policy Law," the chief object of which legislation, taken as a whole, is to hold such companies to the value of the property insured as originally fixed at the time the policy issued by the terms of the policy, on the basis of which valuation the premiums would have been exacted. It is true, the act of 1896, *supra*, goes further, and also "fixes the amount of taxes to be paid by fire-insurance companies." But this added feature covered all else it sought to accomplish, and presents merely a graduated scheme of taxation for competitive companies, according to the varying conditions in the act prescribed. For example, competing companies which made no extra charge on account of the valued-policy law were to pay but 2 per cent on all premiums, and be relieved of all further taxation. Section 3 provided they were in no way influenced, directly or indirectly, by any insurance tariff association, etc. Section 4 provided the mode for doing this, the report, affidavit, etc., and further provided that nonconformity to this statutory mode should subject such nonconforming companies to the payment of a \$750 privilege tax, to remain till they did comply. And section 5 added further stipulations. Sworn statements were to be filed with the auditor, etc., as conditions precedent to the right of even competing fire-insurance companies to do business in this State, if they wished to secure the benefits of the low taxation in the act named. And section 7 then declared that competing fire-insurance companies which refused to comply with the act at all,—ignored or defied it,—and competing fire-insurance companies, which pretended to comply, but did not, or attempted to, and did not, conform to its requirements, should pay a privilege tax of \$1,500. This, manifestly, is the whole effect of this act. Section 7 says "every fire-insurance company doing business in this State," meaning, of course, fire-insurance companies licensed to do business here. But section 4439 of the Code of 1892 had already declared that a corporation entering into a trust denounced by section 4437 should not do business here at all. The statutes must be taken together. It is too plain for disputation that to hold that section 7 of the act of 1896, *supra*, meant to license fire-insurance companies, which had entered into a trust to place the control of its business in the power of trustees, to do business by paying a license tax of \$1,500, the doing of which business through

such a trust having already been made a felony, would involve a manifest absurdity. And when the provisions of said act of 1896, denouncing fire-insurance trusts in the strongest terms, and declaring in favor of "the freest and most perfect competition between fire-insurance companies," as our definite public policy on this subject, and seeking to secure it by tendering the low taxation therein declared to competing companies complying with the terms of said act, are considered in the light of the spirit pervading and underlying the whole act, it is clear beyond doubt that section 7 of said act was not meant to repeal section 4437 of the Code of 1892. We are therefore of the opinion that insurance trusts are within the purview of said section 4437 (see 2 Beach, Mod. Law Cont., p. 2060, § 1585), and that that section is not affected by section 7 of said act of 1896. It follows from the views herein indicated that the judgment must be reversed, the demurrer sustained, and the indictment quashed. A proper indictment can easily be framed, and the appellants tried thereunder. So ordered.

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## SUPREME COURT OF MINNESOTA.

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MUELLER

vs.

GRAND GROVE, STATE OF MINNESOTA, UNITED  
ANCIENT ORDER OF DRUIDS.\*

In an action brought upon a certificate issued by defendant association to a member of a subordinate grove, and certifying that the beneficiary therein named was entitled to the benefits of a specified fund, known as the "Widows' and Orphans' Fund," upon the death of the member, certain articles of the constitution of the association considered and construed. *Held*, That the "monthly contributions" provided for in section 1, art. 5, are the "monthly dues" required to be paid by the terms of section 2, same article.

And *held* that, according to these articles, the member must be "in good standing" at the time of his decease, to entitle his beneficiary to share in the benefits of this fund. The beneficiary of a member who is in arrears for nonpayment of monthly dues for more than thirty days, and whose name has properly been stricken from the rolls, is not a member in good standing.

When joining defendant association, each member paid as a fee into its treasury, and into the fund before mentioned, a small sum of money. He thereafter paid monthly dues to the treasurer of the subordinate grove, and special assessments, if required. At the death of a member in good standing, defendant's secretary was by the articles authorized and required to collect from each subordinate grove a sum equal to one dollar for each of its members; and the amount thus collected, coming out of the treasuries of the subordinate groves, constituted the fund out of which the beneficiary was paid. *Held*, that if the subordinate groves have, by a

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\* Decision rendered, July 9, 1897. Syllabus by the Court.

long-continued course of conduct, misled their members respecting the payment of monthly dues; have created a belief that payment need not be made in strict accordance with the articles, and will not be exacted on the day stipulated; have thus led the members to rely upon a belief that delay in payment is unobjectionable, and will not affect their good standing, or their rights and interests in the fund in question,—payment in strict compliance with the articles has been waived, and the defendant association cannot claim that such members are not in good standing, if delinquent in accordance with the custom, and is estopped from insisting upon a forfeiture.

*Held*, in the case at bar, that the evidence was sufficient to support a finding that, within this rule, there had been a waiver, and that the deceased member, although delinquent as to his dues, was a member in good standing when he died.

Assignments of error relative to the admission of certain letters in evidence discussed, the same having been admitted as tending to support an allegation in the complaint that defendant had been duly notified of the death prior to the commencement of the action. *Held*, in view of the vagueness of the article relating to proof of the death of a member, and the fact that the letters were treated by the board of directors of the association as a compliance with the articles, and as sufficient proof of the fact therein stated, that they were properly admitted in evidence as tending to prove the allegation in the complaint as to notice.

JOHN H. IVES, *for Appellant.*

ADAMS & SOUTHWORTH, *for Respondent.*

COLLINS, J.

The defendant is an association incorporated under the laws of this State, and its members, upon joining a subordinate grove, become entitled to the rights, privileges, and benefits of what is known as a "Widows' and Orphans' Fund;" receiving a certificate in which it is stated that the member is thus entitled, so long as he shall comply with its laws, subject in all respects to the provisions of the constitution of the grand grove and of its subordinate groves, and to all amendments which may be made thereto. It is also provided in each certificate that in case of the death of the member the benefits resulting from the membership shall be paid to a designated beneficiary. One Joseph Mueller became a member of this organization, receiving a certificate of the above import, in which this plaintiff (then his wife) was designated as beneficiary. He died June 20, 1895; and this was an action brought to recover the amount she was entitled to recover, it was averred, out of the fund in question. At the conclusion of the trial it was agreed that the jury might be discharged, and the cause decided by the court. Thereafter, upon findings of fact, the court ordered judgment in plaintiff's favor for the sum of \$1,000, with interest and costs. The appeal is from an order denying defendant's motion for a new trial.

The assignments of error from 1 to 4, inclusive, go to rulings of the court on the trial whereby certain letters were received in evidence over defendant's objections. The remaining assignments challenge certain findings of fact, and also the conclusion of law.

Of these, the sixth, seventh, eighth, and ninth may be considered together, as they were by counsel on the argument. The constitution of the defendant association contains articles for its own government, and for the proper administration of the widows' and orphans' fund, as well as articles for the government of the subordinate groves. It is, however, quite crude, and, in many respects, indefinite and incomplete. The plan is for each member, upon joining, to pay in a specified sum, according to his age, into this special fund, and thereafter to pay certain sums every month to the secretary of the subordinate grove of which he is a member, two-thirds of which is set apart for relief purposes. It is provided by section 2, art. 10, that the widows' and orphans' fund shall be expended exclusively for the benefit of the heirs or beneficiaries of deceased members. By section 3 it is provided that every person who is or shall become a member shall be entitled to the benefits of this fund, "and at the death of a brother in good standing the assessment necessary shall be paid out of" this fund. There are other provisions in reference to the form of a certificate to be furnished to the defendant's secretary by the secretary of the subordinate grove in case of the death of a member of the latter "in good standing," and in section 5 is a provision that "on the death of a member in good standing" the benefit shall go (be paid) to his relatives, in a certain order, unless otherwise directed in the certificate. The beneficiary named must be a wife, or the member's children, or his parents, brothers, or sisters, or, lastly, his subordinate grove. Evidently the purpose is that those dependent upon the member shall, in case of his decease, receive the benefits of his membership. In section 6 it is provided that, on the death of a member "in good standing," his properly constituted beneficiary "shall be paid according to membership, the sum of one dollar per member, not exceeding in the aggregate the sum of one thousand dollars; the same to be paid within ninety days after presentation of proper proof of death" to defendant's board of directors; this board consisting of certain designated officers, having charge of and administering the widows' and orphans' fund. On the death of a member the defendant's secretary is required by section 14, art. 10, to "collect a sum from each subordinate grove equal to one dollar from each member;" the amount thus collected to be paid into the fund for disbursement to the beneficiary of such deceased member. Turning now to "Art. 5, Dues and Fees," we find that by section 1

The regular contributions to the grove fund shall be not less than eighteen dollars per year, payable in monthly installments in advance. Two-thirds of the amount to be set aside by the grove for relief purposes.

## Section 2 reads:—

Every member shall pay his monthly dues on or before the first meeting of each month, in advance, and no member shall be entitled to the semi-annual password until such dues are paid. Such member shall have no right to benefits while in arrears.

## Sections 4 and 5 are as follows:—

Sec. 4. Arrearages of a member shall consist of nonpayment of monthly dues, or any special assessments of the grand or subordinate grove. When a member shall be thirty days in arrears, he shall be dropped from the roll.

Sec. 5. A member dropped from the roll for nonpayment of dues or assessments or otherwise shall be entitled to no rights or privileges by reason of his former membership. No member dropped from the roll for nonpayment of dues or assessments shall be restored to membership, except by application to be reinstated, which application shall be accompanied by an amount equal to all dues and assessments which have accrued and been levied since such member was dropped from the roll.

Taking these various provisions as a whole, and construing them for the purpose of giving effect to each in accordance with the intent of the members, we are justified in holding that the word "contributions," in section 1, art. 5, and the word "dues," in the section following, mean the same thing. The contributions mentioned in the first section, of not less than \$18 per year, payable in monthly installments, are the monthly dues provided for in the second section; that is, every member shall pay \$1.50 per month, at least, in advance, and on or before the first meeting in each month, and, if he fails in making these payments, he is in arrears, speaking technically, to his subordinate grove, under the provisions of sections 2 and 4 of article 5. He may be required, under section 2, to pay more than \$1.50 per month, should the contributions or dues be fixed at a greater amount, and special assessments may be made under section 4, and under the same section a member may be dropped from the rolls for nonpayment of dues. That the regular contributions or dues in the subordinate grove of which Mueller was a member were considered to be \$1.50 per month, payable as above indicated, and that its members construed sections 1 and 2 of article 5 exactly as we have, in respect to monthly assessments and payments, is evident from such part of the secretary's book of accounts as was introduced in evidence.

It is also clear that the only method of accumulating or increasing the widows' and orphans' fund was by assessment upon the subordinate groves whenever the defendant's secretary was notified of a death. He was then authorized to collect from each subordinate grove a sum equal to one dollar for each member of the latter. This, so far as shown, was the only method by which money could be obtained for this particular fund, except the small sums paid in

by members as they joined the order. Evidently every subordinate grove was called upon and required to pay a sum equal to one dollar for every member upon the rolls. That a member was in arrears to his grove, and delinquent, was of no particular concern to the defendant association, or to the board which administered the widows' and orphans' fund. It is evident that the fund was affected only when membership ceased by dropping the name of the member from the roll of the subordinate grove, the result being a shrinkage in the amount collected from that grove. But, from the various sections found in article 10, it is plain that, unless a member was in good standing at the time of his decease, his beneficiary was not entitled to participate in the fund. While provision was made for the dropping of a member's name from the rolls if his default continued for thirty days, it does not appear, fairly construing the articles, that his membership rights continued until this was actually done. His certificate assured him of these rights so long as he complied with the articles of the association. These articles expressly stated that while in arrears the members had no rights to benefits, and "arrears" were defined to be the nonpayment of monthly dues or any special assessments. If a member was in arrears for dues, and was liable to have his name stricken from the rolls, he cannot be said to have been in good standing, as the term should ordinarily be construed. That Mueller at the time of his decease, June 20, 1895, had not paid his dues for the months of April, May, and June, 1895; that at a meeting of the subordinate grove held June 11th his name was stricken from the membership list, the stated reason being that he was not in good standing; and that no notice was given to him that he was in arrears, or that any action would be taken at the meeting,—stand conceded.

It is contended by plaintiff's counsel that this action was futile, because Mueller was not notified of arrearages, and was given no opportunity to be heard prior to the action. We need not pass upon this, for it is unnecessary. We are of the opinion that plaintiff was entitled to recover, independently of what may have been Mueller's right to have notice before his name could be stricken from the rolls; for upon an inspection of the secretary's account with Mueller, as kept on the book before referred to, it plainly appears, whatever construction is to be placed upon the articles with reference to the payment of dues, and the effect of nonpayment at maturity, that Mueller had made a practice of paying, and the subordinate grove had been in the habit of receiving, his monthly dues, at irregular intervals, and in such sums as he could pay. His account seems to have been opened in February, 1890, and he was frequently per-

mitted to be two months in arrears. The grove received payments of dues for two months on nine different occasions while he was a member. December 1, 1894, he was in arrears for three months' dues, and was then permitted to pay in full \$4.50. He was two months in arrears when he paid \$3, February 5, 1895. He was in arrears a few days when making his last payment, in March, 1895. And there is nothing whatever in the record to show that this course of conduct was not perfectly satisfactory to the members of the subordinate grove, that they ever objected to it, or that Mueller's practice or custom with reference to payments was unusual or extraordinary. If, then, he was permitted without objection to pay his dues at irregular intervals, this permission covering a period of more than three years, the subordinate grove accepting his money, without the slightest objection, when he got ready to pay, there was a waiver of strict compliance with the various articles which required prompt payment. The subordinate grove had, by its conduct, led him to suppose and believe that a default of two or three months in any one payment would not affect his standing as a member, or his right and interest in the fund out of which his beneficiary would be paid in case of his decease. The defendant could not, after long-continued conduct of this nature, by which he was lulled into the conviction that his delay was unobjectionable and his good standing unaffected, suddenly, and without notice, insist upon the forfeiture, and that he was no longer in good standing, and had forfeited all rights and privileges. The rule which is applied where assessments are made upon members of mutual associations organized for insurance purposes is in point here. It is stated as follows: If the company has, by its course of conduct, acts, or declarations, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to payment of the premium on the day stipulated will not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for forfeiture: *Bac. Ben. Soc.*, § 438, and cases cited. The members of a subordinate grove were bound to pay into its treasury, and the groves were bound to collect from their members, certain fixed amounts, as monthly contributions or dues. The secretary of defendant association was authorized and required to collect from each subordinate grove a sum equal to one dollar for each member thereof upon being notified of the death of a member. The amount so collected came out of the moneys in the treasury of the subordinate grove,—the accumulations of contributions and dues which

had been paid in. If the subordinate grove had, by a long-continued course of conduct, misled its members respecting the payment of dues; had created a belief on their part that payment of such dues need not be made in strict accordance with the articles of association, and would not be exacted on the day stipulated; had thus led the members to rely upon a belief that delay in payment was unobjectionable, and would not affect the members' good standing, or their rights and interests in the fund in question,—it must be held that prompt payment had been waived, and that the defendant association is estopped from insisting upon a forfeiture. In the case at bar the evidence was sufficient to support a finding that there had been a waiver of prompt payment, and that, within this rule, Mueller was in good standing when he died.

This disposes of the case, except as to the four assignments of error first mentioned. The complaint set forth that defendant had been duly notified of the death of Mueller, and had refused to pay the sum claimed to be due. The answer contained a general denial, and, after setting out certain articles of defendant's constitution, admitted that Mueller had been a member, but alleged that he had ceased to be a member, was not in good standing when he died, was in arrears for dues, and had been dropped from the rolls for non-payment of dues, as hereinbefore stated. There were no averments in the answer as to any article of the association which provided for proof of death, or that proof was required as a condition precedent to the right of action. For the purpose of showing that notice of death had been given, one of plaintiff's attorneys, after obtaining from defendant's secretary an admission that he had received letters from the attorneys in reference to the claim, produced a letter which he had received from the secretary in reply, and offered it in evidence. It was received over defendant's objection and exception. Other letters of the same nature—one from plaintiff's attorneys to the secretary, and the latter's answer, and a letter from defendant's attorneys—were also received in evidence over objections made by defendant's counsel. The court found as facts that defendant association had been duly notified of the death of Mueller, had refused to furnish blanks that more formal proof might be made, and had denied all liability under the certificate, for reasons which have been stated, and had refused to pay. The articles of association, as before stated, provided for payment to the beneficiary within ninety days "after presentation of proper proof of death to the board of directors." Nothing further was required, and, except as to the language quoted, the articles made no provision for proof of death. The letter of date October 14th contained a formal notification of



Mueller's death, with a request that proper blanks be sent if formal proofs were required. Payment was also demanded. The defendant's secretary replied, saying that Mueller's name did not appear upon the membership rolls of the subordinate grove. October 21st another letter was written to defendant's secretary, in which payment was again demanded, and another request made that blanks be sent if more formal proof of Mueller's death was required. From the reply to this letter,—the reply being written by defendant's attorney,—it appears that the board of directors, having investigated the claim, refused to recognize Mueller as a member in good standing when he died, and denied that defendant was liable to his beneficiary in any sum. The board seems to have been satisfied with such proof of the death as was contained in the letters of October 14th and 21st, and to have treated these letters as containing proof of the death sufficient to satisfy the article we have referred to. Although blanks were asked for, upon which, if required, formal proof might be made, they were not sent. Taking into consideration the very vague article in reference to proofs in case of death, and the fact that the board acted upon these letters and made no claim that the proof therein contained was not a compliance with the article, we are of the opinion that the letters were admissible in evidence as tending to establish the allegation in the complaint that defendant had been duly notified of Mueller's decease. And, if admissible, they warranted the finding we have mentioned.

Order affirmed.

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## SUPREME COURT OF WISCONSIN.

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WOLTERS ET AL.

vs.

WESTERN ASSURANCE CO.\* }

The evidence showed that insured refused to make any efforts to save insured property, and endeavored to prevent others from making such efforts.

*Held*, That the company was not liable for property lost through such misconduct, but was not released from liability on other property whose loss was not due to this cause.

*Held*, That the burden of proving such misconduct was on the party alleging it.

Statement of facts by PINNEY, J.

This action was brought upon a policy of fire insurance for \$2,000—\$1,500 on a frame building and saloon at Two Rivers, Wis.;

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\* Decision rendered, Feb. 2, 1897.

\$100 on saloon furniture; \$100 on wines and liquors; and \$300 on household and kitchen furniture, beds, bedding, family stores, etc. One Grotegut was joined as plaintiff, by reason of his mortgage interest in the real estate, amounting to \$1,200. The complaint charged the total destruction of the building by fire November 28, 1894, and claimed \$481.64 by reason of loss on household furniture, beds, bedding, wearing apparel, etc., and alleged a loss of \$285.50 on the stock of wines, cigars, etc. The fire and partial destruction of the personal property were admitted by the answer, but all liability under the policy was denied (1) because it was alleged that the fire was set by the plaintiff Wolters, or by his procurement; (2) because Wolters, by his conduct at the time of the fire, actively interfered to prevent salvage by neighbors and friends who were present, and that his conduct in that respect was fraudulent, whereby he forfeited any right to recover damages for personal property under the policy. The jury found for the plaintiffs, and assessed their damages at \$1,963,—that is to say, \$463 over and above the insurance on the building; it appearing that the building was totally destroyed, within the meaning of the law. The undisputed evidence shows the value of the household and kitchen furniture, utensils, and effects covered by the policy was in excess of \$500, and the damage to them by reason of the fire was \$481.64; that the value of the saloon furniture and fixtures before the fire was \$294.50, and the loss or damage by reason of the fire, \$285.50. So that the loss was far in excess of the amount of the insurance. Evidence was given of facts and circumstances tending to show that the fire was incendiary in its origin, and also to show that the plaintiff Wolters absented himself from the fire about twenty-five minutes or half an hour, and tending to show that he made no effort to save anything. One witness testified that, when they tried to get into the front door, Wolters touched him on the shoulder and said: “‘Leave that door shut.’ I says, ‘Why?’ He says, ‘I shouldn’t take anything out.’ I asked, ‘Why?’ He says, ‘If you take it up, you will break it anyway, and I won’t get any insurance for it.’” Other witnesses testified to similar facts, and there was sufficient testimony to require that the question whether Wolters not only made no effort to save anything, but also whether he actively interfered to prevent friends and neighbors from making any salvage, be submitted to the jury. Plaintiff Wolters testified: That at the time of the fire he was greatly excited, and after he got dressed,—got some shoes and coat,—there were a couple of fellows at the front door. He knew not who they were. They were trying to take some stuff out. That the door was not locked,—was left open. That he made some remark

to them about tearing out the things, and, rather than to tear them out, they should leave them in, or something like that. He could not remember exactly what he did say,—something about breaking the furniture or tearing it up. That he was too excited to remember what kind of remarks he made. And he testified to facts and circumstances tending to show that the loss was a fair and legitimate one. So that the whole matter became appropriately a question for the jury. The plaintiffs had judgment on the verdict, and the defendant appealed.

The questions arise upon the instructions of the court asked and refused. The defendant requested the court to instruct the jury that "it was the duty of the plaintiff, at the time of the fire, not only to use all reasonable exertion on his own part, but to encourage other persons to assist in saving as much as possible of the unsaved property from destruction, and if you find that the plaintiff not only omitted and neglected all effort on his part to save any such property, but also requested others to desist from saving it, and the evidence fails to show you that reasonable efforts to save such property would have been unsuccessful, then the plaintiff would not be entitled to recover for the loss of any such property;" but it was refused. The court, after properly submitting to the jury the question whether the plaintiff Wolters burned or procured the property insured to be destroyed by fire, charged the jury, in respect to the point involved in the above request, as follows, namely: "That the plaintiff was not entitled, under the evidence, to recover anything for the loss on the stock of wines, liquors, and cigars." And, further: "That the policy under which this property was insured provides that the company shall not be liable for loss caused, directly or indirectly, by the neglect of the insured, Wolters, to use all reasonable means to save and preserve the property at and after the fire. If the plaintiff prevented or obstructed the saving of the personal property, so that, in consequence thereof, said property was destroyed or damaged by fire, the insurance company is not liable for such loss; nor is it liable for the loss of any property caused, directly or indirectly, by the neglect of the plaintiff to use all reasonable means to save and preserve the property at the fire and after the fire. Was any of this personal property destroyed or damaged by such neglect of the plaintiff to use all reasonable means to save and preserve the same? If so, what was the value of the property lost by such neglect of the plaintiff? If all the personal property was lost in consequence of such neglect, then the defendant is not liable for the value of any of the personal property whatever. If, however, only a part of the personal property was lost in consequence of such neglect, then

what was the value of the property so lost by the negligence of the plaintiff, provided you find the plaintiff did not set fire to his building? That the amount found to be the actual loss on the personal property should be added to the value of the building, which is the sum of \$1,500, and which the plaintiffs, if they were entitled to recover, were entitled to for loss on the building." Defendants moved the court for a new trial, upon the minutes of the court, for error in the giving and refusing of instructions to the jury, and because the verdict was contrary to the evidence. The motion was denied, and from a judgment entered on the verdict in favor of the plaintiffs the defendant appealed.

QUARLES, SPENCE & QUARLES, *for Appellant.*

G. G. & C. H. SEDGWICK and TIMLIN & GLICKSMAN, *for Respondents.*

PINNEY, J. (after stating the facts.)

1. We cannot interfere with the verdict in this case, upon the defendant's contention that it is contrary to the evidence. There was sufficient evidence on all contested points to require the submission of the issues to the jury, and it cannot be said that the verdict is not supported by competent evidence. The weight and credibility of the testimony, and the proper inferences to be drawn from the facts and circumstances in evidence, were for the jury; and the circuit judge appears to have been satisfied with the verdict, and refused a new trial.

2. We think that the instructions to the jury on the subject whether the loss was caused, directly or indirectly, by the neglect of the plaintiff Wolters to use all reasonable means to save and preserve the property at and after the fire, and also as to the effect of such negligence on the plaintiff's right of recovery, as well as the fact, if they so found it, that the plaintiff Wolters prevented or obstructed the saving of the personal property, are correct. It was submitted to the jury to find what was the value of the insured property lost in consequence of such conduct on his part, if any, and they were told that the defendant would not be liable for the value of the property lost by reason of such neglect or improper interference. It is not claimed that there was any stipulation or condition in the policy by which it would be avoided for such neglect or misconduct. The law does not favor forfeitures, and a forfeiture of the policy cannot be raised, on these grounds, by implication. The most that can be said is that the company would not be liable for any loss caused by the negligence or misconduct of the insured, and, if no loss was so caused, the defendant was not

injured thereby, and had no ground of defense by reason of the alleged neglect or misconduct: *Commercial Bank of Milwaukee vs. Firemen's Ins. Co.*, 87 Wis., 297. The instruction asked by the defendant's counsel is faulty, and was properly refused. Instead of resting its partial defense, for destruction of the personal property, on the legitimate result of the negligence or misconduct of Wolters, such partial defense was to be made available to the defendant, by this instruction, not upon the ground that such negligence or misconduct was the proximate cause of the loss, but in the event that the evidence failed to show that reasonable efforts to save such property would have been unsuccessful, making the partial defense to finally depend, not upon what the evidence showed, but upon what it failed to show. The burden of proof was on the defendant to show that the loss was caused by Wolters' neglect or misconduct: *Freeman vs. Insurance Co.*, 144 Mass., 572; *Conkhite vs. Insurance Co.*, 75 Wis., 116; *Insurance Co. vs. Johnson*, 46 Ind., 315, 326. The instruction asked was properly refused, and, as the instructions given were sufficiently favorable to the defendant, it follows that the judgment is correct, and must be affirmed.

The judgment of the circuit court is affirmed.

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## SUPREME COURT OF NORTH CAROLINA.

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SPRUILL

vs.

NORTHWESTERN MUT. LIFE INS. CO.\*

The policy stipulated that it should be void if within two years the insured should die by his own hand, sane or insane.

*Held*, That suicide while insane within the period avoided the policy, no matter what might be the degree of mental unsoundness.

The proofs of death, stating the cause to be a pistol shot from his own hand, were put in evidence by the company.

*Held*, That this shifted the burden of showing death from a cause not excepted, to the plaintiff, and when the statement in the proofs was not contradicted, it was not error to direct a verdict for the company. The term death by his own hand is the equivalent of suicide.

F. S. SPRUILL and C. M. COOKE & SON, *for Appellant*.

BATTLE & MORDECAI and F. H. BUSBEE, *for Appellee*.

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\* Decision rendered, April 6, 1897.

VOL. XXVI.—66.

DOUGLAS, J.

This is an action by Mrs. Sarah F. Spruill against the Northwestern Life Insurance Company to recover the amount of a policy of insurance issued to her, as beneficiary, upon the life of her husband, William T. Spruill. The policy, issued on the 2d day of October, 1894, provided that if, within two years from the date thereof, "the said assured shall, whether sane or insane, die by his own hand, then this policy shall be null and void." The assured died on the 24th day of July, 1895, from the effects of a "pistol shot in his own hands," as stated in the proof of loss furnished to the defendant by the plaintiff as required by the terms of the policy. The complaint, among other material allegations, alleged "that on the 24th day of July, 1895, at and in the county of Nash, the said William T. Spruill died," without stating in any manner the cause of his death. The answer of defendant company set up, as a complete defense against any recovery, the date and terms of the policy, and the date and manner of death of the assured, as above set forth. The court held that the burden of proof rested upon the defendant.

During the progress of the trial the plaintiff proposed to ask one W. T. Clark, her own witness, as to the mental condition of the assured at the time of the killing. The defendant objected, the objection was sustained, and the plaintiff excepted. There is no error in the exclusion of such testimony, as, in our view of the law, as applicable to policies like the one in suit, the mental condition of the assured at the time of the killing is entirely immaterial. It is well settled that under the old forms of life-insurance policies, in which it was provided that the insurer should not be liable if the assured "committed suicide," or "died by his own hand," the policy was not vitiated when the assured was insane at the time of suicide: *Borradale vs. Hunter*, 5 Man. & G., 668; *Insurance Co. vs. Terry*, 15 Wall, 580; *Bigelow vs. Insurance Co.*, 93 U. S., 284; and a long line of decisions identical therewith in the large majority of the States. In view of these decisions, the insurance companies began to insert the words used in this policy, or words equivalent thereto. As the expressions "committed suicide," and "died by his own hand," were held synonymous, the words added thereto, "sane or insane," or "feloniously or otherwise," are regarded as equally synonymous, and intended to protect the insurer from all liability where the assured committed suicide, whether sane or insane, and regardless of the degree of insanity. After careful consideration, we are of opinion that such is the legal effect of the provisions of this policy. A policy of insurance is a contract, and should be construed, like all other contracts, in such a way as to carry out the manifest intention

of the parties, unless some of its provisions, conditions, or limitations are contrary to law or to public policy. It was clearly the intention of the policy of insurance in this case to protect the insurer from all liability for any form of suicide, and we do not see how such protective conditions are in any way in violation of law, or of any settled rule of public policy. Nor is the liability of the insurer affected by the degree of insanity, the word "insane" implying every degree of unsoundness of mind. The distinction drawn by some eminent authorities in cases of self-killing by an insane person, "whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect," does not commend itself to our better judgment. It seems to belong rather to the domain of speculative psychology than to the practical administration of the law. The determination of that shadowy line between mental twilight and night, where the last faint rays of reason, resting for a moment on the horizon of the mind, fade away into utter darkness, is practically beyond the power of finite understanding, and, to the jury, would necessarily be a matter of mere speculation, depending more upon their sympathy than their judgment. Of course, the above rule does not include death by accident or mistake, such as the accidental discharge of a pistol in the hands of the assured, or poison, or an overdose of medicine taken by mistake. There must be, at least physically, some suicidal intent, no matter how far removed from a responsible mental operation. We believe this rule to be in accordance with the better line of decisions prevailing in the majority of courts.

In the leading and well-considered case of *De Gogorza vs. Insurance Co.* (65 N. Y., 235), the court says: "We have, therefore, only to consider the interpretation to be given to the language of the contract of insurance, for no question is made but that it was fully understood and agreed to by both parties. It can scarcely be doubted that an insurer of the life of a person may, by apt language, guard himself from liability for all disasters, if the exemption does not contravene public policy. He may provide that if the assured shall die of the smallpox, or any other specified disease of the body, he would not be liable; and there appears to be no reason why he may not guard himself against liability if death results from any disease of the mind. Indeed, it is said by *Rapallo, J.*, in *Van Zandt vs. Insurance Co.* (55 N. Y., 169), 'that no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane

or insane, would be valid if mutually agreed upon between the insurer and the insured,' and then, in substance, adds that, if nothing is said with respect to insanity, the result is that a party does not 'die by his own hand' if his death happens from the involuntary act of a madman. This view of the question is but a very concise and accurate statement of the law as announced in cases previously adjudged. \* \* \* The word 'insane,' or 'insanity,' ordinarily implies every degree of the unsoundness of mind; and in this case we assumed that the assured was in the very last degree mad or insane, so that the mere act of self-destruction was wholly involuntary." After reviewing some of the leading cases the court concludes: "We prefer to place our decision upon the ground that the words of the proviso in the policy before us, by plain rules of interpretation, exempt the insurer from liability. That this language, in view of previous decisions, was inserted for such a purpose, cannot be doubted, and that it was agreed to by both the insured and the insurer is not questioned, and that it is a provision allowed by law no one denies. We are to say from these words what the parties must have intended, and we cannot properly say that additional words having no meaning were inserted in the contract; and, if they mean anything, it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured, proceeding from a partial or total eclipse of the mind, the insurer goes free." In *Scarth vs. Society* (75 Iowa, 346), the court says: "We think that the better rule, and the logical conclusion of all the above cases, is that the condition in the policy was intended to include self-destruction, no matter what the mental condition of the insured was at the time of the act which caused the death. Of course, the policy was never intended to include death by accident, as by taking poison by mistake, the accidental discharge of a gun or pistol held in the hands of the insured, or the like. It means all suicidal acts, whether such as are demonstrated as criminal, or such as are the offspring of insanity." This construction appears to have been subsequently followed in the Supreme Court of the United States, as well as New York and the majority of the leading insurance States: *Bigelow vs. Insurance Co.*, supra; *Insurance Co. vs. McConkey*, 127 U. S., 661; *Insurance Co. vs. Akens*, 150 U. S., 468; *Riley vs. Insurance Co.*, 25 Fed., 315; *Billings vs. Insurance Co.*, 64 Vt., 78; *Chapman vs. Insurance Co.*, 6 Biss., 238, Fed. Cas., No. 2,606; *Penfold vs. Insurance Co.*, 85 N. Y., 318; *Adkins vs. Insurance Co.*, 70 Mo., 27; *Pierce vs. Insurance Co.*, 34 Wis., 389; *Association vs. Payne* (Tex. Civ. App.) In *Insurance Co. vs. Akens*, supra, the court, while affirming the judgment in favor of the plain-



tiff, distinctly recognized the principle herein adopted, by the following distinction (page 475, 150 U. S.): "The clause [then under construction] contains no such significant and decisive words as 'die by suicide, sane or insane,' as in *Bigelow vs. Insurance Co.*, supra, or by 'suicide, felonious or otherwise, sane or insane,' as in *Insurance Co. vs. McConkey*, 127 U. S., 661." In the case before us, any possible hardship arising from the exclusion of all liability for death from suicide is met by the termination of this condition after the lapse of two years from the date of the policy, which then becomes incontestable. The question of the possible waiver of such a condition by the acceptance of premiums after the insured was wholly or partially insane, or threatened with insanity, is not before us.

The only exception remaining for us to consider is that of the plaintiff to the action of the trial judge in directing the jury to answer the issue in the affirmative. The only issue was as follows: "Did William T. Spruill die by his own hand within two years from the date of the policy sued on?" The force of this exception depends upon the consideration of several important principles. The action of the judge can be sustained only under the doctrine, firmly established in this State, that where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests: *Covington vs. Newberger*, 99 N. C., 523; citing *Brown vs. Kinsey*, 81 N. C., 245; *Best vs. Frederick*, 84 N. C., 176; *State vs. White*, 89 N. C., 462; *State vs. Powell*, 94 N. C., 965. That the verdict should be directed against the party on whom rests the burden of proof is the essence of the rule. We have examined the large number of citations in the elaborate brief of the learned counsel for the defendant, and cannot find a single case of a direction to the contrary. In *Purifoy vs. Railroad Co.* (108 N. C., 100), the direction was in favor of the defendant upon a counterclaim as well as the original cause of action, but they both depended upon the same state of facts; and, as there was no conflict in the testimony, the case practically resolved itself into mere questions of law. The doctrine under discussion is of English origin, and of comparatively recent acceptance in this State. The case of *Wittkowsky vs. Wasson* (71 N. C., 451), was apparently the first authoritative exposition of the doctrine as it now stands, although citing the case of *State vs. Vinson*, 63 N. C., 335. The former case, emphasized by the qualified assent of Justice Reade and the unqualified dissent of Justice Bynum, cites with the warmest approval the following quotation

from the opinion of Welles, J., delivered in the English Court of Exchequer Chamber, to wit: "There is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review) is, as stated by Maule, J., in *Jewell vs. Parr* (13 C. B., 916), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." Reade, J., assenting, says: "I assented to the decision as delivered in the opinion of Brother Rodman, upon the explanation therein that it was not to be interpreted as an innovation upon the established rule that the jury are the sole judges of the weight of evidence, without any intimation of opinion on the part of the judge." The rule laid down in that opinion is now too firmly established to be questioned, but it can be carried no further without dangerously infringing upon constitutional provisions. His honor had already ruled that the burden of proof rested upon the defendant, and, we think, properly so. The presumption is always against suicide, as it is contrary to the general conduct of mankind: *Mal-lory vs. Insurance Co.* (47 N. Y., 54), cited and approved in *Insurance Co. vs. McConkey*, supra; *Insurance Co. vs. Akens*, supra. It is further held that, where the words of a policy do not clearly indicate the intention of the parties, the courts should lean to that interpretation which is most favorable to the assured. *McConkey's Case*, supra, citing a large number of cases. If the verdict of the jury is, in the opinion of the court, against the weight of evidence, it can be set aside, and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury: *Hardison vs. Railroad Co.* (at this term). The determination of the necessary character and legal effect of that evidence belongs to the court, as a question of law, but its weight must be left with the jury, as a matter of fact: *Wittkowsky vs. Wasson*, supra; *Best vs. Frederick*, 84 N. C., 176; *State vs. Powell*, 94 N. C., 965; *State vs. McBryde*, 97 N. C., 393; *Powers vs. Erwin*, 108 N. C., 522; *State vs. Chancy*, 110 N. C., 507; *Young vs. Alford*,

118 N. C., 215, and numerous other cases. The rule laid down in some authorities, that, wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be, under our present constitution.

"The ancient mode of trial by jury" guaranteed by the constitution is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommends the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious method of appeal, where findings of fact can be reviewed only from the meager notes of the judge and the uncertain recollection of counsel. The mere fact that the judge can never, save by waiver or consent, render a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law. These principles are "fundamental," and "a frequent recurrence" thereto is of constitutional obligation. The issuing of the policy and the death of the assured, alleged in the complaint and admitted in the answer, made a *prima facie* case for the plaintiff. The onus was thus shifted by the pleadings to the defendant, and was assumed by it. After the conclusion of its oral testimony, the defendant read in evidence the proof of claim sent on to the defendant by the plaintiff, in which it was stated that the cause of death of the assured was "pistol shot from his own hand." This statement, unexplained, was an admission of suicide, and at once shifted the burden of proof upon the plaintiff: *Insurance Co. vs. Newton*, 22 Wall., 32; *Insurance Co. vs. Higginbotham*, 95 U. S., 380. The cause of death, as given, when unexplained, negatives the accidental discharge of the pistol; for the expression "died by his own hand," which, in its broadest sense, might include accidental death, has been uniformly given by the courts a well-recognized meaning, as being equivalent to "suicide." The plaintiff, though she went on the stand herself, in no wise contradicted this import of the words, nor did she testify to any fact tending to show that she had used them by mistake or inadvertence. Her admission, unexplained and uncontradicted, justified his honor's direction to the jury. No error.

## SUPREME COURT OF MISSOURI.

DIVISION No. 2.

O'KEEFE

vs.

LIVERPOOL &amp; LONDON &amp; GLOBE INS. CO.\* }

A loss is total within the meaning of a valued-policy law if the only portion of the building which could be repaired and utilized was the foundation, and a portion of the second-story walls, whose repair would cost more than to build anew.

In case of such total loss a stipulation as to arbitration becomes void. There is nothing to arbitrate.

FYKE, YATES & FYKE, *for Appellant.*

WALLACE & WALLACE, *for Respondent.*

GANTT, P. J.

This is an action upon a policy of insurance issued by the defendant to the plaintiff on the 15th day of May, 1894, insuring plaintiff for one year against loss or damage by fire, to an amount not exceeding \$3,000 to his two-story and foundation brick, gravel-roof building, with its additions, porches, steam, gas, and water pipes, plumbers' work and fixtures, steam-heating apparatus and connections and piping, stone and prismatic sidewalks adjoining, plate glass, skylights, and all permanent improvements therein. The policy contained this provision:—

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided. It shall be optional, however, with this company \* \* \* to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice \* \* \* of its intention so to do.

If fire occurs, the insured shall furnish, if required, verified plans and specifications of any building destroyed or damaged.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, and, failing to agree, shall submit

\* Decision rendered, July 6, 1897.

their differences to the umpire; and the award, in writing, of any two shall determine the amount of such loss.

The loss shall not become payable until after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

No suit or action on this policy shall be sustainable until after full compliance by the insured with all the foregoing requirements.

On June 3, 1894, a fire occurred, by which plaintiff claimed the building was wholly destroyed, in contemplation of the statute of this State, and defendant claimed that there was only a partial loss, and demanded an arbitration. The great burden of the testimony was to the effect that the front, which consisted of iron pillars and brick superstructure, was rendered useless in the condition in which it was left. The pillars were warped, and the wall above them sprung out of plumb. The side walls of the lower story were so badly burned that the architects and carpenters testified that the building could not be repaired; that the old walls would have to be taken down, and the building rebuilt from the foundation up. It appeared, however, that a portion of one of the walls in the second story was not ruined by the fire, and the effort of defendant was to show that this wall could be shored up, and the burnt portion in the first story taken out and rebuilt; but the architects and builders testified that this would be much more costly than taking down the whole of the walls, and building them anew, and, even if done, would not be as good as it was before the fire. The joists were burnt, and the roof and window sills destroyed. The main contention is based upon the evidence that, so far as the witnesses could see, the foundation was not hurt much, if any. Two builders testified for defendant as to their estimates for rebuilding the house. One, Mr. Kelley, testified it could be repaired and replaced for \$1,738.45; the other, Mr. Hucke, estimated it at \$1,688.50; but neither testified it could be done without taking down all the old walls. Plaintiff offered testimony of builders, also, who estimated the loss, one at \$3,419.50, the other at \$3,752. The other defense set up in the defendant's answer—the failure of the plaintiff to furnish the defendant with plans and specifications of the building—grows out of the correspondence between the parties. The company wrote Mr. O'Keefe, under date of June 12th, demanding an adjustment of the damages by appraisers. Mr. O'Keefe answered this under date of June 14th, informing the company that there had been a total destruction of the building as such, and demanding the face of the policy. On July 27th, Mr. O'Keefe furnished the company with proofs of loss, which were duly received, and not objected

to. On August 13th the company wrote Mr. O'Keefe, acknowledging receipt of the proofs, giving notice that they were willing to repair the building or adjust the damages by appraisers. And on August 20th the company again wrote Mr. O'Keefe, as follows:—

John C. O'Keefe, Esq.—Dear Sir: We hereby give you notice that we will repair the building, No. 1521 West Ninth Street, Kansas City, Mo., insured under our policy 13,923, Kansas City, Mo., agency, and in this way make good the damage which occurred on the 3d day of June, 1894. You are hereby requested to furnish us with verified plans and specifications of this building for the purpose aforesaid.

This letter was replied to by the counsel for Mr. O'Keefe, informing the company that, if they would rebuild from the ground up, they could do so, but that the proposition to repair was impracticable, as no part of the old walls could be used, and their use had been forbidden by the city authorities.

1. The merits of this appeal hinge upon whether this was "a total loss" by fire, within the meaning of section 5897, Rev. St., 1889, or "a partial loss" only, and therefore falling within the provisions of section 5899, Rev. St., 1889. To ascertain the fact, the court directed the jury as follows: "By a total loss is meant that the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing." If this is a correct instruction on the law of the case, the finding of the jury must conclude the defendant. In *Havens vs. Insurance Co.* (123 Mo., 403), the court in banc defined "a total loss," within the meaning of a similar section, when applied to a building, to mean "totally or wholly destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some debris remains which may be useful or valuable for some purposes." Over thirty years ago, this court, in *Nave vs. Insurance Co.* (37 Mo., 430), held that a policy of insurance upon a building was insurance upon the building as such, and not upon the material of which it was composed. In *Lindner vs. Insurance Co.*, it was ruled by the Supreme Court of Wisconsin that, where the identity of a building as such has been destroyed by fire, it is a total loss, though some of its materials may not have been entirely destroyed. In that case it appeared from the evidence of the adjuster that the foundation and cellar of the house were entire, and a portion of the sills stood upon the stonework, and it was argued that, because the foundation was intact and had not been broken into a shapeless mass, it was not "a total loss." But the court said this evidence would not prevent the case from being regarded as one of total loss. "It was not expected that the foundation and cellar would be utterly destroyed." The

court quoted with approval the language used in *Seyk vs. Insurance Co.* (74 Wis., 72), that "it cannot be doubted that the identity and specific character of the insured buildings were destroyed by fire, although there was not an absolute extinction of all the parts thereof." "This was entire destruction of the buildings, within the meaning of the statute." So clear, indeed, did it seem to the court, that it held that the circuit court might have properly given a peremptory instruction that it was a total loss. To the same effect are the following decisions: *Oshkosh Packing & Provision Co. vs. Mercantile Ins. Co.*, 31 Fed., 200; *Insurance Co. vs. Eddy*, 36 Neb., 461; *Insurance Co. vs. Bachler*, 44 Neb., 549; *Insurance Co. vs. Garlington*, 66 Tex., 103; *Huck vs. Insurance Co.*, 127 Mass., 306; *Williams vs. Insurance Co.*, 54 Cal., 450. In *Corbett vs. Insurance Co.* (85 Hun., 250), the court said: "There was sufficient to go to the jury upon the question whether the building had 'lost its identity and specific character as a building.' If it had, then there was a total destruction, within the meaning and intent of the parties and the policy." See, also, *Insurance Co. vs. McIntyre* (Tex. Civ. App.) We hold the instruction was proper, and that the court committed no error in refusing to instruct for defendant that if the cellar walls remained, and the lower floors were in such condition that they could be safely used in rebuilding, the building was not wholly destroyed. The escape of the stones in the foundation walls from complete extinction, if such a thing be possible, did not prevent the destruction of the building, as such, being total.

2. It follows as a necessary corollary that as the jury found there was a total loss, and the right to an arbitration was only stipulated for in case of a partial loss, there was nothing to arbitrate. An agreement to arbitrate in case of a total loss is repugnant to our statute and void: *Daggs vs. Insurance Co.* (Mo. Sup.); *Havens vs. Insurance Co.*, 123 Mo., 403. Clearly, an appraisalment of property wholly destroyed would be an anomaly.

As to the remaining points, they seem to be without merit. The proofs were duly made out, and no objections were made to their sufficiency. The whole case depended upon the claim of plaintiff that the loss was total. If he was right, there was nothing to appraise, nothing to arbitrate. Under proper instructions, the jury sustained his claim, and their verdict concludes the fact.

The judgment is affirmed. Sherwood and Burgess, JJ., concur.

## SUPREME COURT OF ALABAMA.

KELLY

vs.

LIFE INSURANCE CLEARING CO.\* }

The policy provided that the statements in the application as to health should be warranties, and if untrue the policy should be forfeited, and that it should not take effect unless the health was in accordance with the health certificate attached.

*Held*, That the papers referred to were part of the contract and the court could not consider the question of materiality in case their statements were not in accord with the facts.

The health certificate also provided that it was a warranty, and if the statements therein and in the original application were untrue the policy should be forfeited.

*Held*, That a statement that the insured had never made application to another company and been rejected, whereas he had made such application and without his knowledge had been rejected, avoided the policy.

THOMAS H. WATTS, *for Appellant*.

HORACE STRINGFELLOW, *for Appellee*.

HARALSON, J.

The plaintiff's counsel in his brief states the issue on the pleadings in the case, as follows: "The theories upon which the causes of demurrer are based are, first, that the policies themselves contain the only conditions, stipulations and warranties upon which they were issued; and, second, that if the said application and health certificate are to be considered parts of the contract of insurance, and as containing some of the conditions upon which the policies were issued, said statements in said application and in said certificates are to be considered as representations and not as warranties, and, being only representations, the matter complained of must have been material to the risk." The defendant's counsel states the issues as to the pleas 1, 2 and 3, and demurrer thereto to the same effect, as follows: "The first question to be considered is, do the said pleas (1, 2 and 3) show that the said answers were warranted by the insured in said contracts of insurance sued on, to be true? If they do show such warranty, then the demurrers of plaintiff thereto were properly overruled; otherwise, they should have been sustained." The parties are thus agreed as to the substance and effect of the demurrers to the pleas, and we may, therefore, consider the questions thus presented, first, whether we are to look alone to the face of the policies, as containing the only conditions, stipulations and

\* Decision rendered, Jan. 13, 1897. The facts sufficiently appear in the syllabus.—ED. INS. L. J.



warranties upon which they were issued; and, second, if we go outside the policies themselves, and look at the application for insurance, and health certificate, as it is called, as parts of the contract of insurance, whether the statements therein contained are to be regarded as representations only,—the matter, as alleged, not being material to the risk,—or, are they to be treated as warranties, the breach of which will avoid the policies. The policies themselves contain an express warranty in respect to the health of the insured, and his freedom from any disease; of his age, and the exemption of his parents, brothers, and sisters from specified diseases. It is then provided in each, “It is expressly agreed, that if the above declarations and warranty shall be found untrue in any respect, or, if there shall be any breach thereof whatever, then this policy shall be ipso facto null and void, and all payments thereon shall be forfeited to the company.” If this were all, and the policies were to be construed without reference to any other contemporaneous writings, only those statements which are found in the policies themselves, and expressly warranted to be true, could be considered as warranties,—the rule being, that courts will not create or extend a warranty by construction. But, the rule of law is well settled and familiar, that different writings, executed at the same time and relating to the same subject-matter, will be construed as one instrument. The intention of the parties controls, and is to be gathered from the writings to which their stipulations and agreements may be referred: *Bridgeport Land & Imp. Co. vs. American Fireproof Steel Car Co.*, 94 Ala., 596; *Railway Co. vs. Gilmer*, 85 Ala., 423, 434; *Walker vs. Struve*, 70 Ala., 167; *Robbins vs. Webb*, 68 Ala., 398; *Collins vs. Whigham*, 58 Ala., 440; *Byrne vs. Marshall*, 44 Ala., 357. A good illustration of the rule as applicable to the case in hand, is that of *Roberts vs. Insurance Co.*, 3 Hill, 501, where a policy of insurance was made by using a form printed on the half of an entire sheet of paper; and on the other half sheet, there was a printed statement, commencing, “Conditions of Insurance,” but no express reference was made to this, in the body of the policy. The court held, that there was no doubt of the intent that both should be taken together; that the assured accepted the policy, with what purported to be conditions on the same sheet; that there was no need of an express reference by the policy to the conditions, in order to fix the meaning, and that the juxtaposition of the papers was a sufficient *prima facie* expression, subject to be rebutted by parol evidence, that they were connected by mistake. In *Insurance Co. vs. Thomas* (74 Ala., 578, 582), the indorsements and the policies on which they were made, were construed together as a whole. It may be said, then,

that where reference is made in one paper to another, they are to be construed together as a whole, when, legally, the papers constitute one entire transaction, as they most frequently do in a policy of life insurance, the application therefor and indorsements thereon: *Insurance Co. vs. Johnston*, 80 Ala., 467, 471. They need not be physically attached. On each of the policies in hand, there was entered on the margin in writing or printing, the words, "This policy shall not take effect, until the first premium thereon shall have been paid to the company, or to some person authorized by the company to receive it, while the insured is in good health, and in accordance with the health certificate and premium receipt accompanying the same." Again, the insured, in making his application for these policies, signed an agreement as part of his application, as follows: "I hereby warrant and agree, \* \* \* that the statements and answers to the printed questions above, together with this declaration (containing other agreements), as well as those made to the company's medical examiner, shall constitute the application, and be the basis of this contract." Further still, to make the intention of the parties even more manifest and indubitable, in accepting the policies, the insured signed another paper, or certificate, provided on the face of the policies themselves to be signed, in which he states, in consideration of the issuance and delivery of said policies, respectively, to him: "I hereby certify, declare, and warrant in consideration of the delivery to me of said policy, \* \* \* that the statements herein (touching his health habits) are, and that the statements in the original application were, when made, in all respects true, otherwise the insurance will be void." Italics ours.

In this case it thus appears, the contract of the parties as averred in said pleas, consisted of three writings to which their statements and agreements are necessarily referable, namely, the original application for insurance, made to the Penn Mutual Life Ins. Co.; the policies of insurance themselves, and the health certificate. From these papers, there can remain no doubt of the intent of the parties, that they should be taken and construed together, as if there were but one paper embodying the provisions and conditions of each. When so construed, we are constrained to hold, that when the insured, in his application for insurance, made the statement that he had never applied to any company or agent for insurance, without receiving a policy of the exact kind and amount applied for, and that there were no negotiations for insurance then pending, he warranted his answer to be true, otherwise, as agreed in his certificate on receiving the policies, the insurance was to be void. This agreement was not a simple representation of the fact he averred, to be held of

no vitiating effect, if untrue or immaterial, but a warranty as plain as words can create one, and on the truth of which the vitality of the policies were made to depend. In giving construction and effect to such a contract, in a kindred case, this court has well said: "In construing this contract, all its conditions and terms will be construed liberally, in favor of the assured, and strictly against the insurer. Clear and unequivocal language must be required in order to create a warranty, and all statements of a doubtful meaning must be construed to be representations rather than warranties. \* \* \*

But, while these rules of construction are followed, it is our duty 'to interpret the contract of the parties, as they have made it, and to enforce it according to obvious intention legally expressed, so long, at least, as it offends no law, or violates no principle of public policy:'" *Insurance Co. vs. Thomas*, 74 Ala., 578, 583. In *Insurance Co. vs. Garner* (77 Ala., 215), it was again said: "While warranties are not favored, and will neither be created nor extended by construction, when a warranty is expressly, and in terms declared, its stipulations and conditions must be strictly complied with. The question is disembarrassed of any consideration of materiality, the parties having made it material by their contract." Materiality of a statement is not, therefore, as is generally conceded, an element of defense in case the statement is warranted to be true. The agreement of the parties, that a statement is true, and that its falsity, in any respect, should avoid the policy, on principle and authority, removes the question of materiality from the consideration of the court and jury: *Insurance Co. vs. France*, 91 U. S., 510; *Jeffries vs. Insurance Co.*, 22 Wall., 47. The demurrers to said pleas, it must be held, were properly overruled, for the pleas aver, that in said health certificate, "it was warranted by the insured that the statements in said original application were, when made, in all respects true, and that otherwise the insurance should be void. The warranty is admitted by the demurrers. Matters alleged and warranted to be true, though stated by mistake, through ignorance, carelessness or inadvertence, constitute no defense to an action on a policy of life insurance. There is nothing in the case of *Insurance Co. vs. Johnston* (80 Ala., 471, 2 South., 125), as is supposed, in conflict with these decisions. In that case, it is stated expressly, that there is nothing therein decided, which conflicts with the cases above referred to. The court properly said: "The strong inclination of the courts is to make these statements or answers binding only; so far as they are material to the risk, when this can be done without violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary."

From the foregoing it plainly appears that the rulings of the court, sustaining demurrers to replications 1, 3 and 8 and to pleas 1, 2 and 3, were properly made. The matters set up in said replications were no answer to said pleas. Replications 9 and 10 are general, and no more than a joinder in issue on the allegations of the pleas, that the statement in the pleas to which the replications refer was a warranty. The replications merely deny that the statement referred to in each plea was a warranty, and sets up that it was a mere representation. The same is true of replication 11. The ninth was not demurred to, but the tenth and eleventh were, and the demurrers overruled. The demurrers to the last two, were probably overruled, as to pleas 1, 2 and 3, for the same reason, that said replications denied, as was done in replication 9, that the statement as to the previous application for insurance was a representation merely and not a warranty. Being a matter of legal construction of the papers themselves, and what they contained, demurrers might well have been sustained to each of said replications, for, as we have seen, they contain, really, no answer to the said pleas. In no event could replication 11 be held to be an answer to plea No. 1, which contains nothing about a rejection of insured by said New York Life Ins. Co. This replication admits the allegations of said plea 1, and simply denies that the allegation in respect to the previous application to said insurance company was a warranty, and sets up that it was a representation. The allegations of each of said pleas, by the policies and the papers contemporaneously executed as a part of them, and by the evidence introduced, without any conflict, are sustained, and there was no error, therefore, in giving, as was requested, the general charge in favor of defendant.

It is unnecessary to consider the other questions raised by other pleading in the cause, discussed by counsel, the rulings on which are assigned as error, since their decision, the one way or the other, could not affect the result. Affirmed.

## UNITED STATES CIRCUIT COURT OF APPEALS.

THIRD CIRCUIT.

FIDELITY &amp; CASUALTY CO., OF NEW YORK, )

vs. }

WILLEY ET AL.\*

Where the company, in the usual course of business, transmitted the renewal receipt to the agent and charged him with the premium, and the agent delivered the receipt to the insured, this was a waiver of a provision in an accident policy that it should not take effect unless the premium was paid prior to an accident.

Before Dallas, Circuit Judge, and Butler and Buffington, District Judges.

BUTLER, D. J.

The suit is on a policy of insurance issued by the plaintiff in error to James Getty, Jr., insuring him against accident, for one year. Just before the expiration of this period the company forwarded a renewal receipt to its agent and charged him with the premium. He delivered the receipt to Getty, and thus extended the policy, on the latter's promise to pay at a future time. It was the habit of the company thus to forward policies and renewal receipts and charge premiums, to its agents, and it was the practice of this agent, Mr. Scott, to deliver policies and receipts without exacting prepayment of premiums due, where he had confidence in the assured. He had so dealt with Getty previously. The policy in suit contains the usual provision that it "shall not take effect unless the premium is paid previous to any accident under which claim is made;" and further that its terms cannot be waived or modified by an agent without the approval by the president or secretary of the company.

At the close of the testimony the company requested the court to charge as follows:—

"(1) That the insured, James Getty, Jr., by accepting and retaining the policy of insurance, without objection, assented to all its terms and conditions; more particularly (a) he assented and agreed that the policy should not take effect unless the premium should be paid previous to any accident under which claim might be made; and (b) he agreed that the terms of this policy could not be waived by any agent of the insurance company, and that any modification of the policy should not be valid unless indorsed thereon by the president or one of its secretaries.

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\* Decision rendered, April 12, 1897.

"(2) The insured, James Getty, Jr., had knowledge, either actual or presumptive, that the agent of the defendant company, Mr. Scott, had no power to waive or modify any condition of the policy, including that provision of the policy which required prepayment of the premium before an accident.

"(3) The defendant's agent, Mr. Scott, could not bind his principal, the defendant, by waiving payment of the renewal-premium when Getty, the insured, knew that he had no power to make such waiver.

"(4) It is immaterial whether Mr. Scott was a general agent or a subagent of the defendant company, so far as his right to waive any condition of the policy was concerned.

"(5) Where the contract of insurance expressly provides by its terms the particular manner in which a condition of the contract may be waived or modified, no other attempted waiver will be permitted to modify the contract.

"(6) The mere delivery of the renewal receipt did not give the policy force, because, by its terms, it was expressly stipulated between the parties that it should not take effect unless the premium should be paid previous to an accident. The failure to pay the premium simply suspended the policy until the premium should be paid.

"(7) The possession by the plaintiff of the renewal receipt is merely presumptive evidence that the premium was paid, and is not binding upon the company, unless the jury find that the money was actually paid."

The court declined to charge as requested, but instructed the jury, *inter alia*, that: "If you find from the evidence that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott, as its debtor, for the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50, named in the receipt, then, for the purpose of this case, that premium must be regarded as paid to the company, as between the company and Mr. Getty, or his personal representatives, or cash payment thereof must be deemed to have been waived, and the non-payment of the premium by Getty to Scott under the circumstances would constitute no defense to this suit."

While the court so charged, it nevertheless reserved the legal question raised by the points, whether the plaintiff is entitled to recover under the facts. The jury rendered a verdict for the plaintiff below, as follows: "The jury find for the plaintiff in the sum of

ten thousand, five hundred and seventy-three and  $\frac{33}{100}$  dollars, subject to the opinion of the court upon the question of law reserved—whether the nonpayment by Mr. Getty of the renewal premium mentioned in the renewal receipt of June 7, 1895, (pro ut) constitutes a defense to this action upon the facts established by the verdict, namely, that it was the usual course of dealing between the defendant company and Mr. Scott, its general agent, for the company to charge Mr. Scott as its debtor with the premiums on policies of insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named therein; and Mr. Scott having delivered the renewal receipt to Mr. Getty without requiring cash payment of the premium.”

The court subsequently ruled the reserved question against the company, and ordered judgment accordingly. To this ruling the company excepted,—as it had done to the admission of some testimony produced to prove payment,—and brought the case here, assigning numerous alleged errors. A separate consideration of these assignments is unnecessary. The first, which is to the part of the charge above quoted, covers the entire complaint, except as respects the admission of testimony mentioned.

As the court below said when considering the question reserved, “the verdict of the jury establishes that it was the usual course of dealing between the company and its agent, Mr. Scott, for the company to charge Scott as its debtor with the premium on policies of insurance and on renewal receipts transmitted to him for delivery, and that in this particular instance the company when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of \$50 named in the receipt. The question of law reserved is whether under the circumstances the fact that the renewal premium was not actually paid by Getty to the company constitutes a defense.” And this is the main question raised by the assignments of error. If it were new, difficulty might be found in answering it. It is not new, however. It was involved in *Miller vs. Insurance Co.*, 12 Wall., 285; *Elkins vs. Insurance Co.*, 113 Pa. St., 386; *Insurance Co. vs. Carter* (Pa. Sup.); *Insurance Co. vs. Hoover*, 113 Pa. St., 591; and numerous other cases which need not be cited. It is urged, however, on behalf of the plaintiff here, that *Miller vs. Insurance Co.* is distinguishable from the case before us, and that all the other cases cited, which followed it, were decided under a misapprehension of that case. The only distinction pointed out consists in the fact that the Brooklyn Company instructed its

agents that if they delivered policies without exacting prepayment of premiums as the policies required, they would be charged with and held responsible for the amount. It is difficult to see the importance of this fact. The instruction was a caution, simply, to the agents, who would have been as clearly responsible for such premiums without it. The delivery of the policies under the circumstances would be a violation of duty, and would necessarily render the agents liable for the premiums. The caution did not therefore affect their obligations to the company. The court thought it tended, with other circumstances named, to support an inference of authority to deliver policies without exacting prepayment. This may be so; but its tendency in that direction is certainly no greater than is the charge, itself, against the agents, on forwarding policies for delivery. What the case decides is correctly stated in the syllabus, as follows: "Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, 'as the same will stand charged to their accounts until the premiums are received,' and the agent did nevertheless deliver a policy, giving a credit to the insurer and waiving a cash payment, \* \* \* the company was bound."

Under the circumstances of that case, and of the one before us, the charge against the agent and delivery of the policy, or premium receipt, to the assured may be treated as a transfer of the assured's indebtedness to the agent, and consequently a payment as between the former and the company; or as an estoppel of the company against setting up the stipulation for prepayment of the premium in avoidance of the policy. We are not called on to consider the reasonableness of this rule; it has become a part of the law of insurance. Companies can avoid it by avoiding the facts on which it rests, but in no other way.

The exceptions taken to the admission of evidence cannot be sustained. The evidence was competent to prove payment, under the circumstances shown, and the rule above stated.

The judgment is therefore affirmed.



## SUPREME COURT OF SOUTH DAKOTA.

HARDING

vs.

NORWICH UNION FIRE INS. SOC.\*

The policy provided that it should be wholly void if the subject is personal property and is incumbered by a chattel mortgage.

*Held*, That the provision was not waived by failure of the insurer to inquire regarding the interest. The Statute of South Dakota declaring that such information need not be disclosed except when inquired after does not relate to chattel mortgages.

An agent authorized to accept applications, receive premiums, fix rates, and to issue and renew and countersign policies when signed by the resident manager of a foreign company, is a general agent.

Such agent may employ a solicitor without the knowledge of his principal, whose waiver of a provision against incumbrance, when already existing, will be binding.

Where, before suit, the company had been served with notice of levy at the suit of judgment creditors for anything it might owe the insured and denied any indebtedness, the company cannot insist that such creditors were necessary parties to the suit against itself.

MARTIN & MASON, *for Appellant*.

RICE & POLLEY, *for Respondent*.

HANEY, J.

This action is on an insurance policy, containing the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if \* \* \* the subject of insurance be personal property, and be or become incumbered by a chattel mortgage." The insurance was on plaintiff's household furniture and effects. Before the policy was issued, plaintiff and his wife executed a chattel mortgage upon the property to secure a note of \$451.50, payable on demand. An action was commenced to obtain possession of the property, for the purpose of foreclosing such mortgage, and the insured had given a re-delivery bond. Subsequent to the fire, the aforesaid action was tried, and it was determined therein that, when such action was commenced, the mortgagee was entitled to possession of the property. Defendant is a foreign corporation, L. W. Stilwell was its agent at Deadwood. He had an arrangement with one Kimball, whereby the latter solicited insurance for defendant, delivered policies, and collected premiums. The employment of Kimball was unknown to defendant.

\* Decision rendered, June 16, 1897.

Stilwell's authority was in writing, and authorized him to receive proposals for insurance against loss or damage by fire in Deadwood and vicinity, to fix rates of premiums, to receive moneys, and to countersign issue, renew, and to consent in writing to the transfer of policies of insurance signed by the resident manager of defendant, subject to its rules and regulations and the instructions of its manager. In this case the insurance was secured by Kimball. Stilwell countersigned the policy, gave it to Kimball, who delivered it to plaintiff, collected the premium, and paid it to Stilwell, who remitted it to the defendant. Kimball received a part of Stilwell's commission. Plaintiff testified that, when he negotiated with Kimball for the insurance, he informed him of the existence of the chattel mortgage, the action to obtain possession, and that he desired the insurance as protection to the sureties on his redelivery bond. In this he is flatly contradicted by the evidence of Kimball. There was no communication between Stilwell and insured until after the fire. Neither he nor defendant had any knowledge or notice of the incumbrance before the loss occurred, and neither of them made any inquiry concerning the interest of the insured. The mortgage was not filed. It is not shown that plaintiff ever had any dealings with either defendant, Stilwell, or Kimball, other than in connection with this policy. Nor does it appear that he knew anything about the relations existing between Stilwell and Kimball. There was no written application.

Evidently upon the theory that the incumbrance affected plaintiff's interest in the property, the learned circuit court charged the jury as follows: "If you are satisfied from the evidence in this case that the defendant issued the policy of insurance to the plaintiff, without any misrepresentations or concealment by the plaintiff of the existence at the time of the chattel mortgage upon the insured property, and without the defendant making any specific inquiries of the plaintiff as to the existence of any such chattel mortgage, and without any representation by the plaintiff upon this point, then the defendant was guilty of negligence and carelessness, which amounted to a waiver of this clause in the policy, and this defendant cannot avoid the policy thereby." Information of the nature or amount of the interest of one insured need not be communicated, unless in answer to inquiries, except that the policy must specify the interest of the insured in property insured, if he is not the absolute owner thereof; Comp. Laws, § § 4126, 4142. If it was not the duty of plaintiff to inform defendant of the incumbrance, except in answer to inquiries, its existence did not avoid the policy, and the court should have so directed the jury, as the evidence shows there

were no inquiries. But the statute cited does not relate to mortgages. In this State a chattel mortgage merely creates a lien, and does not transfer the title: Comp. Laws, § 4330. It neither increases nor diminishes the owner's insurable interest, but its existence is a fact peculiarly within the knowledge of the insured, material to the contract, which should be communicated to the insurer. In Texas it is held that the existence of a lien on property is not a breach of a condition in a fire policy requiring "unconditional and sole ownership" in the assured: *Insurance Co. vs. Brooks* (Tex. Civ. App.). Such in effect is the decision of this court in *Peet vs. Insurance Co.*, twice before the court, and reported in 1 S. D., 462. On the first appeal the court considered the clause of the policy relating to the insured's ownership or title, and properly concluded that as the insurer had issued its policy without specific inquiries of the plaintiff as to the title to the land, and without any representations by the insured upon that point, it was its own carelessness, and it could not avoid the policy. On the second appeal the court considered the clause relating to incumbrances, taking care to state that such clause was not involved in the former appeal, and decided that the lease was an incumbrance, which avoided the policy. It follows that the court below erred in charging the jury that this incumbrance did not avoid the policy if defendant failed to make any inquiries.

But, if defendant knew of the mortgage when its policy was issued, it is estopped from asserting a forfeiture by reason of the incumbrance. Authorities need not be cited in support of this firmly established proposition. It was recognized by instructions given in this case upon defendant's request. Then the vital question is whether notice to Kimball was notice to the company. All the material facts concerning his relations to defendant are undisputed, and have been heretofore stated. The doctrine of ostensible authority is not involved. The record discloses no evidence from which it could be inferred that defendant intentionally, or by want of ordinary care, caused the plaintiff to believe that Kimball was authorized to act for it in any capacity whatever: Comp. Laws, § 3979. Whatever authority Kimball possessed to represent defendant resulted from his employment by Stilwell. Was the latter, by reason of his appointment as recording agent of the company, authorized to employ a solicitor, and did such employment clothe the solicitor with authority to waive the condition of the policy concerning incumbrances? This inquiry must be answered in the affirmative. It was so answered in effect by the Territorial Supreme Court in the case of *Lyon vs. Insurance Co.* (6 Dak., 67), and in principle by this court in *South Bend Toy Mfg. Co. vs. Dakota Fire & Marine Ins. Co.* (3

S. D., 205), where the court used this language: "It is true, Runk & Co. were unknown to defendant, but, in having intrusted Ben Phelon with authority to contract for insurance and issue policies therefor, the company necessarily permitted him to use such methods in examining and determining the character of risks as he might deem proper. As stated by Judge Brewer in the case last cited: 'It is not to be expected that a general agent located in a city like Minneapolis can personally go and examine all the risks offered him. \* \* \* If, instead of making an examination himself, he prefers or is willing to take the representations of another insurance agent, the company is bound by that act.'" To the same effect are the following decisions: *Carpenter vs. Insurance Co.* (N. Y. App.); *Insurance Co. vs. Fahrenkrug*, 68 Ill., 463; *Lingenfelter vs. Insurance Co.*, 19 Mo. App., 252; *Bodine vs. Insurance Co.*, 51 N. Y., 117. In the last-mentioned case it is said: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person; and these clerks can bind their principals in any of the business they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums, and to take payment of premiums in cash or securities, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectively as if it were done by the agent in person. The maxim of 'Delegatus non potest delegare' does not apply in such a case." *Stilwell was a general agent: South Bend Toy Mfg. Co. vs. Dakota Fire & Marine Ins. Co.*, 3 S. D., 205. If he could employ a clerk with the consequences stated, he could a solicitor with like effect. "An agent has authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." *Comp. Laws*, § 3981. As argued by the New York Court of Appeals, the employment of persons to solicit insurance, deliver policies, and collect premiums, is necessary, proper, and usual in the ordinary course of the insurance business. It is contemplated by the appointment of recording agents, and therefore they have actual authority to employ persons for those purposes. It follows that notice of the incumbrance upon the insured property to Kimball was notice to the company. If no other issue than that of Kimball's knowledge of the mortgage had been submitted to the jury, we could assume that the jury must have found in plaintiff's favor on that issue, and could affirm the judgment; but the verdict may have been based upon the fact that defendant failed to make any inquiries

concerning the existence of incumbrances, and, as has been shown, a verdict founded upon that fact cannot be sustained.

Subsequent to the fire, and before the commencement of this action, an execution was issued upon a judgment against plaintiff, and the sheriff served notice of levy upon the defendant for any sum that might be due or owing from it to plaintiff. Defendant made a statement to the sheriff denying any indebtedness. These facts are alleged in the answer, admitted in a reply, and defendant contends that the judgment creditors are necessary parties to the action. The contention is not tenable. If defendant does not owe the plaintiff anything, his creditors can have no interest in the event of the action; and if he does, when the amount shall have been ascertained, any rights resulting from the levy will not be affected if these creditors are not made parties.

Without deciding that it would be reversible error in all cases to permit the jury, upon retiring for deliberation, to take the pleadings with them, the court is of the opinion that the statute does not contemplate that it should ever be done: Comp. Laws, § 5052. Pleadings should be construed by the court. Its charge should clearly define the issues of fact to be submitted, and no useful purpose can ever be served by allowing pleadings to be inspected by the jury. On the contrary, confusion and misapprehension of the real issues will usually result from such inspection by persons unacquainted with the rules and principles of pleading. The pleadings are for the court. They should not be taken by the jury under any circumstances. For the error in the charge regarding defendant's failure to make inquiries, the judgment is reversed, and a new trial is ordered.

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## COURT OF ERRORS AND APPEALS OF NEW JERSEY.

SNYDER

vs.

DWELLING-HOUSE INS. CO.\* }

The policy stipulated that no agent should have power to waive any of its provisions.

*Held*, That the stipulation applied only to conditions to be performed before a loss, not to such as were required for purposes of bringing suit after a loss.

*Held*, That the adjustment of a loss by an agent authorized to contract, and his notification to the insured to do nothing further until he heard from

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\* Decision rendered, July 5, 1897.

the company, was a waiver of a provision that proofs of loss must be furnished in thirty days.

The policy prohibited the keeping of petroleum products more inflammable than kerosene, which last could be used for lights only, provided the oil be drawn and lamps filled and trimmed only by daylight.

*Held*, That this did not prohibit the use of a kerosene oil stove, from which, apparently, the fire might have started.

FRANK P. McDERMOTT, *for Plaintiff in Error.*

C. & R. W. PARKER, *for Defendant in Error.*

DEPUE, J.

This was an action on a policy of insurance against loss by fire, dated August 27, 1892. The suit was tried in the Court of Common Pleas of Monmouth County, and resulted in a verdict for the plaintiff. The property insured was a dwelling house situate at Freehold. The fire occurred August 9, 1894. Notice of the loss was promptly given, and was received by the company August 11th. The policy requires proof of loss, containing a statement setting out several particulars, and sworn to, to be rendered to the company within thirty days after the fire. Near the end of the policy is a clause that no suit or action on the policy shall be sustainable unless the insured shall have fully complied with all the requirements of the policy. The policy concludes as follows:—

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, if any, as properly are or shall be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy.

Proof of loss such as required by the policy was not furnished until the latter part of October, which was after the expiration of the thirty days after the fire. To justify the failure to furnish proofs of loss in season, the plaintiff relied upon a waiver by agents of the company. The facts relied on for that purpose are these: Lockwood, the local agent of the company at Freehold, gave the company notice of the loss by a letter dated August 9th, saying also that the Phoenix Company had a policy of \$1,000 on the household furniture. On the 13th or 14th of August, Nichols, a special agent of the company, came to Freehold. Nichols testified that he came there as the company's special agent, solely for the purpose of ascertaining the amount of the loss or damage. When Nichols arrived at Freehold, Mr. Walsh, an adjuster representing the Phoenix Company, was there. Lockwood testified that Mr. Nichols said to him, in the presence of the plaintiff, "Lockwood, I have arranged with Mr. Walsh to adjust the loss, and I can go on to Philadelphia and save time;" that he, Walsh and the plaintiff then adjusted the

loss at \$1,100, and the plaintiff signed a paper agreeing to accept that sum from the defendant company. Lockwood further testified that he at that time asked the plaintiff if he had the specifications of the loss; that plaintiff said he did not have them then, but the company could have them at almost any time they desired; that he (Lockwood) then said to the plaintiff he would wait to see what the company required further. The plaintiff testified that Lockwood, after the paper was signed, told him that he had nothing further to do until he heard from the company in regard to the insurance. The force of this testimony arises from the fact that Lockwood participated in the adjustment of the loss, and advised the plaintiff that he had nothing further to do until he heard from the company. The plaintiff received no information from the company on the subject until, by a letter dated October 11th, signed by the assistant secretary, he was notified that the company disavowed liability upon the policy, for the reason, among other reasons, that the proofs of loss had not been given to the company within thirty days. Lockwood testified that he was the resident representative of the company at Freehold, and had charge of issuing policies; that the way policies were issued by him was that the policies were sent to him signed, and in blank; that he was to fill up the policies, to issue insurance, either fire, lightning, or tornado, sign them, and deliver them to the insured, collect the premiums, and forward the premiums, less his commissions, to the company. If the presentation of proofs of loss was capable of being waived otherwise than by agreement indorsed upon the policy in compliance with its terms, Lockwood's agency was such that the waiver might be made by him, and his acts and assurances were such as were competent evidence of a waiver. The trial judge gave the instruction to the jury that proofs of loss might be waived by the company by acts and declarations which led the insured to believe that it would not insist upon such a requirement, and that an agent "intrusted with policies of insurance in blank, and authorized to issue them upon the application of parties seeking insurance, is thereby clothed with apparent authority to bind the company in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proofs of loss, and may bind the company by his admissions in respect thereto." With these instructions, the questions of fact arising from the evidence were left to the jury. These instructions were in conformity with the principle adjudged in *Carson vs. Insurance Co.*, 43 N. J. Law, 300. Upon these instructions, the supreme court reversed the judgment. In the Carson Case the language of the policy was that

No agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall be neither changed nor waived except in writing, signed by the president or secretary of the company.

The principle adjudged in that case was that such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue upon his contract; and hence that, after the loss has happened, conditions in the policy with respect to notice of loss and preliminary proofs may be waived by parol, though the policy contain such a stipulation as is above referred to. In the supreme court the learned judge who prepared the opinion distinguishes this case from the Carson Case in the fact that in this policy the phrase is, "any provision or condition of the policy," whereas in the other case the language was, "terms and conditions of insurance." We think this distinction without substance. The word "provision" is a word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. "In law," the word provision "is a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance, as the provisions of law, the provisions of the constitution," etc.: Cent. Dict. "Provisions." Substantially the same definition is given in Webster's Dictionary and in the Encyclopædic Dictionary. "Proviso," when used, always implies a condition, unless subsequent words change it to a covenant: 2 Bouv. Law Dic., 399, "Proviso." The word "provision" in this paragraph is meaningless if not synonymous with terms and conditions contained in the body of the policy, unless it be limited to provisions indorsed upon the policy set out in the preceding member of the sentence. We think the instruction of the trial court on this head was correct, and that the reversing judgment of the supreme court should be reversed.

Another assignment of error appears in the record which was not considered in the supreme court. There was a kerosene oil stove in the shed which was on the premises. The oil stove was used for cooking. The fire broke out in close proximity to the stove. The lamp in the stove was then burning, but the fire was not caused by an explosion. The policy contains a provision that it should be void if "there be kept, used, or allowed on the above-described premises naphtha or petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard [which last may



be used for lights only, provided the oil be drawn, and the lamps be trimmed and filled, solely by daylight].” The only legal standard for petroleum or any of its products is that specified by the act of 1883. That act provides that “only such products of petroleum as will not flash at a less temperature or flash test than 100 degrees Fahrenheit may be sold for lighting or illuminating purposes, except when the same is to be used in street lamps or open air receptacles or in gas machines, in which case (as to petroleum or kerosene) there shall be plainly marked on the barrel, can or vessel in which the same is sold, etc., the words ‘Not for inside lights:’” 2 Gen. St., p. 2454. No standard is prescribed by this statute except for lighting or illuminating purposes,—“inside lights.” In fact, the kerosene oil used in the kerosene stove was of the standard of 150 degrees Fahrenheit, flash test, which is above the standard mentioned in the statute. The contention is that the policy, by force of the above provision, was avoided by the use of kerosene otherwise than in lamps for illuminating purposes. The result of this contention depends upon the construction and effect of the clause of the policy above set out. It is a settled rule, in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy: *Carson vs. Insurance Co.*, *supra*. In *Stone’s Adm’rs vs. Casualty Co.* (34 N. J. Law., 371-375), Chief Justice Beasley said: “A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the indorsement will bear no other rational interpretation. If the terms used are imperfect, it is the fault of the defendants. It is their contract, and the construction of it must be most strongly against them.” The principal member of this clause,

If there be kept, used, or allowed on the above-described premises \* \* \* petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard,

is not broken by the use made of kerosene in this instance. The defense rests upon the other member of the sentence, which is inclosed in brackets, viz., “which last”—i. e., kerosene oil of legal standard—“may be used for lights only, provided the oil be drawn, and the lamps be trimmed and filled, solely by daylight.” This member of the sentence imports a regulation of the use of kerosene oil when used for lighting purposes, and the words used are capable of a construction which would give to it no other effect. If the insurer intended to prohibit the use of kerosene for any other

purpose than for lights, it would have been easy to so express the prohibition in its policies. Policies of insurance against fire are taken out by all classes of persons, educated and uneducated, and no rule of law is more salutary than that conditions in these instruments, expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract. The member of the sentence within the brackets, to say the least, is confusing and ambiguous when taken in connection with the words which precede it, and should not be allowed to make void this policy under the circumstances of this case. The judgment of the supreme court should be reversed, and the judgment of the common pleas restored.

Gummere and Dayton, JJ., dissent.

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## SUPREME COURT OF MICHIGAN.

MIOTKE

vs.

MILWAUKEE MECHANICS' INS. CO.\*

The insured verbally stated to the agent that he had the property on contract. After the loss it was found that the contract ran to himself and wife jointly.

*Held*, That there was no misrepresentation of interest.

The standard policy provides that it shall be void if the interest of insured be other than unconditional and sole ownership.

*Held*, That the mere acceptance of such a policy in ignorance of its provision, where the title does not strictly conform to the provision, is not conclusive against the holder.

Where the agent was too ignorant of the English language to fill out the blank regarding title in his report to the company, defect of title was waived.

*Held*, That the insured was entitled to recover for the whole loss, although his wife had an equal interest.

WILKINSON & POST, *for Appellant*.

MORSE ROHNERT, *for Appellee*.

HOOVER, J.

The plaintiff is a Polander, who is unable to write or speak the English language. He was approached by the defendant's solicitor, who proposed to insure his house, and he finally consented to allow him to do so. When he was asked to insure, he at first declined, saying that he had the place on a contract which was not paid up, and he needed his earnings to pay upon it. Again the solicitor says that

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\* Decision rendered, May 26, 1897.

he inquired what title he had, and the plaintiff said that he had it on contract, and that he (the solicitor) so informed his superior before the policy issued. There was no written application. A loss occurred, and an interview was had, and the amount of the loss was agreed on, and proofs of loss were prepared by the agent in conformity thereto. At this time it became known to the agent that the contract ran to the plaintiff and his wife jointly. The agent testified that this was the first knowledge that he had that the place was held upon contract, while the solicitor testified that he so informed him at the time the insurance was effected. It seems undisputed, however, that nothing was said or known by either in regard to the wife's relation to the contract previous to the making of proofs of loss. This discovery was followed by a denial of liability by the defendant, and a transaction in which the plaintiff was paid \$200 followed. The defendant claims this to have been a settlement, while the plaintiff and his witnesses say that the defendant's agent said the company was not liable, and would not pay, because he had not told that the land was held on contract, but that, as plaintiff was a poor man, he would make him a present of \$200 out of his own pocket, and did so. The jury must have believed the latter version. Upon the trial a verdict and judgment for the plaintiff were rendered for the amount of the loss and interest, less the \$200, which his counsel asked the jury to deduct from the amount of the loss.

The plaintiff cannot be said to have misrepresented his interest in the premises in saying that he held it on contract, and the policy does not contain anything indicating that he made any claim about it. It does not purport to insure his property in terms, but "the house situate," etc. The defendant relies upon the condition in the standard policy, which reads as follows:—

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership or if the subject of insurance be a building on ground not owned by the insured in fee simple.

The day has gone by in Michigan for successfully contending that the mere acceptance of a policy containing a condition like this makes it conclusive against the holder, who accepts it in ignorance of the clause, and whose title does not conform to the strict letter of

the condition. Even in the case of *Schroedel vs. Insurance Co.* (Pa. Sup.), which counsel for the defendant cite, there is a plain intimation that the condition cannot stand against fraud on the part of the company or mistake; and there are many cases that hold that these conditions may be waived, not alone (as counsel contend) by express agreements to waive, but by conduct which amounts to an estoppel.

There is evidence in this case that the solicitor asked the agent whether it was necessary to fill the blanks in the daily report in relation to the condition of the property, and was told that it was, to which the solicitor, who was a German, replied, "Well, I told him I can't make that; I understand not so much English," etc., and was answered, "All right; we will fix it over." The agent testified: "We insist on a report containing the statement of the nature of the holding. We take it for granted that the land is held by deed, or else the agent has to insert it, and make an indorsement in the front part of the policy. There is a blank to state what the holding of the property is. We take it for granted that it is owned by deed in that case." The unfairness of indulging in such a practice, in case of an ignorant person who is unacquainted with the English language, who takes insurance through a solicitor, selected by the defendant, who is also a foreigner, and so poorly equipped for his business as to be unable to make out the papers required of him, and who can himself communicate with the person he solicits only through an interpreter, is manifest. Fair dealing dictates that the agent should see that the information required, and which is necessary to determine whether the policy is valid or not, should appear on the face of the papers. Neither he nor the home office should accept such documents and the consideration, relying upon the right to treat the policy as void if it shall later be discovered that a quibble can be raised over some condition in the policy. And there is nothing unjust in holding that such conduct justifies the inference that the insurer was content to waive the condition and treat the policy as a contract to insure the interest which the applicant actually had. See *Sibley vs. Insurance Co.*, 57 Mich., 14; *Castner vs. Insurance Co.*, 46 Mich., 18; *O'Brien vs. Insurance Co.*, 52 Mich., 135; *Guest vs. Insurance Co.*, 66 Mich., 98; *Hoose vs. Insurance Co.*, 84 Mich., 321. It is contended that, at the least, the defendant was entitled to go to the jury with the question; but we think the undisputed evidence justifies the instruction by the learned circuit judge that "this was a valid policy at its inception, and that it was not invalidated by the assignment of the land contract, which was ineffective."

The question of settlement was left to the jury under a proper charge.

It is contended that the plaintiff should be restricted to the recovery of one-half the value of the building, inasmuch as the holding was a joint one and his wife had an equal interest with himself. Some interesting questions are suggested by the claim. It is settled that the husband was, in one sense at least, the owner of more than an unqualified undivided half that would entitle him to that and no more on partition. He has the right to a joint occupancy for life, with a right of survivorship. It is true, however that he had no greater interest than his wife, and in that sense may be said to have had a half interest. In *Insurance Co. vs. Webster* (59 Pa. St., 277), it is held that a partner has an insurable interest to the amount of the entire stock, and in *Insurance Co. vs. Barracliff* (45 N. J. Law, 543), it was determined that "a husband, in possession and enjoyment with his wife of her real and personal property, with an inchoate right of courtesy, has an insurable interest in both, and, when the intention was evinced to insure the whole ownership, may recover the whole loss." This case contains an interesting discussion of the subject, and asserts the doctrine that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as the assured represents those interests, whether as his own or by the precedent authority or subsequent ratification of others. See *Waring vs. Insurance Co.*, 45 N. Y., 606. We think the doctrine applicable here.

We find no error in the case, and the judgment is affirmed. The other justices concurred.

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## SUPREME COURT OF NORTH CAROLINA.

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NELSON ET AL.

vs.

ATLANTA HOME INS. CO.\*

Where there was no evidence impeaching the title shown under regularly executed deeds, it was not error to instruct the jury that their verdict should be for plaintiff if they believed the evidence, when the special issue was as to the title.

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\* Decision rendered, April 6, 1897.

VOL. XXVI.—58.

After the loss the plaintiff sent proofs of loss to another company from which he claimed he had received a policy issued without his knowledge or consent, containing a statement to that effect.

*Held*, That the insured could not, after a loss, accept a policy so issued, and which he did not intend to accept at the time, and the question of whether such policy was other insurance was for the jury.

*Held*, That the fact that such other insurance would reduce the actual liability of the defendant did not make a dispute as to whether the policy was void because of other insurance a disagreement as to the amount of loss.

ALLEN & DORTCH, *for Appellant.*

GEO. ROUNTREE, *for Appellees.*

DOUGLAS, J.

This was a civil action on a policy of fire insurance issued by the defendant to the plaintiff Nelson as owner, and payable to the plaintiff Loftin as mortgagee, in which was the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The defendant alleges that this condition was broken by the issuance to the plaintiff Nelson of a policy of insurance covering the same property by the Western Assurance Company, of Toronto, Canada. The plaintiff Nelson maintains that this latter policy was issued without his knowledge or procurement, and was never accepted by him. Nine issues were submitted to the jury without objection, all of which were found for the plaintiffs.

There are three exceptions, all to the charge. The first was to the charge on the first issue, where his honor told the jury that if they believed the evidence they would answer this issue "Yes." We see no error therein. The plaintiffs introduced two deeds covering the land in question to Nelson, who, in his testimony, identified the land. There was no other evidence on this issue, and, as it was direct, full, and uncontradicted, the jury could come to no other possible conclusion if they believed it. Its credibility was left to them and the charge of his honor amounted practically to telling them what would be the legal effect of the facts if found: *Hannon vs. Grizzard*, 89 N. C., 115; *Gaither vs. Ferebee*, 60 N. C., 310; *Chemical Co. vs. Johnson*, 101 N. C., 223; *Purifoy vs. Railroad Co.*, 108 N. C., 100. The possession of land under a deed apparently good and sufficient, properly acknowledged and recorded, and unimpeached, is sufficient evidence of title.

The second exception was "to the charge upon the third issue, for that his honor did not present the contentions of the defendant, and did not explain the law arising upon a consideration of the

evidence bearing upon this issue." The judge, after reading to the jury his notes of the evidence at the beginning of his charge, instructed them as follows on this issue: "The third issue submitted to the jury is, did the plaintiffs have, at the time of the issuing of the policy of insurance, or did they afterwards have, any other contract of insurance, whether valid or not, on the property covered by the policy of insurance? The burden of this issue is upon the defendant to show by the greater weight of the evidence that the plaintiffs did have another contract of insurance, whether valid or not, on the property covered by the policy of insurance. The defendant contends that the plaintiffs did have another contract of insurance on the property covered by the policy of insurance. It contends that the plaintiffs had received and accepted from the Western Assurance Company a policy for three thousand dollars on the property covered by the policy of insurance sued on. The plaintiffs contend that they had no other policy on this property. This is for the jury to determine from the evidence in the case. If Nelson received and accepted a policy of insurance from the Western Assurance Company,—a policy covering the property covered by the policy sued on,—then the jury will answer the third issue 'Yes.' If the defendant has failed to show the affirmative of the third issue by a greater weight of evidence, then the jury will answer the third issue 'No.'" We think this is sufficiently explicit, taken in connection with the testimony. The simple question at issue was, not whether the policy of the Western Assurance Company was valid, but whether it was accepted by the plaintiff Nelson. There can be no possible question of ratification, which is the subsequent affirmation or adoption of the act of another, or of the voidable contract of the party himself. There is no pretense that Nelson authorized Midgette to issue this policy, and the only evidence of its acceptance by Nelson was the fact that he did not return it immediately upon receipt, and that after the fire he sent to the Western Assurance Company a proof of loss containing the remarkable statement that "this policy was issued by your company through its agent voluntarily, and without the knowledge or procurement of this affiant." It is needless to say that he got nothing from this company, and yet this is relied on as a ratification. A ratification of what? Surely not of the policy, for it will scarcely be contended that the assured can, after the property insured has been destroyed, accept a policy issued without his knowledge or procurement, and which, at the time of issue, he never intended to accept. In the absence of any prayer for fuller instructions, we think the charge sufficient: *Morgan vs. Smith*, 77 N. C., 37; *King vs. Blackwell*, 96 N. C., 322; *Morgan vs.*

Lewis, 95 N. C., 296; Boon vs. Murphy, 108 N. C., 187; Willey vs. Railroad, 96 N. C., 308.

The third and last exception was "to the charge upon the eighth issue, for that his honor did not present the contentions of the defendant, and did not explain the issue or the law arising thereon." The charge on that issue was as follows: "The eighth issue is, has there been any disagreement between the plaintiffs and the defendant as to the amount of loss prior to the commencement of this action? The plaintiffs contend that there has been no disagreement between them and defendant as to the amount of loss, prior to the commencement of this action, and the burden of showing that there was no such disagreement is on the plaintiffs, and they must show this by a preponderance of evidence, and, if they have done so, then the jury will answer the issue 'No.' If there was a disagreement between the plaintiffs and defendant prior to the commencement of this action, the jury will answer this issue 'Yes.'" We might have some difficulty about this portion of the charge, were there any merit in the defendant's contention relating thereto, which is so purely technical as almost to furnish its own answer. It is as follows: "The defendant contended before the court and jury, upon the eighth issue, upon that the undisputed evidence of a disagreement as to the amount of loss, that there had always been a disagreement as to the issuing and validity of the Western Assurance policy, and, if it was valid, both policies aggregated more than the entire loss, and, both containing the three-fourths value clause, the loss that would fall on the defendant must, in any event, be less than \$2,000." The real contention of the defendant was, not what amount it should pay the plaintiffs, but whether it should pay them anything at all, as it set up the policy in the Western Assurance Company, not in diminution of the recovery, but as a bar to the action. There was no disagreement as to the value of the property destroyed, three-fourths of which is largely in excess of the defendant's policy. As we see no substantial error in the charge, the judgment is affirmed. Affirmed.



## SUPREME COURT OF PENNSYLVANIA.

NATIONAL MUT. INS. CO.

vs.

HOME BEN. SOC., OF NEW YORK.\* }

Under a contract between the National and Home Life Companies the former agreed to transfer, or cause to be transferred, its membership to the latter, according to the best of its ability, and the latter agreed to reinsure the members on execution of "satisfactory transfer applications," on the basis of the original applications at the same rates and amounts, payable at the same times as the original. The contract was made under a statute defining the equal right of all members to be transferred by such a contract when approved.

*Held*, That the Home Company cannot refuse to reinsure an applicant on the ground that his application for transfer is not satisfactory on account of age and physical condition. It is bound to insure all the members who may so elect. A refusal to accept the premium of such member waives a subsequent tender of premium.

NICHOLAS HERLICH, EDMUND LUIS MOONEY, and JOHN G. JOHNSON,  
*for Appellant.*

GEORGE W. RYON and JAMES RYON, *for Appellee.*

McCOLLUM, J.

There is nothing in the allowance of the amendments complained of which furnishes ground for reversing the judgment. The use plaintiff is the beneficiary named in the policy issued by the National Mutual Insurance Company on the life of her husband. But for the contract of March 28, 1894, her right to maintain an action against the insurer for the amount of the policy could not be questioned. If the insurer had unjustly declared the policy forfeited, and thereupon refused to accept from the insured the premium proffered in accordance with its terms, it could not, while insisting upon the forfeiture, set up the failure to tender the next quarterly premium as a bar to his suit for the enforcement of his rights: *Girard Life Ins. Co. vs. Mutual Life Ins. Co.*, 86 Pa. St., 236. In the case cited the company declared the policy forfeited for nonpayment of a quarterly premium on the day it was due, and on tender of the same, two days thereafter, declined to accept it. This occurred more than a year before the death of the insured, and there was no payment or tender of quarterly premiums after the rejection of the one above mentioned. It was held, in an action against the company by the administrator of the insured, that "where the company has declared a policy forfeited, and refused to accept a premium, the

\* Decision rendered, May 27, 1897.

fact that the insured subsequently failed to pay premiums as they fell due will not affect the right to recover on the policy." That which is not a bar to an action on the policy by the insured or his administrator is not a bar to a suit against it by the beneficiary named in it. If, therefore, the defendant in this case was bound by its contract with the National Mutual Insurance Company to reinsure Edward O'Brien on the basis of his original application to and the terms of his insurance with the latter, his failure to tender the July premium cannot operate as a defense. Its denial that it was bound to reinsure him, and its refusal to accept the April premium, rendered a tender of the next quarterly premium unnecessary. We cannot find in the evidence anything which operates as a release of the defendant from any liability imposed by its contract. The respective rights of O'Brien and the defendant under the contract were not extinguished or qualified by anything said or done by either of them. The case was tried in the court below on the apparently mutual theory of the parties to it that the plaintiff was entitled to recover the amount of the policy or nothing. No claim or suggestion appears to have been made by either of them that there might be a recovery for a less sum. It was the existence of the liability claimed by the plaintiff and denied by the defendant, and not the extent or measure of it, that was in dispute.

The National Mutual Insurance Company agreed "to transfer, or cause to be transferred, to the best of its ability," the membership of it to the defendant. It could do no more in this direction, because the New York Statute under which the contract was made expressly conceded the right of every member to it, on giving the required notice, to elect to be transferred to, or reinsured by, another company. The defendant agreed to reinsure the members of the National Mutual Insurance Company, upon execution of satisfactory transfer applications, on the basis of their original applications to it, and to rate them at the same amount, with premiums payable at same dates, as they were then paying in it. What effect has the requirement of a satisfactory transfer application upon the liability of the defendant? Does it warrant the refusal of the defendant to reinsure a member on the ground that his application for transfer "is not satisfactory, on account of physical condition and age?" This is the distinct ground on which the defendant refused to reinsure O'Brien. If it is tenable ground for refusal, the agreement respecting the basis of reinsurance and the rating of members amounts to nothing, because the defendant may reject the transfer application of any member whose age or health may appear to it as presenting an undesirable risk. The contract, as construed

by the defendant, fails to afford to the membership of the National Mutual Insurance Company the protection contemplated by the statute under which it was made. It was not so construed by that company when its members were requested to approve it. On the contrary, their approval was obtained on the express assurance that they would be transferred, without examination, as at the age of entry in the National Mutual Insurance Company, and at the same rates and dates of payments as with it. This assurance was warranted, we think, by the terms of the contract. The words, "satisfactory transfer application," etc., considered in connection with what precedes and follows them, do not mean that the defendant will reinsure the applicant for transfer on condition that his age and health are satisfactory to it. To attribute to them this meaning is to defeat the obvious purpose of the contract, and of the statute which authorized it. The paramount purpose of the contract was protection to the members of the National Mutual Insurance Company by reinsurance with the defendant. In our view of the contract, it bound the latter to reinsure the members of the former who elected to have their insurance transferred in accordance with its provisions. The defendant sent an application for transfer to O'Brien, who fully and correctly answered all the questions propounded in it, and signed it as instructed. It neither disclosed nor concealed anything which released the defendant from its obligation to him. It must therefore be regarded as a "satisfactory transfer application," within the meaning of the contract. Thenceforth the defendant was liable for the amount of his policy with the National Mutual Company on his compliance with its provisions respecting premiums, and the payment of them. As we have already seen, his failure to tender the July premium is not a bar to this action. The views herein expressed are in accord with the able opinion filed by the learned court below on discharging the rule for a new trial. We infer from the record that the defendant was not allowed a credit for the April and July premiums, amounting to \$154.50. If this inference is in accordance with the fact, we direct that the court below cause a credit to be entered on the judgment for that amount. The judgment, subject to the above direction, is affirmed.

## SUPREME COURT OF TENNESSEE.

ENDOWMENT RANK, KNIGHTS OF PYTHIAS, )

vs. }

COGBILL.\*

The application stipulated that the answers were warranted to be true and that the medical examiner should be held to be the agent of the applicant.

*Held*, That the applicant was not bound to know and state all his ailments when asked so to do. The utmost good faith was all that was required.

*Held*, That, if the work of the examiner was accepted and ratified by the company, he acted as its agent notwithstanding the stipulation.

*Held*, That the mere omission to state a disease which did not cause death was immaterial.

TURLEY & WRIGHT and FELIX MOORE, *for Appellant*.

JAMES M. GREER, *for Appellee*.

CALDWELL, J.

On the 19th of September, 1893, the Endowment Rank, Knights of Pythias, issued to Edmond T. Cogbill, of Lagrange, Tenn., a benefit certificate for \$3,000, payable to his wife, Sallie J. Cogbill. The assured died March 16, 1894; and his widow, as beneficiary, commenced this action in October, 1895, to collect the certificate. In defense it was pleaded that the insurance was procured by false representations and fraudulent concealments on the part of the deceased in regard to his health. The plaintiff obtained verdict and judgment for \$3,450, principal and interest, and the defendant appealed in error.

In Cogbill's application, which was made September 4, 1893, appear the following questions and answers, viz:—

Are you now in good health? Yes. Have you consulted a physician in the last five years? Yes. When, and for what diseases? In 1888. I had bilious fever. Give the name and residence of such physician. Dr. Webb, Collierville, Tenn. Give the name and residence of your medical adviser. Dr. Jones, Lagrange, Tenn.

Subsequent questions enumerated numerous physical diseases, not including la grippe, and of them the applicant replied that he had been afflicted with "catarrhal sore throat" and "external piles" only. Finally he was asked, "Have you had any illness or injury other than as stated by you already?" and to that question he answered, "No." The same person (Dr. Jones) named by the

\* Decision rendered, April 28, 1897.

applicant as his "medical adviser," propounded the questions as "medical examiner," and on the same sheet of paper made a detailed certificate in which he said:—

"The applicant has a catarrhal condition of throat and nose, mild form," and that he has had no other "disease or disorder which affects his present health."

In the printed portion of the application it was stipulated that the

"Statements and answers made to the medical examiner are warranted to be true," and that the medical examiner "shall be held to be the agent of the applicant as to all answers and statements"

made by the latter. The application and the medical examiner's certificate went into the hands of the medical examiner in chief, and he, relying upon the information therein contained, recommended that Cogbill be accepted as a member of section No. 1876, which was done, and the benefit certificate issued. After her husband's decease, Mrs. Cogbill, the beneficiary, made out a certificate of death, and claim of insurance, in which occur the questions and answers following:—

Place and date of death? Eddy, Texas, March 16, 1894. Cause of death? Laryngitis. When did health of deceased first begin to be affected? January, 1893, after an attack of la grippe. Duration of last illness? He was not able to attend to his business after January 1, 1894. Ten weeks. Had the deceased any previous disease, and, if so, when, and what was the nature and duration of same? Nothing more than catarrhal trouble.

La grippe was not mentioned, by question or answer, in the application or the medical examiner's certificate, but was spoken of first in the widow's proof of death. At the trial it was shown conclusively that the applicant did have the disease for a short time in January, 1893, though not in such form as to require medical attention, and that it was followed by sore throat, for which Dr. Jones made three prescriptions—two in February and one in March, 1893. Cogbill's failure to disclose these facts in his application, and his statement therein that he had suffered no "illness or injury" other than "bilious fever," "catarrhal sore throat," and "external piles," were pleaded as a bar to the action; the contention being that such failure was a fraudulent concealment, and such statement a false representation, of matters material to the risk. Though asked to name all diseases with which he had been afflicted in the last five years, and to give the name and residence of physicians consulted about them, the applicant did not say he had catarrhal sore throat, or that he had consulted a physician about it. These omissions, it was suggested in behalf of the widow, were justified by the fact that the medical examiner, Dr. Jones, who propounded the questions to the applicant, already had the information, being

himself the physician consulted. The same suggestion was made in regard to the applicant's failure to state that he had la grippe in 1893; and as to the latter it was suggested, additionally, that such failure could not be fatal, since la grippe was not mentioned in any of the numerous questions asked. In reply it was contended on the other side that the general questions propounded to the applicant called for a disclosure of all diseases, la grippe among the rest, with which he had been afflicted, and that the knowledge of the medical examiner could in no event be imputed to the Endowment Rank, because he was the agent of the applicant alone as to all statements and answers made in the application.

The trial judge rightly instructed the jury to the effect that Cogbill was not bound, at the peril of the beneficiary, to know, and to state in his application, with absolute certainty, his real physical condition, and predisposition to one disease or another (*Knights of Pythias vs. Rosenfeld*, 92 Tenn., 508), but was required, in the utmost good faith, to disclose fully and truthfully all that he knew about his health, past and present. In the same connection the court further said, in substance, that it was incumbent on the Endowment Rank to honestly and fairly advise each applicant, by plain questions, what information he was expected to impart, and to carry out, in the utmost good faith, any contract honestly and fairly made with him, and that it could not, after his death, repudiate the contract upon the ground that it was based on the examination of a physician not authorized to make it, if in fact the examination was honestly and fairly made, and had been previously ratified. Undoubtedly, the instruction, as it appears in the record, was greatly lacking in precision, and is subject to adverse criticism for that reason, yet it is believed that the foregoing sentence correctly expresses the meaning intended to be conveyed to the jury; and, so interpreted, the instruction was pertinent and sound.

Referring again to the examination of the applicant, and the agency of Dr. Jones in making it, the court further said to the jury: "If you find from the evidence that Dr. J. W. Jones was the medical examiner who examined E. T. Cogbill, who was at the time the medical adviser of said Cogbill, and had been for more than a year previous to his application for membership in the Endowment Rank of Knights of Pythias, and you find that his work as medical examiner for them was accepted or ratified by them, then he was their representative." Stripped of obvious surplusage, this instruction announces the single and axiomatic proposition that Dr. Jones was to be regarded as the agent of the Endowment Rank in examining Cogbill, if in doing that he acted as medical examiner for the

Endowment Rank, and it accepted or ratified his examination. The soundness and applicability of this proposition are not impaired in this case by the recitation in the application that the medical examiner "shall be held to be the agent of the applicant as to all answers and statements" made by him; for that recitation, if so intended, could not abrogate and reverse a well-established rule of law. If A., without authority, assume to act as agent for B., and B. accepts or ratifies the unauthorized act, he becomes bound thereby; and, for all legitimate purposes of the transaction, A. is to be treated as B.'s lawful agent. Jones examined Cogbill as medical examiner of the section, and so signed his certificate of examination; and upon that certificate, in connection with Cogbill's application, the medical examiner in chief indorsed his recommendation of acceptance, after which the benefit certificate was issued without other examination. There was some testimony in favor of the proposition that Cogbill's death was attributable to his attack of la grippe in January, 1893, and the sore throat which followed; and there was some, and perhaps a preponderance, to the contrary, and in favor of the insistence that his death was caused by exposure and a cold contracted in December, 1893, nearly a year subsequent to the attack. In regard to the attack of la grippe, the consequence of not mentioning it in the application, the effect of the medical examiner's knowledge of it, and the disclosure as to catarrhal sore throat, the jury received this charge: "If you find from the evidence that the applicant, E. T. Cogbill, had a case of la grippe in January of 1893, which resulted in catarrhal sore throat, and finally in his death [his omission to mention], this would be such a failure to disclose his physical condition and history as would make the contract void, and defeat a right of recovery. On the other hand, if the medical examiner was E. T. Cogbill's medical adviser, and so noted in the application for admission into the Endowment Rank; and knew of his condition then and for the year preceding his admission into the order, and the applicant, Cogbill, disclosed his physical condition by saying, and having noted in his application, that he was suffering from catarrhal sore throat, and you find that was the after-consequence of la grippe, or cold, then the failure to tell that he had la grippe would not defeat his widow's right of recovery, and your verdict should be for plaintiff." The criticism against the first sentence of this portion of the charge is that it erroneously made the applicant's failure to disclose the fact that he had suffered from la grippe of no consequence unless that disease finally resulted in his death, when, as contended, the omission to make the disclosure was a fraudulent concealment, that should have

avoided the insurance in any event. The court was right. The mere omission of an applicant to mention a disease which does not directly or indirectly cause his death can be only an immaterial matter in an action for the insurance. Such an omission does not affect the risk, and cannot be properly characterized as a fraudulent concealment. It is not every slight or temporary illness, and especially when not specifically inquired about, that must be revealed. Only those attacks which have in some degree a detrimental influence upon the general health or constitution of the applicant are material to the risk, and therefore within the rule as to warranties: *Rand vs. Society*, 97 Tenn., 391; *Insurance Co. vs. Lauderdale*, 94 Tenn., 642; *Knights of Pythias vs. Rosenfeld*, 92 Tenn., 508; *Insurance Co., vs. Wilkinson*, 13 Wall., 230, 231; *Connecticut Mutual Life Ins. Co. vs. Union Trust Co.*, 112 U. S., 250; 1 Bac. Ben. Soc., 234. It is urged against the last sentence quoted from the charge that it erroneously imputes the knowledge of the medical examiner to the Endowment Rank itself. The objection narrows the proposition laid down by the court, and drops two qualifying elements out of view. Briefly restated, the proposition is this: (1) If the medical examiner knew of the applicant's condition for the last year, (2) and the applicant had the fact that he was suffering with catarrhal sore throat noted in the application, and (3) that sore throat was the after-consequence of la grippe, "then the failure to tell that he had had la grippe would not defeat the widow's right of recovery." The case is not made to turn upon the medical examiner's independent and uncommunicated knowledge, but, in addition thereto, the widow was required to show that the fact of the applicant's catarrhal sore throat was disclosed in the application, and that such condition "was the after-consequence of la grippe." Considered as a whole, the proposition is not subject to the objection made. After all, the effect of a case of sickness is the important matter. Its influence upon the system of the patient, if known, is more to be considered by the insurer than the mere fact of the attack itself. In this case the court virtually said that, if the effect of the disease—"the after-consequences"—was revealed, the failure to have the disease itself particularly noted would not vitiate the insurance, especially when the fact omitted was known to the medical examiner. There is no error in the charge given, nor in the refusal to give other instructions requested, nor in ruling upon evidence; hence the judgment is affirmed.



## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### AUTHORITY OF AGENT OF INSURED AS TO CANCELLATION.

The Supreme Court of Wisconsin, in the case of John R. Davis Lumber Co. vs. Home Ins. Co., decided Feb. 2, 1897, held that an agent of insured to procure insurance is not presumed to have authority to accept notice of cancellation, unless he is a general agent managing the insurance of his principal.

### APPRAISEMENT.—WAIVER OF PROOFS OF LOSS.—LIMITATION.

In the case of American Fire Ins. Co. vs. Bland, decided by the Kentucky Court of Appeals, April 22, 1897, it was held that a plea that there was no appraisal which did not aver that an appraisal was asked for was defective. It was further held that the omission of the word "Fire" from the name of the company in the summons which was not corrected until after the limitation period had expired did not render the action too late. It was further held that it was not necessary that a waiver of proofs of loss by the company should be in writing.

### OTHER INSURANCE WITHOUT NOTICE.

In the case of Arbuckle vs. Interstate Casualty Co., decided by the United States Circuit Court of Colorado, in August, 1897, the company defended on the ground that the insured subsequently procured additional insurance, contrary to a provision in the policy requiring notice of any additional accident insurance. The court sustained a demurrer to the defense on the ground that no penalty was prescribed for failure to give such notice. Nor was any time specified when the notice should be given. The company was not notified until after the death and insisted that it should have been given during the life.

## BENEVOLENT SOCIETY.—CHANGE OF BENEFICIARY.

In the case of *Hall vs. Allen*, decided by the Supreme Court of Mississippi, April 26, 1897, the certificate of a benevolent society required a change of beneficiary when desired to be written on the prescribed form on the back of the certificate by the member. The certificate was in the hands of a subordinate lodge and the member being sick at a distance was unable to put his directions in writing, but wrote the name of the beneficiary desired to be substituted in a note book, and verbally instructed a friend as to the change. The society paid the money into a bank, awaiting the result of the contest. It was held that by thus paying the society waived compliance with its requirements, and the member having done all that he was able to comply, equity would decree the desired change of beneficiary.

## CHANGE OF TITLE.—AGENCY.

In the case of *Bank of Glasco vs. Springfield Fire & Marine Ins. Co.*, decided by the Court of Appeals of Kansas, March 22, 1897, the following syllabus was furnished by the court:—

Where the insured gave a quitclaim deed to the property, purporting to be an absolute conveyance, but intended to be only a mortgage to secure the payment of debts, and no instrument of defeasance was executed, acknowledged, and recorded as provided by paragraph 3885, Gen. St., 1889, such action does not forfeit an insurance policy thereon containing a clause: "If the property be sold or transferred, or any change takes place in the title or possession (except in case of succession by reason of death of the assured), whether by legal process or judicial decree or voluntary transfers or conveyances, then, and in every such case, the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate."

The fact that the agent of the insurance company was, at the time of his appointment and at the time of the transaction in controversy also the agent of, a small stockholder in, and one of the managing officers of, the assured, and his appointment was made with full knowledge of such relations, and no fraud, deception, or concealment was used, is not sufficient to relieve the insurance company from being bound by the acts and knowledge of such agent.

## WAIVER OF PROOFS OF LOSS.

In the case of *National Fire Ins. Co., of Hartford, vs. Strebe*, decided by the Appellate Court of Indiana, Sept. 30, 1896, it was held that where the policy was in the possession of the insurer who refused to deliver it to the insured, this was sufficient excuse for failure to comply with the requirements as to furnishing proofs of loss.

## WHAT CONSTITUTES DISEASE.

In the case of *Rand et al. vs. Provident Savings Life Assurance Society*, decided by the Supreme Court of Tennessee, Sept. 26, 1896, it was held that an answer in the application which was a warranty, denying the existence of certain diseases, was not false where there

was a mere temporary ailment which did not affect the general health or probabilities of life.

#### WAIVER OF TITLE.

In the case of *Schultz vs. Caledonian Ins. Co.*, decided by the Supreme Court of Wisconsin, Sept. 22, 1896, the policy provided that it should be void in case the title was less than fee simple, unless otherwise provided by an indorsement on the policy. It was held that the issue of the policy and acceptance of premiums without such indorsement by an authorized agent with knowledge of the title was a waiver of the provision.

#### WARRANTY IN APPLICATION AS TO SUICIDE.

In the case of *Kelley vs. Mutual Life Ins. Co.*, of New York, decided by the United States Circuit Court, the Southern District of Iowa, Nov. 25, 1896, the application was made a warranty by the policy, and provided among all other things that the applicant warranted that he would not die by his own act whether sane or insane. It was held that a violation of this agreement was a breach of warranty which avoided the policy.

#### TIMELY NOTICE OF ACCIDENTAL DEATH.

In the case of *Peele vs. Provident Fund Society et al.*, decided by the Supreme Court of Indiana, Sept. 25, 1896, an accident policy stipulated as a condition precedent that notice should be given with full particulars within ten days of the accident. The insured was drowned and the beneficiary could not know the cause of death until the finding of the coroner's jury, eleven days later, five days after which she gave notice. It was held that such notice was within sufficient time where the general agent had knowledge of the facts within the required ten days.

#### EXTENSION OF LIMITATION IN CASE OF CREDITOR.

In the case of *Cochran vs. London Assurance Corporation*, decided by the Supreme Court of Appeals of Virginia, Sept. 24, 1896, a creditor to whom loss was payable, requested an extension of the time for bringing suit in order to procure signatures of owners to proofs of loss, which was granted. The suit, however, was actually brought within the period of limitation but resulted in a nonsuit on technical grounds. It was held that such bringing of suit within the period was not a presumption that the creditor had not accepted the extension of time, and did not prevent a subsequent suit within the time so extended.

**RENEWAL OF PREMIUM NOTES.—TENDER.**

In the case of *Mutual Life Ins. Co. vs. Smith*, decided by the Supreme Court of Georgia, Aug. 18, 1896, the court furnished the following syllabus:—

Where a promissory note was given for a premium on a policy of life insurance, and the person taking it executed and delivered to the maker a contemporaneous agreement in writing "to renew said note at the request of [the maker], until three annual payments have been made," it was incumbent upon the maker, in order to obtain under this agreement the right to renew the note in question, to tender or pay in cash the next annual premium upon the policy when the same became due, the contract not contemplating that a promissory note would be accepted for such premium.

It appearing from the evidence in the present case that the defendant did not tender or make payment, as above indicated, he did not show himself entitled to the privilege of renewing the note sued on; and, this being so, he was liable thereon, and a verdict in his favor was not warranted.

**FIDELITY INSURANCE IN CASE OF RECEIVERSHIP.**

In the case of *Jackson vs. Fidelity & Casualty Co.*, of New York, decided by the United States Circuit Court of Appeals, Fifth Circuit, June 15, 1896, the policies insured a bank against loss by dishonesty of its officials. Suit was not brought for recovery until after the expiration of the time of limitation. As a reason for the delay it was alleged that shortly after the defalcation, the bank passed into the hands of a receiver, that the officials were themselves arrested, that some time afterward the bank was permitted to resume business, and immediately thereafter an investigation by its officials disclosed the fraud and the company was notified; also that the insurance company had been notified of the defalcation by the receiver together with the fact that it was impossible to ascertain the details needed for a suit within the time demanded by the policy. It was held that this was sufficient excuse for the delay in bringing suit.

## COURT OF APPEALS OF COLORADO.

CONNECTICUT FIRE INS. CO., *Appellant*,

vs.

MRS. E. H. SMITH, *Appellee*.

The property which was destroyed was owned by the plaintiff. The policy was issued to her husband. The plaintiff claimed the policy was so issued by a mistake, for which the agents were responsible. She also claimed that the agents afterwards agreed to correct the mistake, and make the policy run in her name. *Held*, That a policy will not be reformed on the ground of a mistake of fact, unless the proof is clear, convincing, and satisfactory. And it must be free from any reasonable controversy. The burden of establishing the facts respecting it are upon the plaintiff, and if the plaintiff fails at all in any of these particulars, he does not become entitled to have the policy reformed as thus altered.

Further *held*, That, although from a conversation between the assured and the agent, about other features of the contract and risk, an inference might have been drawn that the policy was to be changed so as to run to the plaintiff, such evidence is too remote to support a judgment in favor of the plaintiff, when it is testified that nothing was said about ownership at the time.

The evidence reviewed and held insufficient under the rules laid down.

The property was removed from the building where it was destroyed. The agents were requested to transfer the policy so as to cover in the new location. The agents said they were willing to make the transfer of the policy, and the assured was told to bring the policy to the office, and they would make the indorsement thereon, consenting to the transfer. The assured failed to bring the policy; the agents went after it, but assured's agent said he was busy, and asked them to call again. They did so, but again failed to obtain the policy and the transfer was not indorsed. *Held*, That where an agent makes an agreement to change the terms and conditions of the policy, but only in conformity with its requirements, the company could not be bound as by any other waiver of the condition. That inasmuch as the agents made no agreement to consent to a transfer of the policy, except on performance of the conditions of the policy, to wit, by an indorsement thereon, the failure to show such an indorsement would bar the plaintiff's recovery because there was no waiver of the condition which the policy contained, requiring an indorsement to be made.

Whether or not, under the phraseology of this policy, there could be no waiver by the agent of the condition, unless it was indorsed in writing on the policy, not decided.

Under the evidence in this case the indorsement held not to have been in fact waived.

SYLVESTER G. WILLIAMS, *for Appellant*.

HUGO SELIG, *for Appellee*.

BISSELL, J.

This uncommon suit on a fire-insurance policy presents some very novel and unusual features. The policy was issued to E. H. Smith, and covered property which belonged to his wife, Mary H. The

\* Decision rendered, Sept. 12, 1897.

VOL. XXVI.—59.

insurance was taken out when the property was in the Smith Hotel, and it was afterwards burned in the Arlington Hotel. Whatever may be the opinion of the court respecting many of the questions presented, this suggests what we regard as fatal to the recovery. All matters, whether of fact or of law, will be omitted, save as they bear on the two propositions which will be decided. On the 28th day of December, 1894, the Connecticut Fire Ins. Co., through its agents, Atkinson & Reeves, in Montrose, issued a policy for \$500 to E. H. Smith, on sundry household goods which were located in a building on certain designated premises in that town. The building was described as one occupied as a hotel by Smith, and known as Smith's Hotel. It contained many of the covenants and conditions which are found in most fire policies. It covered only the interest of the assured, prohibited other insurance save as consented to in the policy, forbade the removal and transfer of the property, declared void all changes in the terms and conditions of it without the consent of the company in writing indorsed thereon, and contained the usual covenant that there should be no waiver of any condition unless it should be thus indorsed. This summary of the conditions is ample for our purpose, since there is no unusual language found in the policy which requires special construction.

The parties do not disagree as to the property insured, as to its ownership, nor as to its transfer from the Smith Hotel to the Arlington. The suit was brought in the name of Mrs. Smith, who was the owner, and of necessity sundry matters were alleged in order to show the liability of the company for the destruction of property, which belonged to her, on a policy which had been issued to her husband. Generally speaking, the complaint alleged that Mrs. Smith was the owner at the time the policy was underwritten, but that the contract was made out in the name of her husband through the mistake of the agents, and without any fault on her part, and with knowledge on the part of the agents that she was the owner. She likewise charged that afterwards, and in March, 1895, before the fire, she demanded of the defendant company a correction of the mistake, that the agents agreed to correct it, and to have it transferred to the plaintiff. She claimed to have relied on this promise, and did nothing further before the fire happened and the loss occurred. The only trouble with this theory is that the proof does not sustain the allegations. It appeared on the trial, and to this extent there was no disagreement between the witnesses that for at least one, and probably two years prior to the time the present policy was issued, like policies for a similar sum, and on the same goods, located in the same place, and running to the same person,

had been issued, and the one in suit was but a renewal of the others. We therefore have antecedent existing insurance issued by the Connecticut Co. on the same property to the same person. No complaint whatever was made by Smith respecting it, or by Mrs. Smith, but the contracts were accepted by the insured with no request to the agents to change the policy in any respect, either as to party or as to terms. It may likewise be said to be very clearly established by the evidence that the agents had no knowledge respecting the ownership, either at the time this policy was issued, or for a year or two theretofore, and probably none on the 29th of March, at the time the plaintiff alleged the agents agreed to make the change. Manifestly, this proof did not even tend to show that the agents had made any mistake, or that if there was a mistake, it was one for which the company was in any wise responsible. At the trial there was some testimony given by Mr. Smith, to the point that when the property was about to be removed from the Smith Hotel to the Arlington, Atkinson, and one Upton, who represented some other companies, were at the Arlington, with reference to a change in some policies theretofore written by Upton, and also with reference to this policy which, as will be seen hereafter, was to be altered so as to cover the property in the Arlington, in place of the other hotel. Smith attempted to give some testimony tending to show that there was some statement respecting the ownership of the property at that date, and that the agent, Atkinson, was informed then that Mrs. Smith owned the property, and the alteration desired would extend not only to the location, but would cover the matter of title. This, however, was not clearly established by Smith's testimony, and it was completely overthrown by the testimony which Upton and Atkinson gave. Upton testified there was nothing said about the ownership of the property, and that whatever could be taken to refer to it, could, in any event, be only an inference from a discussion respecting the change in the policies which ran to Mrs. Smith, and a permission for \$2,000 concurrent insurance, in place of \$1,500, which had theretofore been the limit, and the transfer of the Connecticut policy to the Arlington Hotel. It might possibly be a matter of inference, that when they were talking about the transfer of the Connecticut policy to cover the property in the Arlington Hotel, there would be no relevancy to this discussion as to the increase of the concurrent insurance permitted on the policies which had been issued to Mrs. Smith, unless the Connecticut policy was likewise to run to her. This is the only basis on which the contention can be supported. This is too remote, however, to support a judgment against a company for the loss, when both Upton and Atkinson

directly testified that nothing was said about the ownership of the property at the time, and what they say about it is totally undisputed. We therefore conclude there was no evidence tending to show that there was any agreement to insure Mrs. Smith's property, either in the Smith Hotel or the Arlington, and no legitimate evidence which established, and scarcely any which even tended to the point, that the policy had been by mistake so written as to insure Mr. Smith's property, and not that which belonged to his wife, Mary H. It is true Smith said that originally the policy ran to his wife on the property in the Smith Hotel, but there was nothing whatever to show that Smith did not likewise have property there, and nothing which even tended to bring home to the agents' knowledge that the particular property covered by the policy belonged to the wife rather than to the husband. We therefore conclude there was no evidence which even tended to establish a mistake in the contract. What may be shown on a subsequent trial it is impossible for us to imagine, but as the case now stands, the verdict is entirely unsupported on this proposition.

We now come to the statement of the facts which bear on another legal proposition, which has been strongly pressed on our attention. We shall only discuss one branch of it, and shall entirely ignore the point that we are urged to decide, that under the peculiar phraseology of this contract there could be no waiver of a condition unless the waiver was indorsed in writing on the policy. This branch of the inquiry has been one of much controversy among the courts, and as counsel suggests, has never been decided in the State; and we are disinclined to express our opinion about it, because our judgment can be very safely rested on the other basis, and we prefer to wait the possible settlement of it by the court whose conclusion would establish the law of the State. As has already been stated, the policy covered property in the Smith Hotel. It was to be transferred to the Arlington. About this there is no question, and it is equally clear the agents were informed of the intention of the assured to transfer it; were requested to change the policy to cover the property in the new location; and that there was some misunderstanding between the agent and Mr. Smith respecting it. It is a little difficult to state exactly what we conclude from the testimony without, possibly, going too far in the expression of our opinion, and thereby unduly influencing the jury on the subsequent trial. We shall avoid it as much as possible, simply stating that in the case as it now stands, the evidence shows what we here state. It is conceded that application was made to the agents for the purpose of a transfer. It is equally true the agents consented to the



transfer, and agreed to change the policy to cover the property in the new locality. The only dispute, if there be any, is respecting the terms and conditions under which the transfer was to be made. The assured attempts to bring the case within those decisions which hold that where the agent agrees to do a thing, and the assured relies upon the promise to his detriment, the company shall not afterwards be permitted to contend the condition or the limitation was not expressed as provided for by the policy, to wit, by an indorsement in writing. This case does not come within either the restricted or the most liberal decisions on this subject. What the evidence shows is that when Smith went to the agents, Atkinson & Reeves, to make the transfer, they said they were willing to consent to it, and would make the indorsement on the policy if he would produce it for the purpose. There was no consent at any time expressed by the agents to a transfer without the indorsement, nor did they agree that the property might be transferred and the consent thereafter indorsed. Smith was told to bring the policy to the office, and they would make the indorsement consenting to the transfer. This Smith failed to do. Subsequently one of the agents, Atkinson, went to get the policy in order to do that which the insured desired, to wit, indorse the consent. Smith himself testifies that on the 28th of March, at the time of the conversation relied upon to show the mistake, Atkinson came up to get the policy for the purpose, as Atkinson said, of making the indorsement. Smith did not give it to him for the reason, as he himself testified, that he was busy; did not know just where it was, and asked him to call again. He did not recollect that Atkinson called the second time, although Atkinson himself directly testified that he went there twice for the purpose. It is thus very evident, even on the plaintiff's own case, that there was no agreement or promise by the agents to consent to the transfer, except by the indorsement for which the policy itself provided. When it comes to the defendant's testimony, both the agents testified that the only suggestion was, that on the production of the policy they would indorse on it whatever he wanted with respect to a change of location. It is thus and thereby made evident, the assured was not misled to his prejudice, and there is no room for the application of the doctrine of a waiver of a condition of the policy resulting from the declarations and acts of the agent, and nothing to show that the assured was misled to his prejudice. This is the basis of nearly all of the decisions which hold that conditions may be waived, although there is an express limitation in the policy, on the right of the agent to waive them without a written indorsement. We are, therefore, not called on to decide as to

the scope or effect of that provision of the policy which forbids the waiver of any conditions by an agent, without an indorsement in writing, because there never was any agreement by the agent to waive the condition, except in the form provided for in the policy, of which the assured was advised. And the agents did nothing and said nothing upon which the assured had any right to rely, and which would constitute a waiver of the performance of that requirement of the policy in the form specified by its terms.

This statement, and this discussion, illustrates very clearly the difficulty with the case. According to the instructions which the court gave, many questions were left to the jury which were not properly involved, and the court refused sundry and divers instructions asked by the defendant, which it ought to have given, in order to enable the jury to pass correctly upon the issues. It does not seem important to recite those instructions, which are numerous and elaborate, since the points to which they refer, and to which we have already adverted, will be clear from a very simple statement. The jury were undoubtedly told that the attention of the defendant was called to the error, as to the person with whom the company contracted, and that it was claimed the agents agreed to make a correction in the policy, so as to protect Mrs. Smith against loss by fire. The jury were left to determine whether the defendant company did agree to make such correction and assignment as she claimed, and the court stated that if the jury should find such to be the fact, she was entitled to recover as though the policy had been originally in her name. This was undoubtedly error, because, under the testimony, there was no such question in the case at all. There was nothing whatever to show that the company had agreed to issue a policy to Mrs. Smith, and hardly any evidence that there was a mistake in issuing it to her husband, and the case was barren of proof which warranted the submission to the jury of the question, whether the company agreed to change the policy in its terms, to run to Mrs. Smith, in place of her husband, and to see that it was assigned to her, and covered her interest in the property. The duty of the plaintiff, in respect to the proof which must be offered, if a contract is to be corrected and made to run to one who is not a party to it by its terms, is pretty tolerably well settled. The policy will not be reformed on the ground of a mistake of fact, unless the proof is clear, convincing and satisfactory, and it must be free from any reasonable controversy. The burden of establishing the facts respecting it are upon the plaintiff, and if the plaintiff fails at all, in any of these particulars, he does not become entitled to have the policy reformed and enforced as thus altered: Home Fire Ins. Co.

vs. Wood, 69 N. W. Rep., 941; Trustees St. Clara Female Academy vs. Delaware Ins. Co., 66 N. W. Rep., 1,140. This case is barren of proof to bring it within the scope of these well-settled rules. Smith testified that the property was his wife's, and he supposed the agent knew it, although he never advised him about it, and his supposition is based on the fact that, according to his testimony, a policy was issued to her on property in the Smith Hotel, and that this policy which ran to him was in renewal, either of another, which ran to him, or of one which ran to his wife, and if the first, it was a renewal of one which had run to his wife, on property in that same house. This does not show that there was any mistake in making out this policy to him, in place of to her. There might have been a change of ownership; it might have covered other property; nothing was said to the agents about it, and they testified that they had no knowledge respecting its ownership. The plaintiff failed to produce the policies; to show that they ran to her, and not to him; were the same in form and in renewal of the same policy, and we are surprised that she was permitted to give any testimony respecting the terms of those instruments, without producing the policies themselves. But, far beyond all this, when we resort to Smith's own testimony, we find that he first discovered the mistake in the policy after the fire. It is true Mr. Smith states that Upton was employed by his wife to see to the transfer and fixing up of these various policies in the Arlington, and says that he thought from what was said it was understood the policy was to be changed to Mrs. Smith, and therefore run to her, and not to him; but Upton himself testified that he was not the agent of Mrs. Smith at all; did not represent her in any way, and was only there for the purpose of fixing up the policies in the companies which he represented. Smith testified that he never considered it of any consequence, until he was getting ready for this suit. He says that, prior to the loss, it did not occur to him that it made any difference whether there was a change in the name of the person insured, or it was permitted to stand. The agents directly testified that they were without knowledge on the subject, and never understood him to make any application for a change in the name of the assured, or any other alteration, save as to the locality of the property.

Under these circumstances this is not the clear, satisfactory, and convincing proof which the cases require, and the court erred in submitting that question to the jury. Unless this question was an open one, which the jury might determine, it is very manifest the plaintiff could not recover, but a verdict should have been directed for the defendant, because the suit was brought in the name of a

person with whom the company did not contract, to whom they were not liable, who had no right to enforce the agreement, and who, by proof, had shown that the property belonged to her and, therefore, was not covered by the policy.

The court did not correctly advise the jury with respect to the question of waiver. The defendant asked numerous instructions on the subject, which suggested the true rule respecting it, although, perhaps, they were not entirely accurate in the form in which they were put, but they were sufficiently so to save the question. Under the evidence there was no question respecting the liability of the company, because of any waiver of conditions by the agent, which were not indorsed upon the policy, and the sole question to be submitted to the jury was, whether the agents agreed to make the proper indorsement on the policy with reference to the change of locality where the property was to be kept, and whether the failure to make that indorsement resulted from the neglect of the plaintiff to produce the policy, or the neglect of the agents to get it, under any agreement between them and the assured, by which the company would be bound. So far as we can see as the case now stands, the agents made no agreement to consent to a transfer of the property from the Smith Hotel to the Arlington, except on a performance of the conditions of the policy, to wit, by an indorsement thereon. If such was their agreement, and the jury should so find, then the failure to show such an indorsement would undoubtedly bar the plaintiff's recovery, because there was no waiver of the condition which the policy contained. It is undoubtedly the rule that, where the agent makes an agreement to change the terms and conditions of the policy, but only in conformity to its requirements, the company could not be bound by any other waiver of the condition. The authorities all seem to agree that, unless there is a waiver proven, or facts proven from which a waiver could be inferred, otherwise than in accordance with the conditions of the policy, it will not be binding on the company. Where the agreement which the agent makes is simply to do that which the assured requests, and to do it only in the way which the policy requires, the company may not be bound without proof of a compliance with this condition, because the agent restricts his consent to a performance in conformity with its limitations. As the case now stands, such is the record. The agents both testified that they only agreed to a change of the property from the Smith Hotel to the Arlington, by indorsing the consent on the policy. As they put it, "whatever you want we will assent to, if you will bring the policy down here, and permit us to put it on." This is totally undenied. The defendant's own testi-

mony tended in the same direction. Therefore, it was improper to leave the question to the jury, as to whether there could be a parol waiver of a condition which the company required should be written on the policy, because there was nothing in the case to justify any such statement of the law. What the case may show on the subsequent trial we cannot foresee, but unless there be some very grave change in the evidence in this particular, it is manifest that upon this point, as well as upon the other, the plaintiff must be defeated.

The plaintiff was not entitled to recover upon the case as she made it; the court erred in some of its instructions to the jury, and in refusing others which the defendant asked upon the propositions which have been determined, and, for the errors committed in these particulars, the cause will be reversed and remanded. Reversed.

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## COURT OF ERRORS AND APPEALS OF NEW JERSEY.

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GRAY  
vs.  
REYNOLDS.\*

The plaintiff was insured in a credit company against losses through insolvency of his customers. The scheme involved no surrender values, reserve fund, or method of reinsurance; the contracts running only for a year.

*Held* That in the event of the company's insolvency no recovery could be had for losses occurring after insolvency, although the sales had been made prior to that event; but only for unearned premiums.

HOWARD W. HAYES, *for Appellant*.

EDWARD A. DAY, *for Respondents*.

DEPUE, J.

The respondents are merchants carrying on business in Virginia. The United States Credit-System Company is a corporation of this State, incorporated in 1888. The business for which this corporation was created was the issuing of certificates of guaranty, which may be called contracts of insurance, or indemnity to traders for losses incurred by the failure of their customers who are debtors to the traders and become insolvent. A policy issued by this company runs for one year, and covers losses on goods sold during that year by the insolvency of their customers during that year; in other words, the goods must be sold, and the insolvency of the customer must also occur, during the period of time covered by the policy.

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\* Decision rendered, May 19, 1897.

Losses incurred after the certificate expires, on sales made during its term, are provided for by other parts of the contract, not material to this case. The vice chancellor very properly describes the kind of insurance undertaken by this company as *sui generis*. Indeed, so peculiar is the system of insurance engaged in by this company that its contracts of insurance appear to be protected, as its exclusive property, by a copyright. In this adventure there is no reserve fund to meet the obligations it incurs, no surrender value, and no opportunity for reinsurance in other companies. The complainants took out a policy, No. L169, dated and issued May 24, 1894. This policy covered the period from June 1, 1894, to May 31, 1895. The company became insolvent August 23, 1894. The order appointing a receiver adjudges that upon that day the company was insolvent. The day on which insolvency occurred, as adjudged by the order appointing a receiver, fixes the time to which the several claims of creditors must be referred for adjustment: *Mayer vs. Attorney-General*, 32 N. J. Eq., 815. The complainants presented to the receiver a claim for \$517.60, which was the amount of loss actually suffered on goods sold during the continuance of the policy up to the date of insolvency, which was allowed. They also presented claims for losses on goods sold after the policy was issued, where the losses were incurred after the insolvency of the company, to the amount of over \$2,000. The latter the receiver disallowed. On appeal to the court of chancery, the vice-chancellor set aside the adjudication of the receiver in the latter respect. The vice-chancellor very properly held that under the scheme of insurance there was no reserve value to the policies, and that it did not appear that it was possible to reinsure in any solvent company, so as to put the insured on the same footing he occupied at the time of the insolvency of the company. The vice-chancellor also held that where no provable loss had occurred, either at the time of the insolvency, or at the time of exhibiting final proof of loss, the only method of fixing the loss occasioned by the breach of the contract was to assume that the premium paid was a fair price for the risk, and the risk was equally distributed throughout the period covered by the certificate, and that a rebate of that portion of the premium which represented the unexpired term of the policy would be a practical method of determining the amount of damage to the insured. But the vice-chancellor also held that where the loss has actually occurred after the date of the insolvency, but before the exhibition of the final proof of loss, the occurrence of such an event was competent evidence in respect to the value of the policy at the date of the insolvency, and that the method of ascertaining such value was the amount

of such losses, with a rebate of interest from the time they were payable back to the date of the insolvency, and that, as to the losses that happened between the time the claim was presented to the receiver and the expiration of the policy, the insured should have a right to prove them on the hearing of his appeal as showing the amount of his loss, and that there was no distinction between losses happening on merchandise shipped after the insolvency of the company and on that shipped before. These conclusions of the vice-chancellor, if sustained, must rest upon the assumption that the policyholders were entitled to treat the insurance company as a going concern until all its policies expired. In this view, with respect to companies of this character, we cannot concur. The order in the insolvency proceedings put an end to the business of the company, and terminated its contracts, leaving the holders of policies to be indemnified as indemnity might be awarded. Any other view would compel the creditors of the company to continue the insurance business with the property and funds of the company which the insolvency proceedings contemplate shall be divided among the creditors as of the time when the insolvency occurred. And there being no reserve value to the policies, and no method of obtaining reinsurance, the only practical mode of determining the compensation to be made to the insured, where no provable loss had occurred at the time of the insolvency, would be by a rebate of that portion of the premium which represented the unexpired term of the policy. This view of the nature and effect of policies, where the insolvency of the company has occurred, was adopted by the Supreme Court of Minnesota in the case of *Smith vs. Insurance Co.* (April term, 1896). The order appealed from should be reversed, and an order entered in conformity with these views.

DIXON, J.

I vote to reverse this decree only so far as it allows losses resulting from sales which were made after the insolvency of the insurance company. Against such losses the insured should have guarded himself by reinsuring, for the cost of which a return of the proportionate part of the premium will be compensation. But for losses resulting from sales made before insolvency I find no way to indemnify the insured, except by permitting such losses to be proved, according to the terms of the policy, against the assets held by the receiver. His right to such indemnity seems indisputable, and no equity can be done to other creditors by postponing, if necessary, the distribution of the fund until the amount of those losses can be ascertained.

## SUPREME COURT OF OREGON.

KOSHLAND

vs.

HOME MUT. INS. CO.\* }

The property was incumbered by mortgage with the knowledge of the company at the time of insuring. Subsequently, the mortgagee demanding payment, the mortgagor executed a new mortgage to other parties covering this and other property and with the proceeds discharged the prior mortgage.

*Held*, That this was not a violation of a policy provision against incumbrance.

## Statement of facts by BEAN, J.

On the nights of the 9th and 10th of June, 1895, one Charles Cunningham lost by fire a large amount of property in Umatilla and Morrow Counties, which was insured in several different companies, the defendant being among the number. Its policy was for \$11,825 on three frame buildings and a quantity of hay therein; also \$4,680 on sheep, while contained in a building described in the policy. After the fire, Cunningham assigned the policy and all his rights thereunder to the plaintiff; and, the defendant having denied liability, this action was brought to recover on the policy. Within the time required to answer, the defendant appeared and filed a petition and bond for the removal of the cause to the Circuit Court of the United States for the district of Oregon, on the ground that the controversy is between citizens of different States, and that it is a non-resident of this State. This petition was denied, and defendant answered, setting up, among other things, as a defense to the action, the violation of a condition of the policy of insurance which provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the subject of the insurance be or become incumbered by mortgage, trust deed, judgment, or otherwise," by the assured executing, without the knowledge or consent of the defendant company, a mortgage upon the property covered by the policy, for the sum of \$28,000. The reply admits the execution of the mortgage as charged, but avers that at the time of the issuance of the policy of insurance the real property upon which said buildings were situate was incumbered by three certain mortgages, amounting in the aggregate to the sum of \$25,000, which sum was also secured by a chattel mortgage on the sheep covered by the policy, and that the

\* Decision rendered, July 31, 1897.



risk was accepted and the policy issued by the defendant company with full knowledge of the existence of these incumbrances; that after the issuance and delivery of the policy the sum secured by the mortgages referred to became due, and, the holders thereof demanding payment, Cunningham paid them with money borrowed of the plaintiff, to secure the payment of which he made, executed, and delivered the mortgage referred to in the answer, which covered not only the property included in the prior mortgages, but a large amount of other property, of the alleged value of \$28,000. Trial was had, resulting in a verdict and judgment in favor of plaintiff for the sum of \$6,375, and defendant appeals.

GEO. E. CHAMBERLAIN, *for Appellant.*

JOHN J. BALLERAY and CHAS. H. CARTER, *for Respondent.*

BEAN, J. (after stating the facts.)

The record contains numerous assignments of error, but the only ones relied upon at the argument or discussed in appellant's brief arise out of the refusal of the trial court to surrender its jurisdiction on the filing of the petition and bond by the defendant for removal to the Federal court, and in refusing to rule that the mortgage of \$28,000 to the plaintiff, referred to in the pleadings, was a violation of the condition of the policy against incumbrances, and rendered it void.

Upon the first question but little need be said. While the petition for removal avers that the plaintiff was at the time of the commencement of the action, and still is, a citizen of the State of Oregon, and that the defendant was and is a citizen of the State of California, it was nevertheless admitted in open court by the defendant at the hearing, and made a part of the record, that the allegations of the petition on that subject are not true, but that plaintiff is, and was at the time of the commencement of the action, a citizen and resident of the State of California. The petition was treated in the court below as if it had been amended accordingly, and will be so considered here. This being so, the case is clearly not one of which the Federal courts are given jurisdiction by the first section of the act of Congress of March 3, 1887, on the ground of diversity of citizenship, because both parties are residents of the same State, and the jurisdiction of such courts on removal by the defendant is limited by that section to such cases as might have been commenced therein by original process: *Railroad Co. vs. Davidson*, 157 U. S., 201, 15 Sup. Ct., 563. Hence the trial court properly refused to surrender its jurisdiction, upon the facts appearing of record in that court.

Upon the other point the record shows that, at the time the policy of insurance in suit was issued, Cunningham, the assured, was the owner of about 12,000 acres of land in Umatilla and Morrow Counties, with the buildings and appurtenances thereon, and was also the owner of about 18,000 or 20,000 head of sheep ranging on said land; that the real estate was encumbered by three separate mortgages to secure the sum of \$26,415.38 in the aggregate, which sum was likewise secured by a chattel mortgage on the sheep referred to, and the contract of insurance was made and the policy issued, covering some of the buildings on the mortgaged property and their contents, and \$4,650 on the sheep, with knowledge that the property was so incumbered. After the policy had been issued and delivered, and before the fire, Cunningham borrowed of plaintiff the money with which to pay off and discharge these incumbrances, and gave as security therefor a mortgage not only on the property included in the prior mortgages, but on a large amount of other property, and this is the mortgage referred to in the pleadings. There is no contention that the policy is void on account of the incumbrances on the property at the time the insurance was effected, but the question presented for decision is whether, after the issuance and delivery of a policy of insurance, the giving of a mortgage by the assured on the property covered thereby, without the consent of the company, to secure the funds with which to pay and discharge an incumbrance existing thereon, is a violation of a provision that it shall be void "if the subject of the insurance be or become incumbered by mortgage" without the consent of the company indorsed thereon in writing. Now, if this clause in the policy is to be given a strict and literal interpretation, it would seem that any incumbrance given by an assured after the policy has been issued and delivered is a violation thereof, whatever may have been the purpose for which it is given. But courts are always reluctant to enforce forfeitures; and when one mortgage is given practically as a substitute for another, as in this case, there is no reason, in our opinion, for doing so. The rule that an incumbrance in violation of the terms of a policy of insurance works a forfeiture is based on the theory that it increases the risk; for, if a man may insure his property to its full value, and then incumber it to its full value, it may easily be seen how it may be turned into a source of profit: *Brown vs. Insurance Co.*, 41 Pa. St., 187. But, where the policy is issued with knowledge by the company of an existing incumbrance, a subsequent renewal thereof, or a new incumbrance given for the purpose of discharging the old one, does not increase the risk, because the incumbrance practically remains the same.

By issuing the policy the company contracts to accept the risk, incumbered as the property then is; and a subsequent change in the form of the incumbrance, or the substitution of one creditor for another, is not a violation of the spirit or intent of the contract, and therefore ought not to work a forfeiture of the insurance. If the assured cannot use the property covered by the policy as security for the money with which to pay off an incumbrance existing at the time it is issued, he is either at the mercy of the company, or else must suffer the risk of having his property sold under a decree of foreclosure. There is neither reason nor justice in a doctrine which requires him to suffer in that way, when no possible harm can be done to the insurer by substituting one creditor for another, or one security for another. The risk remains the same, for the interest of the assured in the property is unchanged. There is some diversity of opinion in the adjudged cases as to whether, after an existing mortgage has been paid and discharged, the assured can give another for the same or a less amount without violating the condition of the policy against incumbrances; but, where the new mortgage is given merely in lieu of an existing incumbrance, reason as well as authority favors the doctrine that it does not increase the risk, and therefore is no violation of the conditions of the policy against incumbrances: *Bowlus vs. Insurance Co.* (Ind. Sup.); *Kister vs. Insurance Co.* (Pa. Sup.); *Insurance Co. vs. Gould* (Pa. Sup.); *Weiss vs. Insurance Co.*, 148 Pa. St., 349; *Insurance Co. vs. Saindon* (Kan. Sup.); *Insurance Co. vs. Stein* (Miss.); *Russell vs. Insurance Co.*, 71 Iowa, 69. It follows that the judgment must be affirmed, and it is so ordered.

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SUPREME COURT OF OREGON.

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KOSHLAND

vs.

FIRE ASS'N OF PHILADELPHIA.\* }

A policy provision against increase of hazard is not violated by a mortgage given to discharge existing incumbrances known to the insurer.

A complaint may be amended by alleging insurable interest after motion for a nonsuit based on the absence of such allegation in Oregon.

GEO. E. CHAMBERLAIN, *for Appellant.*

JOHN J. BALLERAY and CHAS. H. CARTER, *for Respondent.*

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\* Decision rendered, July 31, 1897.

BEAN, J.

This is an action to recover \$1,000 on an insurance policy issued by the defendant to one Charles Cunningham, covering certain buildings and personal property which were destroyed by the fire referred to in the case of *Koshland vs. Insurance Co.* (just decided, see ante), and by Cunningham assigned to the plaintiff after loss. So far as necessary to a correct understanding of the principal question to be determined on the appeal in this case, it is sufficient to say that the defense interposed is that the insured violated a condition in the policy which provides that it shall be void, unless otherwise provided by agreement indorsed thereon or added thereto, "if the hazard be increased by any means within the control or knowledge of the insured, or if the subject of the insurance be personal property, and be and become incumbered by chattel mortgage, or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance, whether by legal process of judgment, or by voluntary act of the insured, or otherwise." The particular violation of this condition relied upon and alleged as a defense to this action is that on June 4, 1895, Cunningham, without the knowledge or consent of the defendant company, executed to the plaintiff a mortgage on the real estate upon which the buildings destroyed by fire and covered by the policy were situated, to secure the payment of \$28,000; and the defendant claims that the court erred in refusing to submit to the jury, as a question of fact, whether the hazard was increased by reason of this mortgage. There is very respectable authority for holding that the creation of incumbrances, whether voluntary, as in case of mortgages, or involuntary, as in case of tax liens, is not to be considered a violation of a condition in an insurance policy like the one quoted. See *Rich., Ins.*, §§ 141, 145, 147, and authorities there cited. But, however this may be, it appears in this case that the mortgage in question was given in lieu of, and for the purpose of discharging, incumbrances on the property of which defendant had full knowledge at the time the insurance was effected; and the question presented therefore bears so close a resemblance to the one before us in *Koshland vs. Insurance Co.*, supra, that it is not necessary to do more than refer to the opinion in that case as authority for the ruling here. If a mortgage of the character indicated is not a violation of a condition in an insurance policy against incumbrances, because it does not increase the risk, as was held in the case referred to, it clearly does not violate the terms of the policy now in hand on the ground that it increased the hazard, and the

court committed no error in ruling that its execution was no defense to this action.

The only other assignment of error discussed in the brief is based on the ruling of the court in permitting the plaintiff to amend his complaint by alleging an insurable interest in Cunningham at the time of the loss, and to call witnesses to prove such interest after the defendant had moved for nonsuit for want of the allegation so permitted. But this amendment was not only manifestly in the furtherance of justice, but was one which the trial court had the undoubted power to grant, under section 101 of the Code. It did not change the cause of action attempted to be set up in the complaint, nor did it affect any substantial right of the defendant, but simply supplied an omission which, through inadvertence, had been overlooked until attention was called thereto by the defendant's motion for nonsuit. It follows that the judgment of the court below must be affirmed, and it is so ordered.

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## SUPREME COURT OF OREGON.

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KOSHLAND

vs.

HARTFORD FIRE INS. CO.\*

Where a waiver of proofs of loss is admitted by the company, evidence erroneously admitted to show such waiver is harmless.

The policy provided that it should be void in case of concealment or misrepresentation, or if the interest be not truly stated.

*Held*, That failure to state incumbrance in the application filled out by the agent in the absence of any inquiries by him was not a violation.

A mortgage is not a change of interest, title or possession within the meaning of the policy.

GEO. E. CHAMBERLAIN, *for Appellant*.

JOHN J. BALLERAY and CHAS. H. CARTER, *for Respondent*.

BEAN, J.

This is an action against the Hartford Fire Insurance Company to recover \$1,600 on a policy issued by it to one Charles Cunningham, and by him assigned to the plaintiff after loss. In many of its features the case is similar to the actions brought by the plaintiff against the Home Mutual Insurance Company and the Fire Association of Philadelphia (just decided, see ante), to recover

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\* Decision rendered, July 31, 1897.

under policies issued by them, and covering property destroyed by the same fire which caused the loss under the policy now in suit; and therefore the questions presented on this appeal, so far as they have been considered in those cases, need not be further considered here.

It is claimed in this case that the court erred in admitting in evidence a writing, purporting to be a denial by the defendant of liability under the policy in suit, signed, "William Reid, Adjuster for the Hartford Fire Insurance Company," and certain telegrams offered for the purpose of showing Reid's authority to bind the company. Considerable space in counsel's brief is devoted to the discussion of this question, and there would be much merit in his contention if the evidence was material to any issue in this case. The only object of its introduction was to show a denial of liability under the policy by the defendant, as an excuse for the failure of the plaintiff to make proof of loss as provided in the policy; but the complaint having alleged that, after the loss, plaintiff offered to make due proof thereof, but the defendant "refused to accept said proof, and denied all liability under said policy, in writing, and waived all proof of loss under said policy," and this allegation of a denial of liability and waiver of proof of loss being admitted by the answer, because not denied, there was no issue before the trial court upon the question of the denial of liability by the defendant, or of Reid's authority to bind it; and hence all evidence tendered upon that subject, and the errors, if any, committed by the court in its admission, were wholly immaterial, and could not have prejudiced the defendant.

It is also claimed that the court erred in withdrawing from the consideration of the jury the evidence offered by the defendant in support of the first separate defense set up in the answer, and instructing them not to consider such defense. By this defense it is averred, in substance, that the policy provides that it shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, and that in violation of this condition the assured falsely and fraudulently concealed from the defendant, its officers and agents, the existence of the mortgage then on the property, and represented to it that the property was unincumbered. The only evidence offered in support of this defense was the application for the insurance, signed by Cunningham, in which it was stated that the property was unincumbered. But the testimony of the local agent of the defendant who took the application and issued

the policy was to the effect that he filled out the application himself, and could not say whether Cunningham read it or not; that he did not remember whether he knew of the mortgages at the time, or whether he made any inquiry of Cunningham on that subject, or in regard to the property, and could not say where he got the statements which appear in the application. This evidence falls far short of showing that the assured concealed or misrepresented any facts or circumstances concerning the mortgage. A failure to disclose the existence of the mortgages on the property at the time the application was made was no violation of this provision of this policy, nor of the clause that it shall be void "if the interest of the insured in the property be not truly stated therein," unless he was particularly interrogated upon that subject: *Rich. Ins.*, § 136; *Dolliver vs. Insurance Co.*, 128 Mass., 315. It follows, therefore, that the court did not err in instructing the jury to disregard the first defense because there was no evidence to support it.

Nor was there error in charging the jury that they need not consider the second defense, for the reason that a subsequent mortgage on property covered by a policy of insurance is not violative of a provision therein that it shall be void "if any change other than the death of the assured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise." *Insurance Co. vs. Walsh*, 54 Ill., 164; *Judge vs. Insurance Co.*, 132 Mass., 521; *Walradt vs. Insurance Co.*, 136 N. Y., 375. These are all the questions presented in this case which have not already been considered, and, finding no error in the record, the judgment is affirmed.

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## UNITED STATES CIRCUIT COURT.

S. D. OHIO, W. D.

KNIGHTS TEMPLARS & MASONIC MUT. AID ASS'N

vs.

GREENE ET AL.\*

The beneficiary in the certificate of a benevolent society in Ohio, under the statutes of that State, could be changed to any other of his family or heirs. The member wrote to the society to change it, and make it payable to his heirs, executors and assigns. The change having been made, the certificate was lost, and a new one was issued to him, payable to his heirs. The application was made and the insurance was taken out by the member

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\* Decision rendered, March 20, 1897. The facts sufficiently appear in the syllabus.—ED.  
INS. L. J.

in New York, where he was a resident. The member left a widow, mother, and brothers and sisters, but no children, all in New York.

*Held*, That the word heirs must be regarded as the language of the insured, and must be construed as if used in a testamentary way, according to the laws of New York, subject to the limitations of the Ohio statute as to who may be beneficiaries.

*Held*, That in New York the heirs were those who would take personal property, in case of intestacy.

*Held*, That the insured, judging from his correspondence with the company, desired his widow to share in the distribution.

T. M. HINKLE, *for Plaintiff*.

C. D. ROBERTSON and M. L. BUCHWALTER, *for the widow of John G. Greene*.

N. J. DAVIDSON, *for the mother, brothers and sisters of John G. Greene*.

TAFT, C. J. (after stating the facts.)

It is contended on behalf of the widow of John G. Greene, the insured, that the word "heirs" should be construed according to the laws of Ohio. If so, it is conceded that, as the insured left no children, she would take the entire fund, whether the word "heirs" is to be construed strictly as meaning those who, at his death, would inherit real estate from the insured, or is to be taken as meaning those to whom personal property of the insured would be distributed if he died intestate. The administrator of Mary Greene, the mother of the insured (she having died since the beginning of this suit), and the brothers and sisters of the insured, contend that the word "heirs" is to be construed under the law of New York, and that, whether it is to be interpreted technically as those inheriting real estate, or only as next of kin, in either case, by the New York law, the widow, Sarah L. Greene, takes nothing. It is contended by the association (which has paid \$1,000 to the widow), and by the widow that, even if the New York law is to control the meaning of "heirs," the court must construe the word in accordance with that law to mean those to whom the proceeds of the policy would have gone had it been part of his estate and he had died intestate, and in that case by the intestate statutes of New York the widow would receive a moiety of the proceeds of the policy.

The application was made and delivered to the agent of the company in New York, and the certificate or policy was delivered by an agent of the company in New York, to the insured. All payments were made in New York by the insured to an agent of the company, both those accompanying the original application, and all subsequent ones. These circumstances, under the decision in *Assurance Soc. vs. Clements* (140 U. S., 226), might seem to justify the conclusion that the contract, having been made in New York, should be



construed by the New York law, and thus that the word "heirs," within the intention of the parties, should be construed to be "heirs" as interpreted by the New York law, rather than as interpreted by that of Ohio. I do not propose, however, to rest the decision in this case on its likeness to the case of Assurance Soc. vs. Clements. There are some additional circumstances in this case which may, perhaps, distinguish this case from that. The policy was to be approved and issued in Ohio. The policy was to be payable there. In cases where both parties are interested in the construction of the insurance contracts, these circumstances are sometimes regarded as important.

But I do not think this a case for construing the terms of a contract to reach the common intent of two parties, and it does not seem to me that the same rules apply. What we are construing here is language of the insured designating the beneficiary of his bounty after his death. By the by-laws of the association he was given power to change this designation at any time before his death. The association reserved no right or power to object to any designation or change of designation, provided the beneficiary named was within those classes of persons to whom, by statute, charter, and its own by-laws, the association was permitted to pay policies. Now, it must be conceded that, as those classes are limited by the law of Ohio, the terms used to describe them in the law must be construed according to the law of the State. Therefore the association had no power to agree to pay policies to any person not a member of the family of the insured, or not an heir of the insured, as "family" and "heir" are defined by the law of Ohio. Within these classes, however, the association was entirely indifferent who the designated beneficiary might be. It is conceded that each of the claimants at the bar is within the requirement of the statute of Ohio. Subject to the limitation of the statute, the construction of the language of the designation becomes solely a matter of determining the intent of the insured. In other words, the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances: *Bolton vs. Bolton*, 73 Me., 299; *Duvall vs. Goodson*, 79 Ky., 224-228; *Mutual Ass'n vs. Montgomery*, 70 Mich., 587; *Silvers vs. Association*, 94 Mich., 39; *Chartrand vs. Brace*, 16 Colo., 19, 26 Pac., 152; *Phillips vs. Carpenter* (Iowa).

This designation was made in New York, by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were construing this language as a clause in a will, whether the money bequeathed were payable in New York or Ohio,

there can be no doubt that the word "heirs" would be construed under the New York law, because that of the domicile of the testator: *Harrison vs. Nixon*, 9 Pet., 483; *Anstruther vs. Chalmer*, 2 Sim., 1; *Yates vs. Thompson*, 3 Clark & F., 544; *Enohin vs. Wylie*, 10 H. L. Cas., 1; *Wilson's Trusts (Shaw vs. Gould)* L. R., 3 H. L., 55; *Parsons vs. Lyman*, 20 N. Y., 103; *Freeman's Appeal*, 68 Pa. St., 151. Following this testamentary rule of construction, I have little difficulty in concluding that Greene intended that the language he used should be construed by the law of New York. Indeed, without the aid of authority, I should reach the same decision. Greene lived in New York, and all the possible objects of his bounty lived there. Is it reasonable to suppose that he would use language to describe them, intending it to be interpreted by the law of some other State? I cannot think so. Nor is there anything in the circumstances of his change of the beneficiary to lead to a different result. If the correspondence between the insured and the association at the time the beneficiary was changed is competent, it shows that he wished the proceeds of the policy to go to his estate, for he used the words "heirs, administrators, executors, and assigns." To this the association responded that the law of its creation forbade a designation to his "estate," but that he might designate his "heirs," which he did. This shows that his purpose was to leave it to those to whom it would go, were it part of his estate, and he were to die intestate, and he used the word "heirs" as most nearly accomplishing that purpose. Had he been permitted to designate his estate as the payee, certainly the proceeds of the policy would have been distributed under the New York law. May we not presume that, with the same purpose in view, he intended that the designation he was permitted to make should receive a New York construction? The mere fact that he was cautioned that the Ohio law did not permit him to direct payment to his estate does not, it seems to me, show that he intended the words he used to receive an Ohio construction. He knew that the association did business outside of the State of Ohio. He knew that, so large was the number of New York certificate holders, the annual meeting of the association was held in New York. Was it not most natural for him to think that, so long as he designated persons within the limitation permitted by the Ohio law, the particular individuals named by him should be determined by giving to his language the meaning it would have at his home, where the money was ultimately to come and where the beneficiaries lived? We can be certain that Greene regarded the proceeds of this policy as part of his estate which he was leaving to be distributed at his death; and we may be sure that he did not distinguish

between language used in the designation and that which he would have used in a will concerning his personal estate.

In *Mayo vs. Assurance Soc.* (71 Miss., 590), it was held that the proceeds of a policy of life insurance issued in New York, and payable to the heirs of the insured, who was domiciled in Virginia, were to be distributed under the laws of the latter State. In *Association vs. Jones* (154 Pa. St., 107), an association of Ohio, organized under exactly the same law as the complainant, issued a policy payable to the legal heirs of the insured, who was domiciled in Pennsylvania. It was held that the court must determine who the legal heirs of the insured were by the law of his domicile, to wit, Pennsylvania. The court said (page 108, 154 Pa. St.): "This contract is made with William D. Jones, of Philadelphia, and it fixes his domicile, and promises to pay the fund to his legal heirs. His domicile being thus here, a promise to pay to his legal heirs must be such as are determined by the intestate laws of such domicile."

In *Association vs. Jones* (154 Pa. St., 99), a policy was payable "to the devisees, or, if no will, to the heirs, of the said William Jones." The association was organized under the laws of Illinois. It was held that there was no disposition of the proceeds of the policy by the will. It was held that the word "heirs" meant those distributees to whom personal property of the insured would go if he died intestate. It was contended that the words should be given effect according to the law of Illinois, and as, by those laws, the husband's personal property would go to the widow in case of his intestacy, she was entitled to the whole fund. The court held that, as the policy was issued to Jones as a citizen of Pennsylvania, the promise to pay to his heirs must be treated as a promise to pay according to the intestate law of his domicile, and that it was a case for the application of the common-law rule "that personal property has no situs, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicile."

There are other cases in which the same result was reached, though no question seems to have been raised on the point by counsel, or considered by the court: *Gauch vs. Insurance Co.*, 88 Ill., 251; *Britton vs. Supreme Council*, 46 N. J., Eq. 102. It may be noted, in connection with the two Pennsylvania cases just cited, that the policy in this case expressly insures the life of John G. Greene, of Schenectady, N. Y. I conclude, both on reason and authority, that the word "heirs," as used in the certificate or policy in the case at bar, is to be construed according to New York law.

And what does the word "heirs" mean, according to the New York law, used in a policy of life insurance? It is well settled in

many States that where "heirs" is used, in a will or other document having a testamentary effect, to designate persons who are to receive personal property, it shall be held to mean those persons to whom the personalty of the giver would be distributed if he were to die intestate. Of course, as already said, technically it means those who would inherit the giver's real estate in case of his intestacy. But courts recognize that the word is given in common parlance—"ut loquitur vulgus"—a much wider meaning, and includes all those who would succeed, under the intestate laws of the State, to the enjoyment of the property in question: *Association vs. Jones*, supra; *McGill's Appeal*, 61 Pa. St., 46; *Eby's Appeal*, 84 Pa. St., 241; *Sweet vs. Dutton*, 109 Mass., 589; *Welsh vs. Crater*, 32 N. J. Eq., 177; *Freeman vs. Knight*, 2 Ired. Eq., 72; *Croom vs. Herring*, 4 Hawks, 393; *Corbitt vs. Corbitt*, 1 Jones, Eq., 114; *Henderson vs. Henderson*, 1 Jones (N. C.), 221; *Alexander vs. Wallace*, 8 Lea, 569; *Collier vs. Collier's Ex'rs*, 3 Ohio St., 369; *Doody vs. Higgins*, 2 Kay & J., 729.

In the case of *Tillman vs. Davis* (95 N. Y., 17), a testatrix directed that the residuum of her estate should be divided into seven equal parts, and she devised and bequeathed the parts to seven persons (naming them), respectively; "the heirs of any or either of the foregoing persons who may die before my said husband to take the share which the person or persons so dying would have taken if living." It was held by the court of appeals that "heirs" here meant next of kin, but that it did not include the widow. The reasoning of Judge Earl, who delivered the opinion of the court, is avowedly at variance with that of the authorities cited above, but there are certain features of the case which distinguish it from that at bar. One is that the testatrix was using the word "heirs" to describe, not her own next of kin, but those of one of her beneficiaries, and hence the court might justly say, as it did: "It is presumable that she was attached to the legatees named in those clauses by ties of affection or blood, and hence that she desired that the persons of the same blood, who might also be relatives of her blood, should succeed to the property,"—and thus intended to exclude mere connections by marriage of the beneficiaries of her bounty. Again, the court points out that in this case, when the testatrix was writing her will, she was dealing with both real and personal property, "and she undoubtedly used the word 'heirs' to designate blood relatives, and in the same sense, whether applied to real or to personal estate." Still, in spite of these distinctions, it must be conceded that, but for the later New York decisions, the broad language of this opinion in

other parts would fix the law of New York as excluding from the meaning of the word "heirs," used to describe legatees of personal property, the widow of the testator.

There are several earlier cases in New York, which are relied on by counsel for the mother's administrator, and the brothers and sisters. In *Keteltas vs. Keteltas* (72 N. Y., 312), it was held that a residuary bequest to his "next of kin according to the Statute of the State of New York, concerning the distribution of personal estates of intestates," in a will made before the testator was married, did not include his widow. In *Luce vs. Dunham* (69 N. Y., 37), a testator gave all his real estate and \$100,000 to his wife, and then gave the residuum of his estate to be divided among his heirs and next of kin as provided by statute in cases of intestacy; and it was held that the word "heirs" was used with technical correctness, having regard to a possible acquisition of real estate before his death, and that the words "next of kin" did not include the widow. In *Murdock vs. Ward* (67 N. Y., 387), the testator bequeathed the residuum of his estate to his sons when they became of age, and, in case they did not live to take, then "to be equally divided among and paid to the persons entitled thereto as their or either of their next of kin, according to the laws of the State of New York, and as if the same were personal property, and they or either of them had died intestate." It was held that under this the widow of a deceased son could not take any part of his share. The effect of these earlier decisions is to limit the meaning of "next of kin" to blood relations, and not to allow it to be enlarged to include the widow by accompanying directions to follow the statute of distribution in case of intestacy; but they none of them deal with the meaning of the word "heirs," when accompanied by such directions, and used to indicate legatees of personal property. Still, the conclusion in *Tillman vs. Davis* is based on these earlier cases, and they certainly indicate a tendency on the part of the New York Court of Appeals at that time to avoid giving the statute of intestacy full effect when there are any limiting words.

The first indication of a disposition to relax the strict rule adopted in the prior cases is found in *Woodward vs. James*, 115 N. Y., 346. There the testator left a brother; two half-sisters; nine nephews and nieces, children of a deceased brother; half-brother, and half-sister; and plaintiff, who was a grandchild of a deceased brother. After the death of his wife, the testator gave the residuum to his "legal heirs." It was held that these words meant those who would take in case of intestacy, and in the proportions described,

and that the remainder-men took per stirpes and not per capita, and that, as under the New York Statute of distributions representation goes no further than brothers' and sisters' children, and the rule of intestacy applied to the quantity of interest to be taken, the plaintiff had no interest in the estate. This case certainly gave full effect to the statute of distribution, though the only words used were "legal heirs." The next case in New York was *Lawton vs. Corlies*, 127 N. Y., 100. In this case the testator had nothing but personality when he made his will, and left nothing else on his death. His will directed that his estate should be divided among his "heirs at law, in accordance with the laws of the State of New York applicable to persons who die intestate." It was held that the words "heirs at law" were not used in their strict legal sense, but to indicate persons who would succeed to the property in case of intestacy; that it was the testator's intention that his real estate, if any, should be divided according to the statute of descents, and his personal property according to the statute of distributions; and, therefore, that the grand nieces and nephews were not entitled to share in the distribution of the estate. The court say (page 105, 127 N. Y.): "While technical words in a will, when uncontrolled by the context, are presumed to have been used in their technical sense, still the context may overcome the presumption, when it appears thereby and from extraneous facts of the kind already alluded to, that the testator used the words in their common and popular sense. The context in the case in hand shows that the estate was to be divided in accordance with the laws of the State of New York applicable to persons who die intestate. The use of the words 'heirs at law,' in such a connection, indicates, as we think, the 'legal heirs,' in the sense of the persons who would legally succeed to the property in case of intestacy according to its nature or quality; the heirs at law taking the realty and the next of kin the personalty. The cardinal idea seems to be that the division should be made in accordance with the statute in case of intestacy."

The court distinguishes *Luce vs. Dunham*, *Keteltas vs. Keteltas*, and *Tillman vs. Davis*, and then uses this language: "All these cases recognize the principle that, where the context of the will shows that the testator used the word 'heirs,' or the expression 'heirs at law' or 'next of kin,' in a sense other than the primary legal sense, the actual intention must prevail over the use of technical language. In every case, the aim was to get at the intention, and, when that was found, not by conjecture, but by careful study of all the provisions of the will, it was blindly followed. So in this case, after

giving due force to the term 'heirs at law,' we think that the testator meant, as he said, that his property should be divided according to law, the same as if he had not made a will."

The last case in New York, and the one more nearly like the one at bar, is that of *Walsh vs. Walsh* (143 N. Y., 662), where the court of appeals agreed to affirm the judgment of the supreme court in general term on the opinion of that court. The opinion of the general term is found in 66 Hun., 297. In that case, a by-law of a mutual aid society, like the complainant at bar, provided, in respect to the proceeds of the policy of a deceased member, that "in case of a failure of, or imperfect, designation, then the amount shall be paid to the legal heirs of the deceased member. The question was whether the widow could take under this provision. The court held, following *Lawton vs. Corlies* and *Woodward vs. James*, that "legal heirs" included all those who would take such property in case of intestacy, and that, considering the purposes of the association, they could not be limited in meaning to "next of kin."

From this review of the New York cases, it is apparent that, whatever some of the language of the earlier cases, the meaning and scope of the word "heirs," when used to designate those who are to take personal property, either in a will or in any document having the same effect as a testament, are to be determined from the context and the circumstances. In the case at bar those guides leave no doubt in my mind that it was the intention of the insured to secure by his designation that distribution of the proceeds of his policy which would take place in case of his intestacy, were it part of his estate. The circumstances of the change in the designation, instead of showing a desire to exclude the widow from sharing in the proceeds of the policy, confirm me in the view that he wished her, if living, to take under the statute of distribution in New York, rather than by special designation. His will (so called) is not competent evidence, but the correspondence between him and the association in regard to the designation seems to me to be clearly so. It is the correspondence which really contains the designation. What he wished was to make the policy part of his estate, probably for his own use during life, and, failing that, he used the word which came nearest to his purpose, and which would, as he supposed, make the proceeds take the course after his death which they would have taken were they his during his life.

With this construction, we must refer to the statute of distribution of New York to determine how the money in this case must go. Paragraph 2, § 75, tit. 3, of chapter 6 of the Statutes of New York on wills and decedents' estates (4 Rev. St. [8th Ed.], p. 2565)

provides as follows: "That if the deceased leaves no children the widow shall take a moiety of the personal estate."

Paragraph 6 provides: "If the deceased shall leave no children and no representatives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters."

The decree of the court must be, therefore, an order distributing the proceeds of the policy, one-half to the widow, Sarah L. Greene, and one-half to be equally divided between the administrator of Mary Greene, the mother, and the brothers and sisters of John L. Greene, including as one of the equally sharing distributees, the son of his deceased sister. The widow, Sarah L. Greene, will, of course, be charged with the \$1,000 already paid her by the complainant. The costs will be paid out of the fund.

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## COURT OF ERRORS AND APPEALS OF NEW JERSEY.

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LAUER ET AL.

vs.

GRAY.\*

1. Where a party was the holder of a certificate of guaranty or policy of insurance against the loss of credits for goods shipped and loss occurring between the commencement and expiration thereof, and which contained a provision that "if this certificate is renewed by the said above-named party, on or before the date of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate on goods shipped between the commencement and the expiration thereof shall be provable under the renewal in the same manner as if losses occurred on goods shipped after the commencement of the renewal,"—upon which original policy losses occurred in accordance with its terms and conditions, and which, upon adjustment and allowance by the insurers, were not paid to the insured, but retained by the insurers, under an agreement, made subsequent to the expiration of the policy, that upon the cancellation thereof such losses should answer the payment of a premium for a renewal policy,—*held*, that the retention of these losses under such an agreement constituted payment, "on or before the date of the expiration" of the original policy, of the guaranty fee or premium of the renewal policy, and was a compliance with the condition therein that "if this certificate has been paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate," although the adjustment of the losses under the prior certificate, and the

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\* Decision rendered, March 23, 1897. Syllabus by the Court.



cancellation thereof, and the execution and delivery of the renewal, did not take place until after the expiration of the original certificate. The two certificates or policies of insurance were connected together, and had reference to each other, and the adjustment of loss, cancellation, agreement aforesaid, and the execution and delivery of the renewal had relation to the life of the prior certificate, the losses upon which, by virtue of the agreement, constituted the payment of the premium of the renewal, by reason of the situation which existed before the expiration of the prior one, and to which the renewal had reference; and it was immaterial, under such circumstances, that the execution and delivery of the renewal was postponed until the adjustment of the losses and cancellation of the former policy could be accomplished.

2. The obligation of the insurer to issue and deliver the certificate of renewal, accepting, as payment of the premium therefor, the losses owing to the insured upon the prior policy when adjusted and the policy canceled, being established, the payment related back to the life of the prior policy, and was of the time during which such losses occurred, and the mere delay during negotiations of putting the obligation into a written agreement or contract, or embodying it in a formal certificate of renewal, did not alter or extinguish such obligation. Equity will impute the intention to fulfill the obligation, and, if necessary to protect and enforce the just rights of the parties, it will assume the obligation to have been fulfilled in accordance with the principle or maxim that equity looks upon that as done which ought to be done.

Statement of facts by LIPPINCOTT, J.

The appellants are the holders of a certificate of guaranty or policy of insurance for the sum of \$20,000, issued and delivered to them June 12, 1893, by the United States Credit-System Company, guarantying or insuring them against losses upon credits given by them to their customers in business, on sales and shipments made by the appellants between June 1, 1893, and May 31, 1894. This certificate also contained the following clause of insurance, to wit: "If this certificate has been paid for on or before the date of expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of the losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate." The appellants had been the holders of a prior certificate of guaranty against losses of this character dated June 12, 1892, to run until May 31, 1893, as the date of its expiration. This prior certificate contained the following clause, to wit: "If this certificate is renewed by the above-named party on or before the day of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, the losses occurring after the expiration of this certificate on goods shipped between the commencement and expiration thereof shall be provable under the renewal in the same manner as if the losses had occurred on goods shipped after the commencement of the renewal." Under the terms of this prior

policy, and before its expiration, losses upon adjustment to the amount of \$580 had occurred. When the adjustment of these losses had been made, on June 10, 1893, it was agreed that this policy should be canceled, and this amount of losses should be devoted to the payment of the guaranty fee or premium for a renewal certificate. The losses and the cancellation, it was agreed, should stand as the consideration or payment for the renewal certificate. Under this arrangement between the appellants and the Credit-System Company, the appellants, on June 10, 1893, indorsed upon the original or prior certificate the following receipt, to wit: "Cincinnati, O., 6-10, '93. Received from U. S. Credit-System Co. five hundred and eighty  $\frac{1}{100}$  dollars (\$580), in full and complete satisfaction of all claims and demands, of whatever kind or nature, of within certificate. Stern, Lauer, Shol & Co." This sum of \$580 was not paid to appellants, but retained by the United States Credit-System Company; and at the same time, contemporaneously with the receipt on June 10, 1893, the following agreement was delivered to the appellants: "Cincinnati, O., 6-10, 1893. It is agreed and understood that the U. S. Credit-System Company will issue to Stern, Lauer, Shol & Co. a renewal certificate, on terms as follows: "Own loss to be  $1\frac{1}{4}$  per cent Class D 2,  $1\frac{1}{4}$  per cent Class D 1, limit of single accounts \$5,000; absconding debtor special; also special allowing S., L., S. & Co. to renew certificate for \$10,000, instead of \$20,000, should they desire. This certificate to be gratis, in consideration of canceling certificate No. 470.5, having expired May 31, 1893. U. S. Credit-System Co., Oscar Ising, Inspector." The delivery of the certificate of renewal to which reference is made in this agreement was made by the secretary of the company, by mail, with an accompanying letter, to wit: "Newark, N. J., June 12, 1893. Messrs. Stern, Lauer, Shol & Co., Cincinnati, Ohio: Inclosed we hand you \$20,000 guaranty, in accordance with arrangements made with an application submitted by our inspector, Mr. Oscar Ising. Yours, respectfully, Frank M. Wheeler, Sec'y." To this letter and inclosure the following reply was made by Stern, Lauer, Shol & Co.: "Cincinnati, June 16, 1893. United States Credit-System Co., Newark, N. J.—Dear Sirs: We are in receipt of your \$20,000 guaranty policy in accordance with arrangements made with your Mr. Ising. Respectfully yours, Stern, Lauer, Shol & Co." On June 16, 1893, the following letter was sent to appellants: "Newark, N. J., June 16, 1893. Messrs. Stern, Lauer, Shol & Co.—Gentlemen: Inclosed we hand you special for attachment to your certificate No. 1,414, which you will please substitute for the one now attached to your certificate, as we notice that the amount of \$10,000 mentioned

in the second paragraph of the special reads '\$1,000,' the last naught of the '\$10,000' being quite indistinct. Yours, very truly, Frank M. Wheeler, Secretary."

Under these facts and circumstances, the appellants became the holders of the renewal certificate which contained the clause to which reference has been made. Certain losses, amounting, as computed according to the terms of the renewal, to the sum of \$15,256.83, were sustained, on goods shipped between June 15, 1892, and May 31, 1893, during the life of the prior policy, the losses occurring after the expiration thereof; and the same were presented to the receiver of the United States Credit-System Company, as provable under the certificate of renewal issued June 12, 1893. These losses were disallowed by the receiver, on the single ground that the guaranty fee or premium of the renewal certificate was not paid on or before the expiration of the prior certificate, that date being May 31, 1893, and that, therefore, the certificate under which the claim was presented was not a renewal. It is agreed that if the claim of the appellants does not include losses occurring during the year ending May 31, 1894, on shipments made during the year ending May 31, 1893, then there are no losses provable against the receiver under the conditions of policy. The appellants filed in the court of chancery a petition of appeal from the disallowance of losses by the receiver, claiming that the last certificate was a renewal of the prior policy, on the ground that the guaranty fee or premium for the renewal had been paid before the expiration of the prior certificate, and also that the respondent was estopped by reason of the issuance of the renewal certificate under the circumstances from denying the effectiveness of this particular clause of the renewal certificate to cover losses upon goods shipped during the life of the prior one. The petition also prayed a reformation of the certificate in case it was found in contradiction of the agreement between the Credit-System Company and the appellants, so that the claims for losses sustained during the period covered by the prior certificate might be lawfully made. Subsequently the appellants also presented a petition to obtain permission to bring suit against the receiver, if it should be found necessary, to reform the certificate of renewal so as to include such losses. The vice chancellor, after hearing, approved the disallowance of the losses by the receiver, upon the ground that the renewal certificate had not been paid for before the expiration of the prior certificate, and that, therefore, the clause in the renewal policy intended to cover losses during the life of the prior policy never had any force or effect, and, besides, that there existed no waiver by the Credit-

System Company of the condition of such clause that, in order to have effect, it should have been renewed and paid for before the expiration of the prior certificate. The vice-chancellor therefore advised that the petition of appeal from the disallowance of losses by the receiver be dismissed, and decree was accordingly made. At the same time a decree was advised denying permission to sue for reformation of the certificate. From both these orders and decrees an appeal has been taken.

EDWARD A. and WILLIAM T. DAY, *for Appellants.*

HOWARD W. HAYES, *for Respondent.*

LIPPINCOTT, J. (after stating the facts.)

No question has been or could be made against the validity of the issuance of the certificate of guaranty or policy of insurance to the appellants on June 12, 1893. It is only assailed upon the ground that the condition of the clause under which the appellants seek to establish liability was never complied with. The certificate was in form a renewal certificate, as distinguished from an original certificate. It is clear from the terms of the renewal that it had relation to a prior certificate, and, besides, that the agreement to renew was made in view of the fact that a prior policy existed, upon which, and in accordance with the terms thereof, a liability for losses had arisen. The original policy, by its terms, only insured losses on credits for merchandise sold and delivered where the sales had been made and the losses incurred before or on the date of its expiration; but it contemplated specifically a renewal, which would cover and include losses for goods shipped before its expiration, where such losses did not actually occur until after its expiration. Under this renewal certificate, not only losses occurring before its expiration on goods shipped during its life were provided for, but it also, by this special clause, covered losses incurred during the same period on sales and shipments of merchandise during the life of the prior certificate. That the renewal certificate succeeded a prior certificate is conceded, and the only defense to its effectiveness in the respect claimed is that the premium or guaranty fee for which this renewal was made was not paid before the expiration of the original or prior certificate.

The conclusion reached is that no such defense has been sustained by the evidence presented to the court. The losses sustained by the appellants under the prior certificate were sustained before its expiration on May 31, 1893. These losses were subject to adjustment payable to the appellants on or before that time. These

losses, amounting to the sum of \$580, retained by the insurer, and the cancellation of the certificate, related to the date of its expiration; and thus all of the benefits which could ever arise to the appellants from it were surrendered to the insurer as of the date of its expiration. The amount of losses was not only retained, but the policy, perhaps covering other losses than those which had been adjusted, was extinguished by the assent of the appellants, upon the condition that they were to receive from the insurer a renewal policy, and which was duly and formally issued and delivered. The negotiations which resulted in the agreement which accomplished these ends continued over a period of ten days after the expiration of the prior certificate, but all the benefits and considerations of the renewal were in the hands of the insured before the expiration of the prior certificate, and related to a period prior to that date, and must, upon every process of reasoning, be held to have been a fair and substantial compliance with the condition of the clause in question, which required that the renewal certificate must be paid for on or before the expiration of the original certificate; and, if this be true, it would matter little when the renewal certificate was actually issued and delivered.

It must be recalled that the terms of the renewal certificate must govern in its construction and the effect to be given to its different provisions. In order to make every clause effective, it only required the payment prior to the expiration of the original certificate. The renewal policy not only included this special clause, but also others covering the different losses which might be incurred. The prior certificate may have contained terms antagonistic to the validity of this clause of the renewal, but, the renewal being the legally substituted contract, liability must be determined by it. The only condition of the renewal in order to make every provision, including the one in question, effective, was that whatever was considered and agreed upon as the premium for the renewal must be paid or satisfied before or on the date of the expiration of the prior certificate. If this was done, the renewal became the right and due of the appellants, in such form as would cover the losses contemplated. The satisfaction, or payment, if that term is to be chosen, being found in the existence of the liability of the insurer to the appellants, during the life of the prior policy, and before its expiration, under the agreement to renew, the obligation of the insurer arose to carry out the intention of the parties to so devote this previously existent liability to the purpose of this renewal. The nature of the transactions between the insurer and the appellants not only exhibited the intention of the parties that this was to be so, but, I think,

indicated conclusively that the renewal was based upon the benefit of the retention of the losses occurring under the old policy during its life, and the extinguishment of liability of the insurer under it on the day of its expiration. It is difficult to perceive upon what course of reasoning or upon what principle of equity it can be contended that the letter, as well as the spirit, of this contract of insurance, has not been complied with, or upon what ground liability can be equitably and honestly avoided. It can be fairly concluded that, in order to arrive at this conclusion, there exists no need of construction or interpretation of the agreement between the parties for the renewal policy. It has direct reference to the satisfaction or payment of premiums, by applying the losses arising out of the prior policy incurred before its expiration; and, upon such express reference, it is discovered that under it, and during its life, and before its expiration, the full premium for a renewal had been retained; and, by express agreement, these considerations are made to answer for the payment of the premium for the renewal policy. This is conceded by the insurer, but the answer is made that the agreement making this application was not made until after the prior policy had expired. Under the renewal policy it may be a question when the expiration of the prior policy occurred; but, conceding that it expired at the time claimed by the insurer, the mere delay of embodying the renewal agreement in a formal certificate did not alter or extinguish the obligation, for, the obligation once being established, the application of equitable principles imputes an intention to fulfill it; and, if necessary to protect the parties in their just rights, and enforce them, equity will assume the obligation to have been fulfilled, in accordance with the doctrine that equity looks upon that as done which ought to be done. It is, therefore, concluded that, according to the terms of the contract between the insured and the insurer, there was a satisfaction and payment of the premium or guaranty fee of the renewal certificate during the life and before the expiration of the prior policy.

It is not necessary to consider the other grounds urged to establish the liability of the insurers upon this clause of the renewal. The receiver, therefore, was bound, under the terms of this renewal policy, to make allowance for the losses of the appellants upon merchandise shipped during the term of the prior certificate, where the losses occurred after its expiration, and during the life of the renewal certificate, and include the same in the calculation of losses under the renewal certificate, for a pro rata distribution of the assets of the United States Credit-System Company. The decree dismissing the appeal from the disallowance by the receiver must be

reversed, with costs. With this result, the petition for permission to bring suit against the receiver for a reformation of the renewal certificate becomes unnecessary, and therefore the decree denying the permission to bring such suit must be affirmed, without costs.

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## COURT OF APPEALS OF MARYLAND.

SCOTTISH UNION & NATIONAL INS. CO.,  
OF EDINBURGH, SCOTLAND, }

vs. }

KEENE.\*

The insured is obligated to show with reasonable exactness the possession of the property insured, and the amount of loss; but, when the principal books have been burned, evidence of the stock on hand when inventory was taken, and of his subsequent purchases and sales, and the average profits from auxiliary books, is admissible.

The policy required a copy of the schedules and descriptions of other policies insuring the property.

*Held*, That a list of the companies and their policies, giving number, amount, date of expiration, and copy of written portion was sufficient compliance.

GEORGE M. BOND, N. P. BOND, and EDWARD DUFFY, *for Appellant.*

W. PINKNEY WHYTE, *for Appellee.*

ROBERTS, J.

This suit was brought to recover on a policy of insurance against loss by fire. The policy was written by the appellant, in favor of D. Langfeld & Co., who were engaged in the business of manufacturing ladies' clothing. The property insured is described in the policy in these words: "\$5,000 on merchandise, consisting principally of dry goods and ladies' ready-made clothing, and on all materials used in their business as manufacturers of same, their own, or held in trust or consignment or commission, or sold, but not removed, while contained in the brick building situate No. 32 S. Paca Street, Baltimore, Md.; communicating through fireproof boiler house in basement with No. 34 S. Paca Street; opening protected by fire doors." In addition to this policy, there were risks written by sixteen other companies on the same stock, the aggregate of the sixteen policies being \$40,000. The usual conditions were annexed to and formed parts of the policy. A fire occurred on December 2, 1893, within the period of time covered by the policy sued on, and the entire stock and machinery of the assured, as well as most of

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\* Decision rendered, March 31, 1897.

their books, were totally destroyed. Proof of loss was furnished, but was objected to as insufficient; and upon this and other grounds, to be stated presently, the insurer refused to pay the loss, and thereafter this suit was brought. The refusal of the appellant to pay the amount of the loss insured against in the policy issued by it is founded on several grounds, which may be briefly summarized as follows, viz.: That the proof of loss was not sufficient, in that it did not contain a statement in detail of the stock and materials on hand at the time of the fire, nor set forth the cash value of each item thereof, and the extent to which each article was damaged; that the assured had not furnished, as required by the policy, within sixty days after the loss, a copy of the descriptions and schedules in other policies written upon the same property; that the assured refused to subscribe an examination taken by a person designated and appointed by the insurer; and that, notwithstanding a difference arose between the assured and the insurer, respecting the amount of the loss sustained by the former, the assured refused to enter into an appraisement, as provided for in the policy in such a contingency, although a demand was made for such appraisal by the underwriter. During the progress of the trial six bills of exception were taken, and they present the questions to be disposed of on this appeal. Under the rulings and instructions of the superior court the jury rendered a verdict in favor of the assured, for the full amount claimed to be due by the terms of the policy, and upon that verdict a judgment was duly entered. From that judgment the insurance company has prosecuted the pending appeal.

There was no dispute respecting the execution and delivery of the policy, the payment of the exacted premium, and the subsequent loss and destruction of whatever property was on the premises when the fire occurred. Nor was there any denial that the loss, if a loss was sustained at all, was a total and complete one. The controverted question at the threshold was, whether there was sufficient evidence to show that any of the materials described in the policy were, in fact, destroyed by the fire. The first, second, and third exceptions, and the appellant's fourth and fifth prayers in the sixth exception, involve this inquiry, and may be considered and discussed together, because upon the correctness of the rulings on the objections set forth in the first three exceptions depends the propriety of the court's action in rejecting the two prayers just designated by their numbers. We have said that most of the appellee's books were destroyed in the fire. The only ones saved were the sales book or the day book, showing the amount of daily sales; the purchase book, showing the amount of merchandise bought from



January 1, 1893, up to the time of the fire; and the book of expenditures, showing the amount paid out in manufacturing between the same dates. Now, it is obvious that to entitle the assured to recover it was incumbent on him to show to the satisfaction of the jury—First, that he had sustained a loss by fire; and, secondly, what the amount of that loss was, not with exact mathematical precision, but with a reasonable measure of certainty. Confessedly, all that he had on the premises, described in the policy, was destroyed. His most valuable and important books had been burned, and there is no pretense that from mere memory he could possibly have stated the quantity or description of a stock of goods, such as it is apparent he carried. But his inability to do this, arising as it clearly does from the very misfortune against whose disasters the appellant wrote the insurance, can scarcely, in a court of justice, be considered a valid and sufficient ground to defeat his claims for indemnity. Though deprived, by the casualty which the policy was designed to reimburse him for, of the best means to compute the precise amount of his loss, he was by no means precluded from resorting to other, even if less satisfactory, methods of laying that branch of his case before the jury. And to other methods he did resort. He showed most incontestably that the amount of stock which he had on hand the 1st day of January, 1893, was \$22,131.46. He then showed by his book of purchases that from that date to the day of the fire he had bought \$107,821 worth of materials, and by one of his other books saved from the fire, that the cost paid for manufacturing during the same period had been \$35,311.04; making a grand total of \$165,263.50. He likewise demonstrated from his day book, or book of sales, that his sales during the same period had been \$169,215.25, and that the average or usual profit included in this gross amount of sales was 40 per cent, or \$48,347, which, on being deducted from the gross amount of sales, showed the cost value of the manufactured articles sold to be \$120,868.25, and, that sum being deducted from \$165,263.50, the aggregate of the inventory, the merchandise bought, and the cost of manufacture, left the sum of \$44,395.25 as the value of the goods and materials in stock when the fire occurred. This process is the one objected to in the exceptions now being considered. Without pausing to consider the specific questions objected to, because such a course is wholly unnecessary, we deem it only necessary to say that there was no error in allowing the questions to be asked which elicited this result. But a single observation is all that is needed to illustrate the correctness of this conclusion. Were this method of ascertaining the value of the goods destroyed excluded, there would be no possible way, in the

event of a total loss of the goods themselves and the books of the assured, to arrive at even an approximate estimate of the amount of the loss, for it is not to be assumed that in a large business establishment, either the proprietor or his employees, can carry in their minds a schedule of the stock in trade. And, if the method of proof allowed by the court below were excluded, then in the case supposed (which is, in fact, the case at bar), no proof could be adduced at all; and it would follow that, the more complete and disastrous the conflagration, the less would be the liability of the insurer. A ruling leading to such a conclusion is obviously illogical and untenable. We find, therefore, no error in the rulings set forth in the first, second, and third exceptions, and in the rejection of the appellant's fourth and fifth prayers.

The question presented by the fourth exception arose in this way: The conditions annexed to the policy provide, among other things, that "the insured, as often as required, shall submit to examinations under oath by any person named by this company, and subscribe the same," etc. On March 5, 1894, Mr. Thomas E. Bond, adjuster, required the appellee to submit to an examination under oath. No authority from the company to Mr. Bond to make the examination was shown the appellee, but he nevertheless did undergo an examination, which was taken down by a stenographer, and he states he produced what books he had. He further testifies that Mr. Bond never asked him to sign the examination, and that he did not sign it because, as taken down, it was full of errors. He likewise stated that he was not asked to sign it. He was then asked whether Mr. Bond ever refused to let him (the appellee) correct the statement. The question was objected to, the court sustained the objection, and hence the fourth exception. The question was irrelevant. It did not appear that Mr. Bond had been appointed by the company to make the examination, and the appellee was under no obligation to submit to or to sign an examination until he had been informed that some person had, in the language of the policy, been "named by" the company to make it; and whether Mr. Bond refused to let the appellee correct errors in the stenographic report of the examination was, under the circumstances, wholly immaterial, as respects the liability of the company. If the company desired the statement signed, it should have demanded that the appellee sign it. The mere fact that Mr. Bond did not refuse to correct any errors in the copy was no evidence that the company either exacted or insisted on the signature. It literally proved nothing.

The fifth exception also presents a question of the admissibility of evidence. Listner was the adjuster for the appellee. He made

out the proof of loss, and was present at the examination alluded to in discussing the preceding exceptions. Mr. Bond testified that he had given a copy of the examination to Listner, and he was then asked, "What did you say to Mr. Listner at the time you gave him the copy of the deposition of Mr. Keene [the appellee]?" An objection was made, which the court sustained, and this ruling is the one complained of in the fifth exception. Clearly, there was no error in this ruling. Nothing that Mr. Bond said to Mr. Listner could affect in any way the rights of the appellee. There is no pretense that Listner had any authority to bind the appellee. Listner was the appellee's adjuster, and any declarations made by Bond to him about a totally different subject, viz., the written examination of the appellee, could not possibly bind the appellee. The proffered evidence was wholly irrelevant.

The remaining exception relates to the prayers. The appellant presented seven, all of which were rejected. The appellee offered four, the first, second, and fourth of which were granted, the third not being in the record; and the learned judge of the superior court gave an instruction of his own. The appellant filed special exceptions to the granting of the appellee's first and fourth prayers. We find no errors in the granted prayers. The first prayer asks the court to instruct the jury that, if they find from the evidence that the defendant made the policy of insurance offered in evidence, and delivered the same to the plaintiff; and further find that the property described in said policy was totally destroyed by fire on or about the 2d day of December, 1893, and that the defendant had notice of the fire at the time thereof, and that the plaintiff furnished the proofs of loss referred to in the evidence, together with the certificate of the magistrate; and furnished, so far as it was possible for him so to do, an inventory of the property destroyed, stating the quantity and cost of each article, and the amount claimed thereon; and furnished, so far as it was possible for him so to do, the cash value of each item, and the amount of loss thereon; and also furnished the copy of all the descriptions and schedules in all the policies,—then the plaintiff is entitled to recover. This prayer is clearly sound, if supported by the evidence; and we think the evidence alluded to in considering the first, second, and third exceptions was quite sufficient to go to the jury, and, if believed by them, to support the hypothesis of the instruction: *Insurance Co. vs. Mispelhorn*, 50 Md., 193. The second instruction is not open to criticism. There was evidence, if credited, to support the facts hypothetically submitted; and, if the jury found those facts, then

obviously the failure of the appellee to sign the examination heretofore mentioned furnished no reason for the refusal of the appellant to pay the loss. The fourth prayer is not obnoxious to the special exception filed to it, for the same reason we have given in disposing of the special exception to the first prayer. The legal principle it announces is sound, and is that generally applied in estimating damages in such cases as this, and in apportioning them among contributing companies.

The first, second, and third prayers of the appellant were properly rejected. They relate to the proof of loss and its legal sufficiency. The proof of loss furnished in this case—a case of total loss—was, under the circumstances, all that could have been required. These prayers, exacting a more detailed proof, were consequently erroneous. The sixth prayer, being the converse of the appellee's second, and the latter being right, the former must be wrong. The seventh prayer asserts that the appellee did not furnish a copy of all the descriptions and schedules in all policies, as he was required to do under the terms of the policy sued on; and, inasmuch as the evidence shows that such description and schedules were duly demanded by the defendant, the verdict of the jury must be for the defendant. But the evidence does not justify the assumption of facts contained in this prayer. The proof of loss distinctly gave the names of the other sixteen companies having policies on this property. It gave the numbers of these policies, the amounts covered by each, and the dates of their respective expiration; and it expressly stated that "full copies of the written portions of all other policies and indorsements, transfers, and assignments are hereto annexed, or will be furnished on demand." The requirement was substantially complied with. The written portion of the policy sued on was set out, and, as stated, a statement of the names of the other companies holding policies on the same property; and a statement of the respective amounts and of the dates, showing that they were concurrent with the policy in suit, constituted a substantial compliance with the condition relied on in the seventh prayer: *Jones vs. Insurance Co.* (N. Y. App.); *Keeney vs. Insurance Co.*, 71 N. Y., 396. The court's instruction was clearly right under the case of *Insurance Co. vs. Doll*, 35 Md., 103. Finding no errors, the judgment will be affirmed, with costs above and below.

Judgment affirmed, with costs above and below.

## COURT OF APPEALS OF COLORADO.

MERCHANTS' INS. CO., OF NEWARK, N. J., *Appellant*,

vs.

NEW MEXICO LUMBER CO., *Appellee*.\*

The policy of insurance was issued upon lumber, lath and shingles, and contained a warranty that a clear space of 100 feet should be maintained between the property insured and any wood-working or manufacturing establishment, and that the space should not be used for the handling or piling of lumber for temporary purposes, tramways upon which lumber was not piled alone being excepted.

*Held*, That such a provision is not one to be construed, and its length and breadth determined and measured, and there is no question of hardship or of equity involved. It is a naked matter of agreement, and the immateriality of it, or its importance to the insurer, do not concern the court, because the very object of the provision is to avoid any questions between the parties, respecting either its terms or its obligation. If the assured has violated it, he may not recover on his contract.

*Held*, Upon the pleadings and the proof, that the space clause was violated.

The policy was issued on June 3d, and the property destroyed on June 5th. The local agent, at Denver, reported the issuing of the policy contemporaneously with the report of the loss, to the general manager, at Chicago. The same agent represented various other companies, carrying insurance upon the same property, but whose policies were written some time prior to that of the appellant. On May 11th, the agent was informed by the inspector of the other companies of the condition of the property, and that the appellee was not observing the clear-space clause. An interview was on that day had between the agent and the officers of the lumber company, in which the lumber company were informed that, unless the property was immediately put in coddition, the policies would be cancelled, or the mill rate of 9 per cent premium would be charged, instead of the lumber rate of 2½ per cent. The officers of the lumber company agreed to do whatever was necessary to comply with the terms of the insurance contract. When the policy in suit was executed on June 3d, thereafter, nothing was said about the condition of the property, and the warranty referred to was written into the policy.

*Held*, That the knowledge of the agent, on May 11th, of the existing violation of the space clause, would not operate as a presumption of knowledge upon his part at the time the policy was issued. That it could not be presumed, because of such knowledge, that the agent, when he inserted an express condition into the policy, was without the intention to make that condition a binding part of the contract.

*Held*, further, that an intention to waive a provision of the policy may not be presumed from the mere possession of knowledge. There must be some evidence in the case tending to show an intention on the part of the agent to waive it.

The local agent of the insurance company was, by virtue of his letter of appointment, expressly authorized to write insurance and deliver policies in Denver and its immediate vicinity. As such agent, he was entrusted with policies already signed by the officers of the company, which he filled out, and delivered to parties with whom he did business. He had, at times, also issued policies in various other localities within the limits of Colorado, distant from Denver, which the company accepted and carried. He also, on various occasions after fires had occurred, estimated

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\* Decision rendered, September, 1897.

and adjusted losses upon instructions from the general manager of the company, at Chicago, without waiting for the intervention of a special adjuster; and, in some cases, where small amounts were involved, the losses would be settled according to his report and representations.

*Held*, That these facts did not constitute an authority to compromise or waive a forfeiture caused by a breach of the warranty contained in the clear-space clause.

The local agent, some months after the loss, in connection with the representatives of other companies, assumed to accept on behalf of the appellant company, an additional premium, equivalent to the mill rate, at which rate the insurance would have been written, without the clear-space clause, and to agree that the loss would be paid. The insurance company repudiated this agreement, and denied the authority of the agent to make it, and refused to accept the additional premium which the agent had received from the insured.

*Held*, That the agent could not bind the company by such an agreement. An agreement to waive a forfeiture already incurred, or to waive a breach of warranty contained in the contract of insurance, cannot be made by an agent after the happening of a loss, unless the agent *pro hac vice* represents the company.

An instruction that a general agent has authority to waive a forfeiture, and, if the jury should find that S. was a general agent, they were at liberty to conclude that he had authority to make a settlement and accept the additional premium, was clearly erroneous.

In the absence of evidence in the case to warrant it, it was error to instruct the jury that if they believed from the evidence that when the policy was issued S. was a general agent, and had actual knowledge of the condition of the property insured, and knew that the warranty was not observed, the space clause was waived because of that knowledge.

In measuring the clear space between the wood-working establishment and the lumber, it is proper to measure not merely from the permanent corners of the mill, but from the projections, sheds or hoods, attached thereto, which really form a part of the structure.

It is not true, as a general proposition, that in order to insist on the invalidity of the policy, an insurance company must offer to return the premium.

The use of the words "general agent," in an instruction to the jury, has a tendency to mislead the jury, and cause them naturally to infer that the agent has a greater authority than the law would imply. The word "general" has a very broad significance to the lay mind.

Whether or not the waiver of a condition of the policy may be evidenced other than by indorsement upon the policy, in conformity to a provision to that effect, is not decided.

#### Statement of Case by BISSELL, J.

To discuss the sixty-five errors, which the appellant has assigned, and express an opinion about the various propositions of law which are supposed to be suggested by the record, and which may be said to be either directly or collaterally involved, would prolong this opinion beyond any reasonable limits. It will, therefore, be confined to the discussion of a few general questions which are decisive of the appeal, and an indication of the basis on which the cause must be tried.

The action was brought by the New Mexico Lumber Co. against the Merchants' Insurance Co., of Newark, on a policy of insurance issued in Denver on June 3d, 1893, by Anthony Sweeney, who was then, and for some time theretofore had been, the local agent of the

company in Denver. The policy was written on what is known as the New York standard form, but contained a written warranty, inserted at the time the policy was prepared and executed, which is known to the insurance world as a clear-space clause. It was substantially a warranty that a clear space of one hundred feet should be maintained between the property insured, which was lumber, lath, and shingles, and any wood-working or manufacturing establishment; and that the space should not be used for the handling or piling of lumber for temporary purposes, tramways upon which lumber was not piled alone being excepted. It was agreed that a violation of the warranty should render the policy null and void. The principal defense was based on the alleged breach of this clear-space clause. A statement of Mr. Sweeney's relation to the company, the extent and character of his authority, and the circumstances surrounding the execution and delivery of the policy are indispensable, not only to an understanding of the case, but also as a basis for the application of the legal rules by which the rights of the parties must be measured. Mr. Sweeney was, by virtue of the letter of appointment from the insurance company, a local agent of the corporation, with power expressly conferred to write insurance and deliver policies in Denver and its immediate vicinity. As the agent of the company, he was entrusted with policies already signed, which he filled out, and delivered to parties with whom he did business from time to time, as the applications were accepted and approved by him. Under the letter of appointment his powers were only to be exercised in the city and its immediate environments. The question of the authority of the agent became one of pronounced importance at the trial of the case, and in the maintenance of their contention that his authority was broader than what was expressed in the letter of appointment, the plaintiffs offered testimony to the point that at divers and sundry times Sweeney had issued policies in various other localities within the limits of Colorado, distant from Denver, and in various sections of the State, of which the company, of course, had notice, and which they had accepted and carried. This testimony was directed to that portion of the defense which denied the authority of the agent to issue the policy on the property in New Mexico. The lumber company had its mill, lumber, lath, and shingles, which were insured, near Azotea, N. M., and the insurance company contended that Sweeney had no right to issue a policy on property situate in that locality. The company never accepted the policy, as will subsequently appear, save as they might be concluded by the agent's acts. It appeared from the proof that Sweeney had written very considerable insurance on two properties

located very near the same point; one belonged to the Biggs Lumber Co., and the other to the appellee. Mr. Biggs was connected with that company, and was also the president of the appellee. Sweeney had issued quite a number of policies, in various companies, to these two corporations, covering their mill property and manufactured produce, which policies were in force at the time the one in suit was delivered. Prior to the date of the present policy, and on the 11th of May, Biggs, the president of the New Mexico company, and McGinnity, its secretary, were in Mr. Sweeney's office, and had a discussion respecting the situation and condition of the property. It seems that a few days prior to that time Lee, one of the witnesses for the defendant, who was special agent and adjuster for the National Insurance Co., of Hartford, which had a policy on one or both of these properties, had been down, inspecting the property. Lee had a general authority from the Hartford company, and his duties were to inspect property on which policies had been written; to appoint agents for his own company; and to adjust losses for them, as well as for other insurers. According to Lee's testimony, when he inspected the property he found that neither in the case of the Biggs Lumber Co., nor in the case of the New Mexico Lumber Co., had the condition of the clear-space warranty been observed, and loose lumber and material were piled within less than one hundred feet of the mill. At this date the policy in suit had not been written, but the other policies referred to were outstanding, and as has been suggested, many of them were represented by Mr. Sweeney. On receipt of Lee's report, and apparently as a result of it, this interview between Mr. Biggs, Mr. McGinnity, and Mr. Sweeney was had. The importance of the conversation is somewhat emphasized by the further consideration that the rate of insurance where this clear space warranty was inserted and observed was 2½ per cent, and where the warranty was not inserted, and not observed, the rate was 9 per cent. At this interview Mr. Sweeney stated, that unless the property was immediately put in condition, and a clear space of one hundred feet left, he would charge them the full rate of 9 per cent, or cancel the policies, and the companies would not carry the insurance at the rate of 2½ per cent, under existing conditions. They both then assured Mr. Sweeney that this should be immediately done; that Mr. Briggs was returning, that night, to Azotea, and his demands should be immediately and fully complied with. No particular report, statement, or information, seems to have been subsequently or otherwise given to Mr. Sweeney. Prior to the 3d of June, one of the policies carried on one of the properties of the appellee had been written by the Phoenix Insurance Co.,



through Mr. Sweeney, but the Phoenix Co. ordered their policy cancelled. McGinnity, the secretary of the appellee, thereupon made application to Mr. Sweeney for additional insurance, and the policy in suit was prepared and delivered to him. Nothing was said between the parties, at that time, about the condition of the property, and the only evidence of the intention of the company, respecting the warranty, comes from the insertion of the written clause which is found in the contract. It was accepted by the secretary, without objection, and the principal question in the case comes from the alleged breach of that warranty. The property was destroyed by fire on the 5th day of June, 1893, two days after the policy was written. Intermediate the issuance of the policy and the destruction of the property, the insurance company was without knowledge that the policy had been issued, and the report of the agent, noting the issue, was received at the office of the general manager, in Chicago, in the same letter which contained the report of the fire. Immediately on receipt of this letter, advising the manager of the policy, and of the loss, telegraphic instructions were sent to Mr. Sweeney to take no action under the policy until further instructions. The exact reason for this is not apparent. One other policy had been antecedently placed by Mr. Sweeney, on the stock and lumber of the Biggs Co., which the general manager ordered cancelled. This may be of very little consequence so far as the New Mexico Lumber Co. is concerned, because they were, of course, without knowledge of it; but it tends to support the contention of the insurance company that Mr. Sweeney was without authority to issue policies on property in that territory, and that his actual authority was expressed in his letter of appointment, subject, perhaps, to its apparent enlargement, by reason of his previous acts in writing policies. Immediately on the happening of the fire, several adjusters visited the scene of the fire, to ascertain its extent, the probable value of the material destroyed, and the situation of the property at the time. These parties made diagrams of the mill as it had stood, the lumber as it had been piled, and the relation between the lumber and other manufactured products with reference to the mill proper, and particularly as bearing on the question whether the clear-space warranty contained in, probably, many of the policies, had been observed by the assured. Evidence was given by these witnesses, tending to show that there had been a breach of the warranty, and that lumber and ties had been piled within considerably less than one hundred feet of the mill, whether taken from one of its corners, or from hoods or sheds connected with it, and really a part of the establishment. There would seem to be but

very slight question as to the breach of the warranty. The plaintiff did not substantially controvert it, and it may be said that his reply practically conceded that there had possibly been a technical violation of the clause, to which admission they were probably induced by the fact that one of the parties in interest had affixed his signature to a diagram found in the record, which somewhat clearly demonstrated the violation. Counsel for the lumber company argues two somewhat inconsistent propositions respecting the matter; one, that there was no violation, and second, that if there was a violation of the condition, it was waived by the agent at the time the policy was issued. In the course of the opinion we shall comment on both of these positions. On the reports of the adjusters who visited the fire and inspected the property, the various insurance companies for a while contested their liability for the loss, and the matters proceeded by way of negotiation between the assured and the companies, for several months. Finally, and in the December following, the various insurance companies seem to have come to an agreement of settlement with the assured, the basis of which was that the insured should pay the difference between  $2\frac{1}{2}$  per cent and the rate charged when the warranty was not contained in the policy, to wit, 9 per cent. Sweeney, assuming to act on behalf of the Merchants' Insurance Co., acceded to the proposition, and agreed to carry it out for that company; thereupon the lumber company gave him a check for \$180, which would be the difference between the actual amount paid, \$50, and the rate which would have been charged had the policy been written without the warranty. When this was done Mr. Sweeney advised the general manager, in Chicago, of his act, debited his own account with the amount received, and credited himself with the various sums to which he was entitled. The company promptly repudiated the settlement, denied Sweeney's authority to make it, and refused to settle his account on that basis. The manager and the secretary of the company both testified that the company never accepted the money, and declined to settle Mr. Sweeney's accounts on that basis. The company offered the testimony of one of the administrators of Mr. Sweeney's estate, with reference to the final adjustment of accounts between the insurance company and the Sweeney estate. The court ruled the testimony out, although the evidence of the secretary of the company on this subject was received without objection. In this connection it may be well to refer to a letter which is found in the record, although not in the abstract, and given very considerable prominence in the brief of counsel for the appellee, and to which they attach very great importance. It was written by Mr. Sweeney to Mr. Rogers, the

manager, concerning this loss. It was written after the fire, on the 8th of July, and is a very strong and urgent request on the part of Mr. Sweeney to recognize the liability of the company under the contract, and to settle the loss, and pay the lumber company the full amount of the policy. It is wholly unnecessary to either comment on the letter and its general terms, or the position of Mr. Sweeney with reference to this particular policy, or his evident desire to procure its adjustment and settlement for people who had for many years been strong and valuable customers of his office. The only part of it of any significance or importance is that which refers to the knowledge he had respecting the condition of the property at the time the policy was issued. What he said about this matter is in the following language: "I knew of the condition of the property insured, from Mr. Lee, who inspected this risk and the Biggs Brothers' similar risks, at Chama, only a few weeks before the fire, and reported both to me—the Biggs 'A 1,' and this as not being in good order. I called up both Mr. Biggs (who happened to be in Denver), and Mr. McGinnity, to my office, and in the presence of Mr. Lee, told both owners that unless the property insured was put in good condition at once, I would advance the rate to 10 per cent, or cancel the policies. Mr. Biggs returned, and at once began putting the property in order, as required." \* \* \* This is all the letter contains which bears on the case, and which is pertinent to the discussion of the law of waiver. In support of the lumber company's contention, respecting the authority of Mr. Sweeney, and the claim that his powers were not simply those of a local agent, with the right to effect insurance and receive premiums, and to that extent to bind the company, and that they were those of a general agent, all of whose acts should be binding and conclusive on the insurer, evidence was offered to the point that, on various occasions after fires had occurred, Mr. Sweeney had adjusted the losses, made his report to the company, and had paid the losses and charged them up in his account. The farthest extent to which this testimony would tend to go would be to support the claim that, under some circumstances, he had the right to estimate and adjust the loss, without waiting for the intervention of a special adjuster, and, on a report to the general manager of the company, would be authorized to settle and to pay. The testimony was not very strong in this direction, because in most of the cases it would appear that the report was made, and Mr. Sweeney instructed to send on proofs, when the loss would be settled according to his report and representations. There was nothing in the case to show that he was a general adjuster for the company, or that, as a rule, he acted in that capacity,

or that there was a departure from the practice which prevails in all companies, to send a general adjuster to inspect and determine the loss, other than in those cases where very small amounts were involved. There was no evidence tending to show that Mr. Sweeney was a general agent of the company, unless that authority can be derived from proof of those special acts which have been referred to. Everything has been stated which is essential to a clear understanding of the case. We are quite inclined to suggest this limitation, because the conditions under which the law of insurance is to be applied so constantly vary, and are affected by so many different circumstances and situations, that it is utterly impossible to so state a general proposition of insurance law that it is not liable to misconstruction, unless it is read with reference to the particular case decided. While this is a general principle, true in all cases, it is particularly true in this class of litigation. At the conclusion of the trial the defendant asked a very large number of instructions, and the court instructed the jury at considerable length. The defendant company asked some twenty-nine instructions, and the court gave some seven or eight, part of which embraced different propositions. Error is laid on the refusal of the court to instruct the jury as requested, and also on the instructions which the court gave. It is impossible for us to state all of them, or even to refer to them specifically. We are only able to state generally that many were asked which ought to have been given, and some given which ought to have been refused. When we come to the discussion of the law, the principles laid down will point out the errors committed, and enable the court, on the subsequent trial, to avoid them.

SYLVESTER G. WILLIAMS, *for Appellant.*

HARTZELL & STEELE, *for Appellee.*

BISSELL, J. (after stating the case.)

Very much of the difficulty which ordinarily surrounds an insurance case is eliminated by the character of that clause of the contract on which the company principally relied for its defense. We are not at all concerned with the materiality of it or its importance to the insurer, because the very object of this specific provision is to avoid any question between the parties respecting either its terms or its obligation. It is not a contract to be construed, and its length and breadth measured and determined, and there is no question of hardship or of equity. It is a naked matter of agreement by which if it be in force the assured is himself bound, and if he has violated it he may not recover on his contract. There is no necessity to dis-

cuss the question of the existence of the agreement and its violation. On the pleadings and the proof as it now stands no verdict could be rendered which would be upheld which should find either that the clause was not within the contract or that it had not been violated.

The contract and its violation being assumed it only remains to be considered whether anything was done by one who had authority to represent the company in the matter about which he assumed to act, and whether what he did as a mixed matter of law and fact would destroy the operative force of the agreement. The importance of the inquiry respecting the authority of the agent, and the extent of his power, will be clearly exhibited by a general suggestion of the tenor of the court's instructions on this subject and a suggestion of the position assumed by the defendant on the trial. It will probably render the discussion a little more perspicuous, if we briefly recall in this connection what the case shows about this matter and the force which the appellee attempts to give to the agents' acts. It will be remembered that on the 11th of May, the adjuster and Inspector Lee reported to Mr. Sweeney the condition of the property and the failure on the part of both the Biggs Company and the New Mexico Lumber Company to maintain the clear space. An interview was immediately had between Mr. Sweeney and the president and secretary of the two companies, Biggs and McGinity, and they were both informed that all the then outstanding policies represented by Mr. Sweeney would be cancelled or 9 per cent premium charged unless the property was immediately put in proper condition. As representing the two companies both these parties agreed that this should be done and the terms of the warranty complied with. It was agreed that one of them should immediately return and do whatever was necessary to comply with the terms of the insurance contract. On June 3d, when the policy in suit was executed, nothing was said about the condition of the property, and the warranty was written in. When the property was destroyed on the 5th of June the company, through its general manager, Rogers, repudiated the agreement, and the company thereafter, so far as concerns its officers, its directory, or its general manager, never accepted the contract, admitted its validity, or agreed to pay it. Negotiations were thereupon immediately entered into between the adjusters and representatives of the various companies which carried the insurance wherein Mr. Sweeney participated, looking to a settlement of the dispute and an arrangement whereby the validity of the various policies should be conceded and an equitable adjustment made of the difference between the insurers and the insured. These negotiations were prolonged for months,

and until the December following when the parties, who were authorized to act on behalf of the other insurance companies, came to an agreement, substantially that if the assured would pay the difference between the premium of 2½ per cent which had been paid and the 9 per cent which was charged where the policies contained no such warranty, the companies would adjust the losses and pay the amount of the losses proven. Mr. Sweeney assumed to act on behalf of the Merchants' Insurance Company, saying that he represented them and would accept the arrangement. Thereupon the officers of the New Mexico Lumber Company paid him \$130. To ascertain whether what was done by Mr. Sweeney would bind the company and permit a recovery, notwithstanding the terms of the contract of insurance and the established breach, the relation which Mr. Sweeney bore to the company must be carefully examined and determined. It must be conceded the authority of an insurance agent is not always measured by the terms and limitations contained in his warrant of authority. Courts very properly hold that the authority of an agent is co-extensive with the business entrusted to his care. Parties dealing with an agent have a right to rely, not only on the actual authority conferred by his warrant, but also on his apparent authority. It has, therefore, frequently been adjudged that an agent who is given authority to enter into contracts of insurance, and who has policies in his possession signed by the officers of the company, may have a much broader and more extensive authority for many purposes connected with insurance contracts than the very limited power conferred by his letter of instructions. Agents of this description are frequently held to have power to waive various conditions in the policy, permit changes of location, use of other modes of lighting the premises than those specified, authorize the carriage and storage of extra hazardous materials, and many other matters which ordinarily could not be done or consented to by a local agent with authority simply to take applications and receive premiums. The authority of the agent is also sometimes held to be enlarged by the power which he has exercised to the knowledge and with the consent of the company in other cases relating to the adjustment and settlement of losses. As we look at the case, these matters are not necessarily involved in this inquiry, though we have a right to use the adjudications on these and collateral matters for the purpose of ascertaining whether what Mr. Sweeney attempted to do was within the actual or apparent scope of his authority; whether the plaintiff had a right to rely on this real or apparent power, and whether what he did can be held to bind the company and to estop them from setting up this defence.

It may very safely be assumed that no power will be presumed to be possessed by the agent, whether he be a special or a so-called general agent, which is either not actually or apparently within its limits. The great trouble is courts are totally unable to define what a special or what a general agent is in terms which shall make the definition applicable to each particular case, so that it by no means follows that when an agent is called a general agent he possesses certain power, and when he is called a special one, the power may not be taken to be within the limits of his authority. The powers of agents resulting from peculiar conditions, the force of particular limitations and the presumptions which may be legitimately indulged in because of his act, are very fully exemplified by the numerous authorities on this question: *Quinlan vs. P. W. Insurance Co.*, 133 N. Y., 356; *Weed vs. London & Lancashire Ins. Co.*, 116 N. Y., 106; *Ermentrout vs. Girard Fire & Marine Ins. Co.*, 63 Minn., 305; *Bush vs. Westchester Fire Ins. Co.*, 63 N. Y., 531; *Gould vs. Dwelling-House Ins. Co.*, 90 Mich., 302; *Kyte vs. Commercial Union Assur. Co.*, 144 Mass., 43; *Biggs vs. Insurance Co.*, 88 N. C., 141; *Gross et al. vs. Milwaukee Mechanics' Ins. Co.*, 92 Wis., 656; *Hankins vs. Rockford Ins. Co.*, 70 Wis., 1.

From these authorities it is very clear it may not be inferred from what Mr. Sweeney did with reference to the Merchants' Insurance Company that he was a general agent and that the act which he attempted to perform in December subsequent to the fire was within the scope of his authority. The case exhibits many instances of small fires which were reported to the Merchants' Insurance Company during his agency, which Mr. Sweeney assumed the power to estimate and in one sense adjust. These he reported to the company and thereafter making and forwarding proofs was instructed to pay. The payments were apparently subject to the approval of the general manager. These acts undoubtedly might be proved to show the extent of the power possessed by the agent and would under some circumstances be of strong, if not persuasive, force, in determining whether the space clause was waived at the time the policy was issued. But in the light of the evidence in this direction it is of slight consequence, because as a matter of law what was done by Sweeney when he issued this policy did not waive the space clause. It must be conceded that on the 11th of May he was told of the condition of the property. The agent may, with some inexactness, be said to have had this knowledge at the time the policy was issued. But the question still remains, what force and effect is to be given to that knowledge. We cannot hold that this knowledge acquired on May 11th was present to Mr. Sweeney's recollection

on June 3d, nor can we hold that knowing it this fact raises a presumption of a waiver of the warranty. The knowledge was obtained prior to the making of the present contract, and when the information was received there was an express agreement made by the representatives of the company to put the property in the condition required by the warranty. Because he had knowledge on the 11th of May that there was a breach of a condition contained in the outstanding policies, we may not presume an intention on his part to waive the condition when he inserted it in the policy issued on the 3d of June. If the policy had been issued on the 11th of May and there had been no promise to put the property in condition then there might be a presumption. We are not at liberty, however, to presume from his knowledge of the situation on the 11th of May, that when he inserted an express condition that the space should be kept clear, he was without the intention to make it a binding part of the contract. The one presumption cannot be based on the other, nor is it a natural presumption from the situation and condition of affairs: *Ward vs. Metropolitan Life Ins. Co.*, 66 Conn., 227.

It is equally true that an intention may not be presumed from the mere possession of knowledge. There must be some evidence in the case tending to show an intention on the part of the agent to waive it: *Stone vs. Howard Ins. Co.*, 153 Mass., 475; *The Concordia Fire Ins. Co. vs. Johnson*, 4 Kans., 7; *Devens vs. Mechanics & Traders Ins. Co.*, 83 N. Y., 168.

The defendant asked many instructions to this point which with a good deal of accuracy and some perspicuity, stated the law as we announce it. We find nothing in those which the court gave which covered this subject and we think the court erred in refusing to give them. It is exceedingly doubtful whether the third instruction respecting the belief of the plaintiff with reference to the apparent authority possessed by the agent was applicable to the case. There was nothing to show that the plaintiff had any knowledge whatever on the subject, and, therefore, the question of his belief was totally unimportant and foreign to the case.

We now come to the principal question in the case. It is very closely allied to the one already discussed and must be settled by the ascertainment of the authority of the agent and the force and effect of his acts. The discussion which has been already had respecting the authority of an agent, the methods to be pursued to determine it, and the legal conclusion which may be drawn from the proof on this matter, must be borne in mind while we discuss this particular question. It may be aptly characterized as one respect-



ing the position occupied by the agent, Mr. Sweeney. The inquiry is, was he a special or was he a general agent, and if either, was the thing which he did within the apparent scope of his authority, and is the company bound by what he did, and thereby estopped to assert the breach, which being established was a perfect defence to the suit. It will be remembered that Mr. Sweeney's agreement to waive the warranty is to be found in what he did months after the loss occurred. During all the intervening time the company had refused to be bound by the policy. There had been no adjustment of the loss, the company had directed Mr. Sweeney not to settle it. The general manager, Rogers, had declined to be bound by it, or accept it as an existing obligation, and the secretary of the company at Newark took the same position. It is, therefore, true that during all this time the lumber company were advised of the contention of the insurance company. This case then differs very largely from other cases in which in reliance on the statements of the agent, the parties have proceeded with negotiations with respect to proofs of loss and other matters and have incurred expenditures which have been sometimes held to furnish a new and adequate consideration for an agreement made by an agent after a loss and in respect to matters which might not otherwise be taken to be within the scope of his authority. We have been referred to no case, nor have we been able to find any in our researches which goes to the extent of holding that an agreement to waive a forfeiture already incurred, and to waive a breach of a warranty contained in the contract of insurance could be made by an agent after the happening of a loss, unless the agent pro hac vice represented the company. It is this condition which occasions the difficulty with the instructions which the court gave on the subject of agency. The jury were told that a general agent of the company had a right to waive a forfeiture, and if Sweeney was the general agent of the company he had authority to accept the payment of the additional premium and thereby bind the company to pay the loss notwithstanding the forfeiture. We do not need to abstract or state the instructions on this subject nor those asked by the defendant which correctly defined the rights of the company and the limitations on the power of the agent. It is enough to say that there was nothing in the testimony which tended to show that Mr. Sweeney was a general agent possessing such unlimited powers, whose acts and negotiations following the loss and carried on for months afterwards, and in the face of the protest by the officers and general manager of the company respecting their liability, would be binding on the company and operate as a waiver. There have been some cases which considered the question of the

authority of the agent after a loss has happened, and they universally recognize the distinction between the powers of an agent after loss, and the powers which he may possess by actual appointment, or by inspection of the property at the time the policy is issued, or probably during its life and up to the time the loss happened: *Queen Ins. Co. vs. Young*, 86 Ala., 424; *Smith vs. The Niagara Fire Ins. Co.*, 60 Vt., 682; *Bowlin vs. Hekla Fire Ins. Co.*, 36 Minn., 433; *Western Assur. Co. vs. Doull et al.*, 12 Canada Sup. Ct. Rep., 446.

There are many matters which agents may under some circumstances waive. It has been held that there may be a waiver of the proof of loss and of the time during which suit may be commenced and other exceptions which it is not needful to notice. The present case presents no such condition. The property was insured on the 3d, destroyed on the 5th, and immediately thereafter the agent was notified by the general manager to take no action on the policy until further instructions. This was on the 13th of June. There is nothing in the case to show that the Lumber Company or its officers were in any wise advised that Sweeney had any extraordinary power which would authorize him to make a contract for the settlement of the loss, or to agree to accept the additional premium and bind the company. There is nothing which shows or tends to show that Mr. Sweeney was possessed of a general agent's authority broad enough in its limits to include the performance of those acts of compromise. The trouble is, it is totally impossible for a layman to understand the difference between a special and a general agency. The word "general" has a very broad significance to the lay mind. When we recognize the difficulty which courts experience in their attempts to determine what is a general agent and the extent and limits of his powers, it can be very readily seen that the use of that term would tend to mislead the jury and they would naturally infer the agent had a greater authority than the law would imply without an express grant of it. It can hardly be said that he was a general agent, but if he was, he was not a general agent with authority to waive the forfeiture after loss. If his agency was broad enough, either when the policy was issued or during its life, to permit him to waive the warranty, there is nothing in the record by which an intention on his part to waive it was established, nor anything from which it can be legally and justly presumed. The instruction that a general agent has authority to waive a forfeiture and, if the jury should find that Sweeney was a general agent, they were at liberty to conclude that he had authority to make the settlement and accept the additional premium, was clearly erroneous. He was no such agent, possessed of no such authority, nor is there anything in the record to

justify a belief by the New Mexico Lumber Company that he had it. As we have already said, none of the matters proven or all of them together would make Mr. Sweeney a general agent of the company with authority to bind them by a compromise of this description without proof of a change in the condition of the assured, which would either constitute a new consideration or show that he was misled to his prejudice, whereby the company would be estopped to set up this defence.

The court instructed the jury that if they believed from the evidence that when the policy was issued Sweeney was a general agent, and had actual knowledge of the condition of the property insured, and knew that the warranty was not observed, the space clause was waived because of that knowledge. This was error because there was no evidence in the case which warranted it.

Among the numerous assignments is one laid on the refusal of the court to instruct the jury respecting the condition of the mill property and the relation of the piles of lumber to the one hundred foot clause and the basis on which that limit was to be determined. In other words, there was evidence to show that there was within that one hundred foot space piles of lumber and ties, whether the point be taken from a permanent corner of the mill, or from that which was a part of it, being a shed or hood attached to it, and really a part of the structure. The company asked an instruction that the distance should be estimated from the hood or shed attached to the mill and not necessarily from a permanent corner. This was clearly right, and the jury should have been so instructed, although as the evidence now stands it would not seem to be a matter of very grave importance: *Home Mutual Ins. Co. vs. Roe*, 71 Wis., 33.

Some point is made on the proposition that there was no offer on the part of the company to return the additional premium which was paid to Mr. Sweeney in December. We do not so understand the terms and effect of the conditions contained in the policy. It may sometimes happen that if a company attempts to cancel a policy, it is bound to return the premium in order to insist on the invalidity of the contract, but this does not seem to be that kind of a case. The contention is that the company was bound to return the \$130 in order to make the defence available. This does not even generally seem to be true: *Blaeser vs. Milwaukee Mechanics' Mutual Ins. Co.*, 37 Wis., 31; *Insurance Co. vs. Willis & Bro.*, 70 Texas, 12.

It can hardly be true in the present case because they never got the \$130. It was paid to Mr. Sweeney in his attempt to make a

compromise but the company refused to receive it; asserted that he had no authority to take it and never accepted it. This is not at all inconsistent with the position which the company assumed. The company insisted that Sweeney had no right to make the compromise; did not represent them when he received the premium and they declined to take it, and there is nothing in the record to show that its acceptance by Sweeney in any way bound the company; made the payment to him a payment to them and obligated them to return what they had never received. We cannot see that the rejection of the evidence respecting the settlement between the administrator of Mr. Sweeney's estate and the company was at all material and its rejection therefore error. It would perhaps have tended to bring out a little more clearly the exact situation, but it was made sufficiently apparent that the money was never received by the company, and as this was sufficiently otherwise established we cannot discover that the company was harmed by its rejection.

We have been asked in this, as in one or two other cases, to determine the force and effect of the clause in the policy which provides that there can be no waiver of any condition contained in it except by an indorsement in writing indorsed on the back of it. There is so much divergence among the authorities in different States on this question that, although the writer of this decision has a very pronounced opinion about it, it is deemed best not to decide the precise question, because it is not absolutely essential to the determination of the case, and the policy of the State in that direction has not yet been determined. Counsel's brief suggests numerous other questions, the settlement of which would doubtless be useful in other insurance litigations, but since what we have determined is decisive of the controversy and adequately settles this appeal, we must be excused from further prolonging a very wearisome and necessarily prolix discussion.

For these errors the judgment will be reversed and the case remanded for a new trial in conformity with this opinion. Reversed.

SUPREME COURT OF WISCONSIN.

COOPER

vs.

INSURANCE CO. OF STATE OF PENNSYLVANIA.\*

The policy was on furniture, beds, linen, wearing apparel, sewing machines, and other enumerated classes of articles, and provided that the entire policy should be void if the interest was other than unconditional ownership.

*Held*, That a sewing machine, held by insured under a contract of purchase, was not covered by the policy, and did not affect it as to the rest.

Unequivocal notification by the adjuster that, under no circumstances, would the company pay, because the policy had never been in force, was a waiver of imperfect proofs of loss, notwithstanding an agreement between the plaintiff and adjuster that nothing said by the latter should waive the company's rights.

A general verdict in connection with a special verdict is not error, where the latter disposes of all issues, and the former necessarily follows as a matter of law.

Statement of facts by NEWMAN, J.

This is an action on a fire-insurance policy for the loss of household goods. The goods intended to be insured were described in a printed slip, attached to the policy, as follows: "\$600.00 on household and kitchen furniture, useful and ornamental; beds and bedding, linen, family wearing apparel, trunks, satchels, printed books and music, musical instruments, sewing machines, pictures, paintings, engravings and their frames, at not exceeding cost; plate and plated ware, mirrors, china, glass, and crockery ware, fuel, family stores and supplies,—all and while in the above-described dwelling house." The policy also contained this provision, relating to the title to the goods: "This entire policy, unless otherwise provided by indorsements thereon, or added thereto, shall be void \* \* \* if the interest of the insured be other than sole and unconditional ownership." Within the life of the policy, the building in which the goods were kept, and the goods themselves, were destroyed by fire. The defendant denied liability, and action was brought. The defense was, that proofs of loss were not furnished, and that the property was incumbered by a chattel mortgage at the time of the loss. There was a special verdict, by which it was found (1) that the chattel mortgage had been paid before the policy was issued; (2) that the plaintiff was not the sole owner of the sewing machine included in the loss; (3) that the defendant's adjuster, at the time when he came to adjust the loss, denied that defendant was liable

\* Decision rendered, May 21, 1897.

for the loss; (4) that the adjuster did not object that certain papers handed to him were insufficient proofs of loss; (5) that the plaintiff had not been guilty of fraud or false swearing in reference to his loss; (6 and 7) that certain papers which were in evidence were delivered, by the plaintiff, to the adjuster, at the time when he came to adjust the loss; (8) that the value of the property totally destroyed was \$475; (9 and 10) find generally for the plaintiff, and assess his damages at \$500. The defendant's counsel requested the court to submit the further question: "Was it understood and agreed by the plaintiff and defendant's adjuster that any act or statement made by him at the time of his visit to La Crosse should not waive any of the rights of the company under the policy?"—which was refused, and he objected to the submission of a general verdict. Motion for a judgment on the verdict was made by both parties. The court required the plaintiff to remit from the verdict the price of the sewing machine, and gave judgment in his favor for \$440, from which the defendant appeals.

C. L. HOOD, *for Appellant.*

HIGBEE & BUNGE, *for Respondent.*

NEWMAN, J. (after stating the facts.)

The bill of exceptions is not certified to contain all the evidence; so there can be no review of the testimony given upon the trial. The special verdict is deemed to be absolute verity. The issues made by the pleading were three: (1) That no proofs of loss had been furnished; (2) that the plaintiff had been guilty of fraud and false swearing relating to his loss; and (3) whether the insured property was incumbered. Questions covering each of these issues were submitted to the jury, and each was found in favor of the plaintiff. But it appeared incidentally during the trial that among the property destroyed by the fire, and included in plaintiff's claim, was a sewing machine, which the plaintiff held under an executory contract of purchase, for the agreed price of \$60, on which he had paid \$30. The defendant claimed that, the plaintiff's interest in this being other than the sole and unconditional ownership, the whole policy was avoided thereby. The court took the view that this only avoided the policy as to the sewing machine, or, perhaps, that it proved that it was not intended that the policy should cover that machine. The policy did not, in terms, designate any specific articles of property, but described it generally by classes. The policy itself did not designate any particular sewing machine as the one to be protected by its insurance. Doubtless, it was intended

to cover any sewing machine at that place of which the plaintiff was the sole and unconditional owner at the time of the loss, and no other. The effect must be that, if the plaintiff's title to this machine was not the sole and unconditional ownership, this machine was not insured by the policy. It could have no effect as to other property of which the plaintiff did have proper title. The property to be covered by the insurance is indeterminate, and not specific. It was intended to cover all the property of the classes named of which the plaintiff should be possessed with proper title, at the place designated, at any time during the life of the policy. If some articles of the classes named, which were in plaintiff's possession, should not be his property, it simply was not intended to insure such. That could not affect the contrary as to other property in his possession, of which he had proper title. The contract, in this sense and to this extent, is certainly divisible, and was intended to be so. The action of the court, in requiring the remission from the verdict of the value of the machine, removed all ground for complaint in that regard by the defendant. Whether the plaintiff should have recovered for this item is not involved in this appeal. Certainly, there are many cases cited in the plaintiff's brief which seem to support that contention; and there are some such cases in this court: *Johannes vs. Fire Office*, 70 Wis., 196; *Carey vs. Insurance Co.*, 92 Wis., 538.

This is the defendant's first alleged error. His second alleged error is that the evidence shows that no proofs of loss were either furnished or waived. The jury seems to have decided this contention against the defendant, and there certainly was evidence to support the verdict. The point seems to be not that no proofs were furnished but that the proofs furnished were insufficient. And it is claimed that further or fuller proofs were waived by the defendant, by the action of the defendant's adjuster in denying all liability of the defendant for the plaintiff's loss. That such denial of liability would, ordinarily, be held a waiver of further or any proofs of loss seems to be well settled in this State: *Gross vs. Insurance Co.* (92 Wis., 656), and cases cited. But it is said that it was agreed between the plaintiff and the adjuster that nothing which the adjuster might do or say should be construed as a waiver of any of the defendant's rights. It is said that whether there was a waiver is a question of intention, and should be submitted to the jury. Ordinarily, when the act which constitutes a waiver is intentionally done, and is unequivocal in significance, it is, as matter of law, a waiver, irrespective of the intention of the parties: *Rasmusen vs. Insurance Co.*, 91 Wis., 81; *Schultz vs. Insurance Co.* (Wis.); *May, Ins.* (3d

Ed.), § 508. The adjuster, in effect, gave the plaintiff unequivocal notification that, whatever the circumstances of the loss, the company declined to pay, on the ground that the policy had never been in force, by reason of the existence of the mortgage. It was unequivocal notice that further proofs of loss would be useless. Parties are not required to do useless things; and the omission to do them does not prejudice rights. A waiver was shown by the undisputed testimony. It did not need to be found by the jury: *Stringham vs Cook*, 75 Wis., 589; *Murphey vs. Weil*, 89 Wis., 146.

The defendant also claims error, in that the jury was permitted to find a general verdict, in connection with the special verdict, against its objection. This court has held that it is not prejudicial, and so not error, to take a general verdict in connection with a special verdict, in a case where the special verdict disposes of all the controverted issues, so that it does not become necessary to resort to the general verdict in order to help out the special one: *Ault vs. Manufacturing Co.*, 54 Wis., 300; *Hoppe vs. Railway Co.*, 61 Wis., 357. In such case the general verdict is merely a correct conclusion of law from the special findings, and neither benefits nor harms either party. In the instant case the special verdict disposed of all the controverted issues, and could not be aided by the general verdict. No reversible error is found in the record.

The judgment of the circuit court is affirmed.

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## SUPREME COURT OF TENNESSEE.

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QUINN

vs.

SUPREME COUNCIL, CATHOLIC KNIGHTS OF AMERICA, ET AL.\* }

The certificate of a benevolent association was payable to the wife of the member. The latter finding it too costly, caused the certificate to be cancelled and a new one issued in accordance with the rules, payable to himself. This one by agreement he assigned to a party having no insurable interest, who repaid to him the assessments already expended and afterwards himself paid the assessments.

*Held*, That the assignment was against public policy and void. The assignee could only legally advance the sums needed for assessments to the member and take a lien on the certificate for the amount.

*Held*, That the representative of the member was entitled to the money from the assignee who had received it, less the sums paid by the latter.

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\* Decision rendered, May 15, 1897.



W. W. GOODWIN, *for Appellant.*  
 RANDOLPH & SONS, *for Appellees.*

BEARD, J.

Thomas Quinn was a member of the order of Catholic Knights of America, and there was issued to him as such a beneficial certificate in which this institution agreed to pay to his wife, Mary Quinn, \$2,000 at his death, upon the condition that he continued during life to pay into the order the dues, assessments, etc., required under its constitution. Subsequently, finding the payments which were necessary to keep him in full fellowship in the order were becoming too burdensome, he proposed to the defendant Carter, if he would repay to him (Quinn) the sum of \$55, already paid in by him, and agree to assume and discharge all dues and assessments which might thereafter accrue against him on account of his membership, that (his wife assenting) he would assign or transfer to him (Carter) the beneficial certificate already issued, or else, delivering to the order the old certificate for cancellation, would cause the issuance of a new one, in which Carter should be named as beneficiary. This proposition was taken under advisement by Carter, who had one or more conversations with officers of the order in Memphis as to the legality of such a contract. Finally, becoming satisfied that he could safely do so, he accepted the terms proposed. Thereupon, on the back of the certificate, Quinn gave an order in writing to the supreme secretary of the Catholic Knights to issue a new certificate in lieu of the old, naming Carter as the beneficiary; and to this Mary Quinn gave, underneath, her written consent. For some reason, undisclosed in the record, this plan thus agreed upon was not carried out. Instead, as Quinn was in arrears for one or more of his assessments, it was evidently thought best to enforce against him suspension, as was authorized by a rule of the order, and in this mode work the change which was to substitute Carter as the beneficiary of the certificate in the room and stead of Mary Quinn. This is apparent from the testimony in the case, and especially from the minutes of the meeting of the order at which this suspension was effected. This minute on this subject recites as follows: "Mr. T. Quinn was suspended for nonpayment of assessments, reading at the same time a letter from the supreme secretary on the subject of changing beneficial certificate, it being the only course Mr. Quinn could pursue in the premises." It is to be observed that at the time of this transaction the laws of this order required the consent, in writing, of the beneficiary named in the certificate, to the surrender of the old and the issuance of a new certificate naming another beneficiary. The effect of this suspension, if not the purpose, was

to disconnect Mrs. Quinn, without regard to her consent, from the certificate, and thus open up the way, upon Quinn's reinstatement, to a certificate absolutely under his control. When the suspension occurred, Mr. Carter paid the dues and assessments which Quinn had failed to pay, and the latter was reinstated to full membership. A new certificate was then issued, in which Thomas Quinn was named as beneficiary; and this was at once assigned and delivered to Carter, who at the same time paid to Quinn the small amount of money theretofore expended by him in keeping up his connection with the order. From that time Carter paid all the dues and assessments which accrued against Quinn up to the time of his death. The sum total of all these payments, as shown by the record, was less than \$600. This assignment of the beneficial certificate to Carter was vested alone on the agreement and consideration above set forth. He was neither of kin to nor a creditor of Quinn. After the death of Quinn, his widow, Mary Quinn, qualified as executrix of his estate, and set up claim to this fund. Over her protest, however, the full sum of \$2,000 was paid to the assignee. This bill was filed by the executrix, seeking to recover from Carter this sum, less the amount expended by him in keeping alive the certificate, and the sum paid by him to reimburse her testator. The chancellor dismissed her bill, and she has appealed.

An examination will disclose that there is an irreconcilable conflict among the authorities upon the question whether a person who has taken out a valid policy on his own life may afterwards assign it to a party who has no interest in that life. Among the cases maintaining the right of the holder of a policy on his own life taken out in good faith to assign it to one without an insurable interest in his life are *Murphy vs. Red*, 64 Miss., 614; *Bloomington vs. Blue*, 120 Ill., 121; *Insurance Co. vs. Allen*, 138 Mass., 24; *Bursinger vs. Bank*, 67 Wis., 75; *Clark vs. Allen*, 11 R. I., 439; *Succession of Hearing*, 26 La. Ann., 326. On the other hand, denying this right are, among others, the following cases: *Warnock vs. Davis*, 104 U. S., 775; *Langdon vs. Insurance Co.*, 14 Fed., 273; *Insurance Co. vs. Hazzard*, 41 Ind., 116; *Insurance Co. vs. Sefton*, 53 Ind., 380; *Insurance Co. vs. Sturges*, 18, Kan., 93; *Basye vs. Adams*, 81 Ky., 368; *Helmstag's Adm'r vs. Miller*, 76 Ala., 183; *Downey vs. Hoffer*, 110 Pa. St., 109; *Hoffman vs. Hoke*, 122 Pa. St., 377; *Price vs. Supreme Lodge*, 68 Tex., 361. Those courts which maintain such assignments do it upon the ground that a policy of insurance upon one's life stands on the same footing with any other chose in action, and, if valid in its inception, is equally valid in the hands of the assignee. The courts which decline, however, to recognize those assignments, rest

their conclusions on public policy; holding that the title of no assignee of such a policy should be sustained when his interest lies, not in the prolongation of the life insured, but rather in its speedy termination. It is not necessary for us, in this case, to range ourselves with either line of these authorities, for we do not regard the question upon which they turn as being necessarily presented here; nor is it at all necessary for us to differ from the many cases which hold that a party, in good faith, both in old-line insurance companies as well as in such a society as the Catholic Knights of America, may select a beneficiary who has neither the claim of blood or debt upon him, and cause the policy or certificate to be made payable to such party, for that is not the present case. The question, rather, is, will this court sustain the title of an assignee where the assignment of the policy follows upon the negotiations already detailed, and where the assignee, of his own means, in fulfillment of a promise contemporaneous with its issuance, keeps it alive in his own interest, and simply as a matter of pecuniary profit? We have no hesitation as to the proper answer to this question. Such a transaction is purely speculative on the part of the assignee,—entered upon by him as a wagering interest, from which the largest profit is to be derived from the termination of the insured's life, and the heaviest loss to accrue from its long continuance. A transaction of this character is obnoxious to the law, as violative of a sound public policy, and should not be sustained: *Brockway vs. Insurance Co.*, 9 Fed., 249. As we view the transaction, it was, in effect, a purchase of a life policy on the life of Quinn by Carter, for a small cash consideration and the agreement to take care of future payments, where the value of the speculation depended upon the termination of that life; thus radically differing from a case where the assured of his own motion takes a risk on his own life, and, notwithstanding its assignment, keeps it alive by his own means. *Bloomington vs. Blue*, supra, is one of the cases holding to the assignability of a policy as a mere chose, yet it recognizes the distinguishing principle on which we rest our conclusion in this case. The court there say, "Public policy forbids one person, who has no interest in the continuance of the life of another, from speculating on that life by procuring a policy of insurance," and the policy in that case was saved to the beneficiary. However, "it did not appear that Blue had any instrumentality whatever in procuring the policy on the life of Bailey, or that he ever paid any portion of the premiums to procure the policy or to keep it in force."

This conclusion, however, does not invalidate the insurance itself. Quinn had an insurable interest in his own life, and, under the rules

of this society, his membership entitled him to the beneficial certificate which was issued. The order of Catholic Knights, recognizing it as a business obligation on its part, has paid over the proceeds of this certificate to defendant Carter. This being so, what are the rights of the complainant as against him? While the law, under the facts disclosed, discountenances the assignment under which these proceeds were collected by the assignee, yet this is alone on the ground of public policy. "No fraud or deception upon any one was designed by the agreement, nor did its execution involve moral turpitude:" *Warnock vs. Davis*, *supra*. It is a transaction from which a court of chancery is not necessarily repelled, so as to be unable to adjust the respective equities of the parties. "It is one which must be treated as creating no legal right to the proceeds of policy beyond the sums advanced upon its security, and the courts will therefore hold the recipient of the moneys beyond these sums to account to the representatives of the deceased:" *Id.*, page 775. It was lawful for Carter to advance the money to reimburse Quinn, and to keep alive this insurance. What was unlawful was that he should make these advancements upon a stipulation that they should be considered an investment on which he was to realize large speculative profits. In the records of the Supreme Court of the United States, in the case of *Warnock vs. Davis*, *supra*, the assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund the sums, with interest. The result is, the decree of the chancellor is reversed, and a decree will be entered here in accordance with this opinion.

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## SUPREME COURT OF CALIFORNIA.

HASS ET AL.

vs.

MUTUAL RELIEF ASS'N OF PETALUMA.\*

The by-laws of a benevolent association at the time of insuring promised the nominee of a member a certain sum for each member in good standing at time of death, also in case of a certain period of membership, a specific sum in case of death regardless of membership.

*Held*, That the by-laws were part of the contract.

*Held*, That a subsequent change of by-law, stipulating that the specific sum in excess of a certain amount was payable only when there should be a certain surplus fund and out of that fund, was also part of the contract,

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\* Decision rendered, Sept. 3, 1897.

and in the absence of any specially defined reserve fund that fund should be deemed to consist of moneys not specially appropriated to other purposes.

TEMPLE, J.

The complaint in this case *inter alia* shows that the defendant is an incorporation, the purpose of which is to secure certain money benefits to the friends of deceased members. By-laws are set out which promise to the nominee of a member dying in good standing "one dollar in coin for every member of this association in good standing at the time of said death." Also a by-law which provides that the nominee of a deceased member who has been such member for ten years "shall receive two thousand dollars, though the association may not have that number of members at the time of his death."

It is averred that one Lena Brenner became a member of the defendant, and, having made the plaintiff her nominee, died on the 5th day of June, 1894; that she was a member in good standing at the time of her death, and had been such member for more than ten years immediately prior to her death. Due presentation of her claim to defendant, and its rejection, are averred.

The answer admits the facts set up, except that, in effect, it shows that only a portion of the contract is set out in the complaint, and proceeds to show the other portions of the contract, which provide that the balance of the \$2,000, over and above the number of members, is payable only out of the reserve fund of the association when there is a surplus in such fund over \$50,000 sufficient to meet such further payment. It is averred that there was not at the time of Lena Brenner's death, and has not since been, a surplus fund equal to \$50,000, or exceeding \$35,000. It also avers that the membership of the association at the time of Lena Brenner's death was only 800, and it denies that there was due to plaintiff, as the nominee of Lena Brenner, any sum in excess of \$800, which sum had been allowed, tendered, and refused.

At the trial the plaintiff submitted her case upon the pleadings, and the defendant then proved the existence of the by-law set up in the answer and put in evidence, which tended to show that at the time of Lena Brenner's death there was not, nor has there been since, \$50,000 in the reserve fund, or even of assets belonging to the defendant. After some evidence in rebuttal, the court found that all the allegations in the complaint are true, but further found the contract as alleged in the answer. It also found that paragraph 3 of section 6 was not in force when Lena Brenner became a member, and that the reserve fund at the time of Lena Brenner's death amounted to \$54,222.90. The court further found that prior to

1893 the defendant had paid dividends to certain of its members to the amount of \$84,458, and also in 1893 the sum of \$2,489; that all such payments were made out of the reserve fund with intent to reduce the fund to less than \$50,000, and thereby evade payment of the indebtedness of \$2,000. Judgment was rendered for the plaintiff for the sum of \$2,105.40 and costs of suits. Upon motion of defendant the court afterwards granted a new trial, and from that order this appeal is taken.

There is no merit in the appeal. The first contention is that the contract between Lena Brenner and the association was an absolute contract for the payment of \$2,000. The section providing that the balance of the \$2,000 shall be paid out of the reserve fund only when there is a sufficient excess over \$50,000, was not a by-law when Lena Brenner joined. I do not see that it would matter whether it was there or not, since the amendment was made in pursuance of a by-law which permitted it, and which was in existence when Lena Brenner became a member; but at that time there was a rule which provided that the payments should be made only when there would be left in the fund \$200,000. The change was not detrimental to the appellant.

Counsel also say that the answer admits that two by-laws providing for the payments are correctly set out in the complaint, whereas they are not. As set out, the answer omits the words "as hereafter provided," which are in the by-laws, and which may be held to refer to subsequent provisions, which limit the rights of nominees of deceased members. No doubt, counsel make this point with extreme reluctance, and will be pleased to find that it does not affect the rights of the parties. All the by-laws, rules, and regulations become part of the contract, whether referred to or not. There was no other contract entered into. All these must be read together.

The finding above alluded to, holding that the reserve fund had been purposely depleted in order to evade payment of dues, finds no excuse either in allegation or proof. It is not supported by a scintilla of evidence. The interest on money was applied to the annual dues of members of long standing, in pursuance of a by-law which was a part of the original scheme. Lena Brenner must have participated in these dividends. They may have kept the fund below \$50,000, but her beneficiary cannot complain, for it was a part of her contract that it might be done. Many such societies promise more than they can perform, and, somehow, promises to do the impossible always attract. If the court was right in finding as to the amount in the reserve fund, this finding could not have been

deemed important; and, even if the finding were sustained by evidence, it would not be the equivalent of the finding of such a fund, and in this case was relevant to no possible issue.

The finding that there was more than \$50,000 in the reserve fund was also unsustained by the evidence. In considering these questions, it must be remembered that the court granted a new trial. The presumption is, therefore, against the findings, and not in their favor.

The by-laws speak of a reserve fund, and, as we have seen, provide for payments out of the excess of that fund over \$50,000. There is, however, no by-law or rule creating a reserve fund, or defining of what it shall consist. Certain moneys are specially devoted to other purposes. Under such circumstances, I think we may treat all the net assets as belonging to that fund which are not specially devoted to other purposes. The assets of defendant for 1894, during which year Lena Brenner died, were not shown. But the assets for 1893 were shown. Waiving the point that this does not meet the necessities of the case, and that the burden of proving that there was an excess in the reserve fund was on plaintiff, we find that the assets of 1893 amounted to \$52,312.32. In this list of assets was included \$1,483.10 due for interest, which, under the by-laws, is devoted to dividends, and \$1,386.22 due for assessments, which belong to the nominees of deceased members, and there is an overdraft of \$10,439.77, which must be deducted from bills receivable. Certainly the court properly granted a new trial. Order affirmed.

We concur: Henshaw, J.; McFarland, J.

## SUPREME COURT OF MISSISSIPPI.

HOPE OIL MILL COMPRESS & MANUFACTURING CO. }

*vs.*

PHOENIX ASSURANCE CO.\* }

A party having the custody, care or possession of property, as bailee, consignee, carrier, factor or warehouseman, may insure for the benefit of the owner, though having no pecuniary interest and not obligated so to do, and may recover for the benefit of the owner upon the subsequent adoption of the insurance by the latter.

The policy insured a compress company against loss on cotton in bales held for compression or compressed, but not loaded on cars, and for which a compress shippers' receipt had been issued for certain railroads while contained on open platforms or in sheds of insured, loss payable to the railroads as interest might appear.

*Held*, That it was not intended to limit the insurance to cotton for which the railroads might be liable, or in which they had an interest. The policy

\* Decision rendered, Jan. 11, 1897.

covered all cotton so described, and recovery could be had for the charges of bailee and the interest of the owners, the amount when received to be held in trust for the latter.

SYKES & BRISTOW, *for Appellant.*

HOUSTON & REYNOLDS, *for Appellee.*

WHITFIELD, J.

It is said in *May, Ins.*, § 80 (2d Ed.): "Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest. \* \* \* And pledgees, innkeepers, factors, common carriers, wharfingers, pawnbrokers, warehousemen, and generally persons charged either specially by law, custom, or contract, with the duty of caring for and protecting property in behalf of others as having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to estate in, lien upon, or possession of it, have an insurable interest." See, also, page 651, and section 445, where it is said, treating of nominal and real claimants, that "the name of the insured may not be stated in the policy, as it need not be." See, as clearly and strongly stating the doctrine, *Eastern R. Co. vs. Relief Fire Ins. Co.*, 98 Mass., at page 423; 11 Am. & Eng. Enc. Law, pp. 316, 317; *Roberts vs. Firemen's Ins. Co.*, 165 Pa. St., 55; *California Ins. Co. vs. Union Compress Co.*, 133 U. S., 387,—a case to which we especially refer; and *Rochester Loan & Bldg. Co. vs. Liberty Ins. Co. (Neb.)* In *Fire Ins. Ass'n vs. Merchants' & Miners' Transp. Co.* (66 Md.), at page 347, it is said further: "The law is now well settled that when a person has the custody, care, or possession, of property for another, and bears the relation to it of consignee, carrier, factor, warehouseman, or bailee, he may, though he has no pecuniary interest therein, and is not responsible for its safe-keeping, insure it in his own name for the benefit of the owners, and the insurance will inure to their benefit upon the subsequent adoption of the insurance, even after the happening of a loss under the policy." The party insuring in such case may sue for and recover the whole loss, holding the excess over his own interest in the property for the benefit of those who have intrusted the goods to him: 133 U. S., 387. See, also, *Insurance Co. vs. Pacaud* (Ill. Sup.); *Waring vs. Insurance Co.*, 45 N. Y., 606.

Let us test the case in hand in the light of these principles. The declaration avers that "on 28th October, 1895, there were held by the plaintiff for compression, and compressed, but not loaded on



cars, and for which compress shippers' receipts had been issued, for the several railroads before herein named to be shipped for and on account of the Prairie Cotton Co., of Aberdeen, Miss., and to be delivered to its consignees at the points of destination," etc. The declaration further avers that "at and before the time of the said fire it had been agreed by and between this plaintiff and the said several railroad companies and the said Prairie Cotton Co. that this plaintiff assumed all the risk of loss on the said cotton by fire, and should be allowed and authorized to claim and collect from the said defendant and other insurance companies having policies as aforesaid on said cotton, the amount of insurance due thereon," etc. It further appears from the declaration that the plaintiff made the contract with the defendant, and paid the premiums, and that the defendant insured the Hope, etc., Co. for the term of three months against all direct loss or damage by fire, etc., on the property, to wit:—

Cotton in bales, held for compression or compressed, but not loaded on cars, and for which a compress shippers' receipt has been issued for Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham Railroad Companies, while contained on the open platforms, and under sheds of the Hope Oil Mill Compress & Manufacturing Co., Aberdeen, Miss., loss, if any, payable to said railroad companies as their several interests may appear at the time of the fire.

We do not think the word "for" in this policy, in this connection—"for which," etc.—is used to indicate ownership of the cotton, but simply the lines over which it is to be routed. We understand the terms of this policy to cover all cotton held by the plaintiff for any owner, situated as described, etc., for which compress shippers' receipts had been issued for shipment over these railway lines, or any of them. Whether these companies might sue, had the cotton been theirs, as carriers, is not material to the right of the bailee (the cotton being the property of other owners) to sue for any interest it may have, by way of charges or otherwise, and for the amount due owners, which amount would be held by it, when recovered, in trust for such owners. That this suit is properly brought is clear: *Ostr. Ins.*, §§ 277, 278, 280, 282. It is not necessary to go into the question of the distinct rights and distinct subjects of insurance, which in some cases, under special policies, are held to exist in the owner and the mortgagee, where slips such as this one are inserted in the body of the policy. See, as to this, *Phenix Ins. Co. vs. Omaha Loan & Trust Co. (Neb.)*, 25 *Lawy. Rep. Ann.*, 679, and note thereto. It would seem that the plaintiff, the Union Compress Co., in the case in 133 U. S. (see page 393, at bottom), had given the owners receipts "which provided that the plaintiff should not be liable for the loss of the cotton by fire," and a recovery was had. In

the policy in this case it is also stipulated that "if, with the consent of this company, an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured," etc., seeming distinctly to recognize the plaintiff's interest as the original assured, and such other interests as different, and as contingently arising.

Applying the foregoing principles to the case in hand, we think the court erred in extending the demurrer back to the declaration, and holding that it stated no cause of action. The demurrer to the fourth plea should have been sustained, because the contract was not made with the Prairie Cotton Co., and, in the light of what has already been said, obviously the demurrers to the 6th, 7th, 8th, 9th, and 10th pleas should have been sustained. The judgment is reversed, the demurrers to defendant's said 6th, 7th, 8th, 9th, and 10th pleas sustained, and the cause remanded.

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## SUPREME COURT OF ERRORS OF CONNECTICUT.

HOGBEN

vs.

METROPOLITAN LIFE INS. CO.\*

Where a party applies for an industrial policy, but upon its execution changes her mind and refuses to receive it or pay any premiums on it, but the premiums were paid by another party having no interest, there is no completed contract of insurance.

But such third party, if induced to pay the premiums through mistake or misrepresentation, may recover them back on repudiating the policy, even though the company, through its acts, may be estopped to deny its validity.

Statement of facts by HAMERSLEY, J.

It appears that on May 8, 1887, one Ellen K. Cannon signed an application to the defendant insurance company for insurance on her life, for the benefit of her son, John M. Cannon. The insurance applied for was that known as "industrial insurance." The amount was \$912, and the weekly premium \$1.20. The defendant on May 30, 1887, duly executed a policy of insurance in pursuance of said application, in which the agreement of the defendant is expressed to be "in consideration of the payment to said company on or before the date hereof of the premium mentioned in said schedule,

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\* Decision rendered, July 13, 1897.

and of a weekly premium, to be paid on or before each and every Monday subsequent to said date, during the life of the person insured." This policy was tendered to Mrs. Cannon, and within two or three months came into the possession of the plaintiff, who paid the weekly premiums until August 19, 1894. The plaintiff's action is brought to recover the premiums so paid. The complaint alleges that the premiums were paid under a mistake; that Mrs. Cannon had refused to accept the policy, had refused to pay premiums, and the policy had no legal existence as a valid policy; that the plaintiff had no interest in the life of the insured; that the defendant represented that, if the plaintiff would pay the premiums, said policy would be good in her hands, and she would be entitled to the amount due thereon in case of loss; that defendant knew such representations to be untrue; that the plaintiff believed the statements, and, acting on such belief, paid the premiums; that defendant has retained said sums, and refused to return them; that plaintiff has demanded the return of said premiums, and has returned said policy to the defendant, and defendant repudiates all liability under said policy. The answer contains two defenses. The first denies all the allegations of the complaint except that alleging the plaintiff had no interest in the life insured, which is admitted. The second defense alleges that the plaintiff, for the purpose of gambling upon the life of Ellen K. Cannon, fraudulently claimed and pretended to the defendant that plaintiff had an insurable interest in said policy, and in the life of said Cannon, and also fraudulently claimed and pretended to defendant that the plaintiff had, by agreement with said Cannon and all others interested in said policy except the defendant, been substituted for and had become the beneficiary under said policy; that these claims were false, and known to the plaintiff to be false; and that all the payments mentioned in the complaint were made in reference to said wagering contract of insurance, with knowledge that she had no legal interest in said life, or under said policy.

The court (Thayer, J.) charged the jury as follows: "The plaintiff in this action sues to recover from the defendant money paid as premiums on the Cannon policy, which is in evidence, under the mistaken belief, as she says, that the policy was valid and binding on the defendant, when in fact, as she alleges, it had no legal existence as a valid policy. The claim is based upon the proposition of law that the insurance premium paid to an insurance company is a compensation for the risk run upon the insurance policy, and that if a policy is invalid at its inception, or had no real existence, the company renders no equivalent for the premiums paid, and has no

right to receive the same, and, even if received, it is its duty to return them to the person paying. This is a correct statement of the law, as is also the further proposition of the plaintiff that, while the law does not allow a person to take out an insurance upon the life of another if he has no interest in that life, it is yet perfectly lawful and proper for a person to take out an insurance on his own life, and make such insurance payable to a third party, whether that party has an interest in his life or not, and this may be done as an act of gratitude, or as a mere gratuity to the beneficiary. He may also take out such insurance, and have it assigned, if he sees fit, to a third party; and it is perfectly proper for such third party, under these circumstances, to pay the premiums and keep the insurance alive. The plaintiff claims that she had a perfect right to become the beneficiary under the policy of Mrs. Cannon, or the assignees of that policy from Mrs. Cannon, provided it was a valid policy legally issued to Mrs. Cannon upon her application, and had the right to pay the premiums and keep the policy alive for her own benefit. And this is true, provided the transaction was entered into in good faith, and not as a cover for a wagering or speculative contract, which the law condemns. The plaintiff claims that she was led by the defendant to believe that the Cannon policy was a valid policy, and in good faith, in that belief, paid the premiums sued for, and that she was in fact mistaken in this belief, and that the policy never had a legal existence and validity. It becomes a question, therefore, whether the Cannon policy ever took effect as a binding contract, or whether, as the plaintiff alleges, it had no legal existence as a valid policy. If the policy took effect as a valid policy, so that the defendant became liable for the risk, the plaintiff cannot recover in this action. In that case the defendant, having sustained the risk, may retain the premiums as the compensation for it. Whether the policy took effect as a valid policy is a question of law, depending upon the facts; but, as the facts bearing upon this part of the case, as proved by the plaintiff, are undisputed, it becomes practically a case for the court to decide, and the jury will be relieved from any serious consideration of the evidence in the case. The evidence is uncontradicted that Ellen Cannon duly applied for the policy of insurance here in question, and that the application was duly received by the defendant, and the policy made or issued by it. It would seem from the application that the first premium of one dollar and twenty cents was advanced by Mrs. Cannon at the time the application was made; but, however that may be, it is proved, and not denied, that the policy was tendered to Mrs. Cannon, and that the premiums were all paid up to the time that the plaintiff

attempted to surrender the policy; that two or three years prior to such attempted surrender the plaintiff or her husband wrote the letter Exhibit E, or sent it to the defendant's president; that he received the same; and that thereafter the defendant continued to receive premiums from the plaintiff on account of this policy. These facts being proved and uncontradicted, the defendant was bound by the policy; and the plaintiff, though she acted in entire good faith in taking the policy and in advancing the premiums, which the defendant denies, cannot recover in this action. This being the case, the question whether Mrs. Hogben acted in good faith in taking the policy, or took it as a mere speculation upon the life of Mrs. Cannon, becomes unimportant to be considered. This question, which would have been a question within the province of the jury to determine, had it not become unimportant, being eliminated from the case, it becomes your duty to render a verdict for the defendant. You may, therefore, retire and prepare such a verdict, and return it to court." The jury, not returning a verdict, were recalled by the court, and further instructed as follows: "It was the intention of the court to make it clear that, on the admitted facts in this case, that the plaintiff could not recover, whatever the facts might be with reference to the great issue that was contested here,—most of the examination of the witness was occupied in attempting to prove or disprove. That being so, it became the duty of the court to instruct the jury that their verdict should be for the defendant; and, of course, it became the duty of the jury, under those circumstances, to return such a verdict. I therefore ask you to retire again, and return the verdict directed." The appeal assigns error in the court's direction to the jury to return a verdict for the defendant.

TALCOTT H. RUSSELL, *for Appellant.*

HENRY STODDARD and ROGER S. BALDWIN, *for Appellee.*

HAMERSLEY, J. (after stating the facts.)

The undisputed facts do not necessarily establish a valid contract of insurance between the defendant and Ellen K. Cannon. It is not enough for such purpose that the defendant signed a policy of insurance in pursuance of Mrs. Cannon's application, and tendered it to her. The testimony tends to prove, if it does not clearly show, that after signing the application Mrs. Cannon changed her mind; that she refused to accept the policy when tendered, and never received it; that neither she nor the beneficiary named in the policy paid the first premium, or any premium, or authorized payment of

the same. In such a state of evidence, it would be error in the court to hold that the undisputed facts, viz., the signing of an application, with the execution and tender of the policy, necessarily prove a completed contract of insurance between the defendant and Mrs. Cannon: *Rogers vs. Insurance Co.*, 41 Conn., 97; *Whiting vs. Insurance Co.*, 129 Mass., 240. This question is not definitely passed upon in the charge. The court, however, couples the facts of the application, the execution of the policy, and the tender, with other undisputed facts, viz.: The plaintiff paid the premiums up to the time she attempted to surrender the policy; two or three years prior to such attempted surrender she wrote the defendant that she held the policy on Mrs. Cannon's life, telling how she claimed to have come by it, and offering to surrender it on return of the premiums paid, if the transaction were not straightforward; the defendant received this letter, and thereafter continued to receive premiums from the plaintiff on account of the policy,—and thereupon the court tells the jury that: "These facts being proved and uncontradicted, the defendant was bound by the policy; and the plaintiff, though she acted in entire good faith in taking the policy and in advancing the premiums, which the defendant denies, cannot recover in this action." If this statement of the law applicable to the facts recited is incorrect, it was error for the court, on such ground, to direct the jury to return a verdict for the defendant. It is plainly impossible for the defendant to be bound by a contract which never existed. If Mrs. Cannon had died before the surrender of the policy, it may be that the defendant, through an application of the doctrine of estoppel, might have been compelled to pay the amount of insurance to the plaintiff. But that does not make the contract valid. It does not affect the liability of the defendant to return money paid under an honest mistake induced by its false representations. When the plaintiff discovered her mistake she returned the policy and demanded the return of the premiums. This she had the right to do, if she had acted in good faith. Her money had been paid in reliance on a valid contract, and not on the chance of an estoppel. She could not be compelled to keep up these payments because the defendant, in the event of the death of the insured, might be estopped from denying the truth of its representations. Nor was the defendant entitled to retain the premiums as compensation for the risk sustained. Whatever the risk may have been, it was not sustained as the result of a contract between the parties, but was incurred wholly through the defendant's own wrong. If, indeed, death had occurred, and the plaintiff had received the amount of insurance, she would then by her own act be estopped

from claiming a return of the premium; but she cannot be prevented from reclaiming her money, paid under a mistake, because the defendant, if it had retained the money, might be estopped from taking the advantage of its own wrong in causing the mistake. We see no ground on which this part of the charge can be sustained; none was suggested in argument. We cannot consider whether the evidence on the question really tried to the jury, i. e., the good faith of the plaintiff, is so conclusive that the plaintiff cannot be said to have been injured by the error in the charge. The conclusion is one to be drawn from conflicting testimony, and one of fact, which the jury were not permitted to pass upon. The control a trial court may properly exercise is very large, both before and after a verdict; but questions of fact in issue, and material to a judgment upon which there is evidence sufficient to support a verdict, must be submitted to a jury: *Occum Co. vs. A. W. Sprague Manuf'g Co.*, 34 Conn., 529, 538; *Cook vs. Morris*, 66 Conn., 196, 211. Upon the testimony reported, the jury might be justified in finding that the payments were in fact and intention made by the plaintiff in the execution of a wagering contract on the life of Mrs. Cannon, which the law holds to be both immoral and illegal. The charge does not state the law applicable to such a state of facts, either in respect to the effect of an honest belief on the part of the plaintiff, induced by the defendant, that the transaction was legal, or as to the position of the payments while held by the defendant pending the termination of the life, which is the subject of the wager. In the view taken by the court, this was unnecessary. So these questions, while evidently in the case, are not presented by this record. There is error in the judgment of the superior court, and a new trial is granted.

The other judges concur.

## SUPREME COURT OF MICHIGAN.

HOUGHTON

vs.

BRADLEY ET AL \*

A general agency firm contracted with a new partner to give him half the renewal commissions on new business secured thereafter so long as he remained with the agency.

*Held*, That the right to such commissions terminated upon the dissolution of the partnership by the partner's retirement.

*Held*, That a custom of the business could not be invoked to change the contract.

JASPER C. GATES, *for Complainant*.

GEORGE W. RADFORD, *for Defendants*.

GRANT, J.

The issues involved in this case are succinctly stated in 68 N. W., 142. The case was then before us on demurrer to the bill. The defendants answered, proofs were taken in open court, and decree entered for the complainant against the defendant Bradley for \$1,838.95; that the defendants terminated the agency of complainant arbitrarily and without just cause; and that complainant is entitled to future renewal commissions upon all premiums which fell due before July 1, 1897. It was decided in the former opinion that complainant and Bradley were partners. No period of duration was fixed in the articles of co-partnership. It was conceded upon the hearing below that either party could terminate the partnership at will. It appears, therefore, to be immaterial, in the determination of the question involved, whether the partnership was terminated with or without just cause. If it were material to decide that question, we should reach a different conclusion from that found by the learned circuit judge.

For some reason, which we need not consider, complainant, for about two years before his discharge, had been a failure as an insurance solicitor. During the last six months of 1894 he had secured only \$14,000 insurance, and in one month (August) did not secure a single policy. During the same time another solicitor, named Van Tuyl, had secured \$149,000. During the first five months of 1895 complainant's record is as follows: "January, nothing; February, \$1,000; March, \$4,000; April, \$3,000; May, nothing." During these

\* Decision rendered, July 13, 1897.



same months Mr. Van Tuyl had secured as follows: January, \$19,000; February, \$15,000; March, \$27,000; April, nothing; May, \$23,500. And during these same months Mr. Bradley, who had the general charge of the office, wrote \$40,000. It is difficult to understand why this record was not sufficient to justify both the defendants in discharging complainant from their employ. If this were so, his right to the renewal commissions would have ceased with his discharge: *Insurance Co. vs. Holloway*, 51 Conn., 310.

Complainant commenced to work for Bradley, July 7, 1890, in the interests of the company, under a written contract, by which he agreed to work for one year from July 7th. Bradley guaranteed commissions to be at least \$50 a month and traveling expenses. Before January 1st following, he secured about \$100,000 insurance. There was a verbal understanding that, if complainant were successful as a solicitor, some other arrangement should be entered into. His success was deemed sufficient to justify entering into the contemplated agreement. Thereupon Bradley, on December 9, 1890, wrote to the company the letter found in paragraph 2 of the former opinion. In that letter was this significant and unequivocal language: "I have made arrangements with him [Houghton] to give him one-half interest in the renewals on all business secured after January 1, 1891, as long as he remains with the company, under the firm name of Bradley & Houghton, General Agents." Complainant read this letter before it was sent, and was fully aware of its contents. In the reply by the company, set forth in paragraph 3 of the former opinion, it said: "We note that on and after January 1, 1891, you have agreed to give him one-half interest in all the renewals on all business secured after said date, as long as he continues with the company." The company assented to the agreement. This letter was also read and its contents understood by complainant. Complainant and Bradley then made the agreement found in paragraph 4 of the former opinion. That agreement contained the following language: "I [Bradley] agree to give him [Houghton] one-half of the renewal commissions on all new business secured and placed on the books of this agency from and after January 1, 1891, as long as he remains with this agency; also, the full first year's commission on all new business secured by him." The bill was evidently drafted in recognition of the force and meaning of the unequivocal language of the agreement, and sought to avoid its effect by alleging that there was a "custom of the business of life insurance, as between life-insurance companies and their general agents, that such general agents have a permanent interest in the insurance secured by such agents, which interest is in the

form of a percentage of the renewal premiums on the policies which represent such insurance, which interest is called 'renewal commissions,' and that said agreement was entered into "under and with reference to said custom and such usage." Complainant entered upon his proofs upon this theory, and his first witnesses were several general agents of other companies, introduced in the attempt to establish this custom. The testimony failed to show any such custom or usage, and the court so found. If, however, such a custom were proven, it would not avoid the plain terms of the contract: *Stagg vs. Insurance Co.*, 10 Wall., 589; *Iron Duke Mine vs. Braastad* (Mich.). The language of this contract cannot be construed as giving complainant a permanent interest in these renewals, without doing violence to the common rules of construction. In fact, the language is so plain that it leaves no room for construction. Twice, in the letters written before the contract was made, the same language was used, and was read by and known to the complainant. In *Stagg vs. Insurance Co.*, *supra*, plaintiff's contract read as follows: "For your services as above, you will be allowed a commission of 10 per cent on the first premiums (cash and notes), and 5 per cent on all subsequent renewal premiums, so long as you continue the agent of the company." It was held that his right to the commissions ceased with the termination of his agency. See, also, *Insurance Co. vs. Williams*, 91 N. C., 70; *Spaulding vs. Insurance Co.*, 61 Me., 329. No other case better illustrates the wisdom of the rule that parties are bound by the plain terms of their contract, and cannot change them by parol testimony of a different one. The parties have agreed in writing and in language susceptible of but one meaning, that his right to renewal commissions is limited to his term of service. It is sought to introduce into the contract, by parol, another provision, extending this right beyond the term of service. Upon this, the testimony is in direct conflict.

This disposes of the only question in the case which we think important to consider. Complainant was only entitled to the renewals up to the time of the dissolution of the partnership, which included what is known as "purchased insurance," to the purchase of which he contributed. The decree will be reversed, and the case remanded to the court below for an accounting and decree in accordance with this opinion. The defendants will recover the costs of this court. Hooker, J., did not sit. The other justices concurred.

SUPREME COURT OF IOWA.

CLIFTON COAL CO.

vs. ,

SCOTTISH UNION & NATIONAL INS. CO., OF EDINBURGH.\* }

A mortgage drawn, but never delivered so as to become effectual, is not an incumbrance within the policy.

A transfer of property subject to consent of insurer, followed by an assignment of the policy with the consent of insurer indorsed, does not avoid the policy which inures to the benefit of the assignee.

The insurance was on an elevator, which was used as a temporary storehouse for the tools and machinery, also covered. The company was informed that it would not be used again as an elevator.

*Held*, That the elevator was not vacant and unoccupied.

The removal of the engine was not an increase of risk.

BABCOFT & McCAUGHAN, *for Appellant*.

BISHOP, BOWEN & FLEMING, *for Appellee*.

ROBINSON, J.

On the 13th day of April, 1894, the defendant issued to the Coon Valley Fuel Co. the policy in suit. It insured the fuel company against loss or damage by fire to the amount of \$1,000 on a certain elevator building, engine, and fixtures, and other machinery, appurtenances, and property of various kinds then owned by the insured, and situated on a tract of land described, in Polk County. In May, 1894, the fuel company sold the property insured to the plaintiff, and assigned to it the policy of insurance. The defendant was notified of the sale, and consented to the transfer, by an indorsement in writing made on the policy. In the latter part of the same month, nearly all of the property covered by the policy was destroyed by fire, and this action is brought to recover the amount of the policy. The defendant pleaded several defenses, but the district court rendered judgment in favor of the plaintiff for the amount of its loss.

1. The policy provides that it shall be void "if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, \* \* \* or if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage." The defendant contends that the policy was void under

\* Decision rendered, May 19, 1897.

these provisions, for the reason that the fuel company represented to the defendant that the property covered by the policy was unincumbered at the time the policy was issued, when the truth was, the property was then incumbered by a chattel mortgage, the existence of which was concealed from the defendant. It appears that a mortgage on the insured property had, in fact, been drawn, but it is shown beyond question that it was never delivered to or for the mortgagees, and that it never became effectual. It was not, therefore, a mortgage or other incumbrance, within the meaning of the policy, and did not in any manner affect the title to the property insured.

2. It is claimed that the policy became void by the transfer of the property, and also a transfer of the policy; that the transfer of the property was made before the policy was transferred, in consequence of which the policy became void; and that the consent of the defendant to its transfer did not revive it. The reasoning of the appellant on this point is hardly satisfactory. The petition alleges that the interest of the fuel company in the property insured was assigned to the plaintiff, subject to the consent of the defendant, and that on the same day such consent was given. The answer does not deny these allegations, and admits that the policy was assigned to the plaintiff, with the consent of the defendant. There could have been but one purpose in the assignment of the policy, and the consent of the defendant thereto, which was to continue the policy in force for the benefit of the plaintiff, and that was done.

3. The policy provides that it shall be void "if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and remain so ten days." The appellant contends that the elevator was vacant after the policy was issued, and before the fire, for more than ten days, within the meaning of that provision. The facts in regard to this matter seem to be as follows: When the policy was issued, the elevator was not in use for hoisting coal, and had not been so used for nearly a year. The fuel company was preparing a new shaft and plant, and in August or September, 1893, had moved the top works of the old plant to the new one. After the policy was issued, the engine was removed from the elevator insured, but other property covered by the policy remained therein. While the policy was in force, the elevator was used as a place in which to store machinery, tools, ropes, and various other articles. That was the use which was being made of the elevator when the policy was issued, and there is testimony which tends to show that the defendant was fully informed at that time with respect to the condition and use of the elevator,

and that it would not be used again for hoisting coal. The removal of the engine did not change the character of the risk. The evidence was ample to authorize the district court to find that the elevator was not at any time vacant, within the meaning of the policy: *Woodruff vs. Insurance Co.*, 83 N. Y., 134; *Short vs. Insurance Co.*, 90 N. Y., 16; *Devine vs. Insurance Co.*, 32 Wis., 471. We find no reason for disturbing the judgment of the district court, and it is affirmed.

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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JONES

vs.

NEW YORK LIFE INS. CO.\*

The agent testified that he had ordered the policy on his own responsibility and had simply handed it to the insured, telling him that if he would accept it to sign his name to it and send a check for the premiums, otherwise to return it. No premium was ever paid and the policy was found among the papers of the insured.

Proof that a wife previously objected to her husband taking a policy on his life was not evidence that he did not afterwards accept it.

Subsequent statements of the agent to other parties that he had insured the deceased was admissible to contradict the agent's evidence that the policy was never delivered to the insured as a binding contract.

*Held*, That the finding of the policy among the papers of insured was evidence for the jury as to a valid delivery.

The policy provided that it was issued in consideration of a written application therefor.

*Held*, That this provision was waived by its delivery with a provision stamped on it that it was based on the application for a previous policy.

The delivery of a policy on the promise of a future payment of premium is a waiver of premium payment in cash in the absence of a provision making such payment a condition precedent.

HERBERT PARKER and CHAS. C. MILTON, *for Plaintiff*.

W. S. B. HOPKINS and T. H. GAGE, JR., *for Defendant*.

KNOWLTON, J.

1. The presiding justice could properly exclude the question put by the defendant's counsel to the plaintiff, whom he had called as a witness, whether, as a matter of fact, she made objection to her husband to his taking the policy declared on. Proof that she objected in a preliminary conversation would have no tendency to prove that

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\* Decision rendered, May 18, 1897. The facts are sufficiently stated in the syllabus.—ED. INS. L. J.

he did or did not afterwards take the policy. Besides, the question called for a communication made by a wife to her husband, and it was not so framed as to exclude private conversations.

2. The testimony of the witnesses, Davis, Curtis, and Dr. Sawyer to conversations with the defendant's witness Dowse was competent, as tending to contradict him. He had testified, in substance, that the policy was never delivered, either for cash or on credit.

3. The court properly refused to give the instruction: "There is no evidence in the case competent to prove the delivery of the policy in suit as a valid policy of existing insurance." The production of the policy by the plaintiff, with testimony that it was found, with other papers of the intestate, in his desk, immediately after his decease, was evidence that it had been delivered as a valid contract of existing insurance: *Chandler vs. Temple*, 4 Cush., 285; *Valentine vs. Wheeler*, 116 Mass., 478; *Perley vs. Perley*, 144 Mass., 107. Such a document is not, ordinarily, found in the custody of the assured unless it belongs to him as a contract that may be enforced according to its terms. Possession by the assured is evidence that everything has been done that need be done to give it validity. The effect of the testimony of the witness Dowse, in connection with the other circumstances of the case, was for the jury.

4. The only other exception is to the refusal of the court to rule that "on the evidence the policy in suit would not be a valid policy of existing insurance, unless accepted by the signature of the insured to the application, and the forwarding of a check for the premium, or the payment of the premium otherwise." The bill of exceptions states that "appropriate instructions, to which no exception was taken, were given to the jury on all issues in the case; the defendant claiming only that the request should also have been given." The proposition involved in the request is, in substance, that it would be impossible for the company to deliver its policy in such a way as to give it validity unless the application was signed by the assured, and payment of the premium was made by check or otherwise. Unless the proposition is correct in both of its branches, the instruction was rightly refused. The only reference in the policy to the application and to the payment of the premium is in a recital of the consideration for the defendant's undertaking. There is no provision in the policy that the binding force of the defendant's promise shall depend upon the consideration being exactly as it is stated to be. If a deed poll is founded on a valuable consideration, it is immaterial whether the consideration is correctly stated in it or not. Signing the application, and making payment in cash or by check, are not made conditions precedent to the taking effect of the

policy. The policy in suit is dated May 19, 1894, and the defendant had just issued to the assured another policy for \$1,000, dated May 8, 1894, for which an application had been regularly made and signed. Stamped upon the policy in suit are these words: "This policy is issued and accepted for two thousand dollars additional insurance, based upon the terms of the application on which policy No. 609,091 was issued, and said application is hereby made a part of this contract." 609,091 was the number of the policy dated May 8th. This provision is a part of the contract, to be considered with the rest of the policy, and, if the defendant delivered the policy in this form, as a completed contract, waiving the signing of the other application, and received the premium, as the jury might find that it did, the contract is binding. The cases show that the making of an application referred to in a policy may even be waived orally: *Com. vs. Hide & Leather Ins. Co.*, 112 Mass., 136; *Ames vs. Insurance Co.*, 14 N. Y., 253. We are of opinion that the other part of the proposition was equally erroneous. We understand that the instruction was intended to call for a payment in cash, or its equivalent, as distinguished from a delivery on credit. But it has often been held that a company may waive a provision of this kind, and that, if a note or a promise is accepted in payment, the policy is in force: *Markey vs. Insurance Co.*, 103 Mass., 78; *White vs. Insurance Co.*, 120 Mass., 330; *Wheeler vs. Insurance Co.*, 131 Mass., 1-7; *Miller vs. Insurance Co.*, 12 Wall., 285, 302, 308; *Washoe Tool Manuf'g Co. vs. Hibernia Fire Ins. Co.*, 7 Hun., 74, 66 N. Y., 613. The case is not like *Dunham vs. Morse* (158 Mass., 134), in which payment in cash was made a condition precedent to the policy's taking effect. There was evidence from which the jury might have found that the agent, Dowse, waived an immediate payment of the premium in cash, and delivered the policy on the promise of the assured to pay in the future. A majority of the court are of opinion that this instruction was rightly refused. Exceptions overruled.

## SUPREME COURT OF PENNSYLVANIA.

HEY

vs.

GUARANTORS' LIABILITY INDEMNITY CO.,  
OF PENNSYLVANIA.\*

The insurance was against accidental damage to property except by fire or lightning.

*Held*, That damage from flood through the rise of a river was covered.

*Held*, That the non-disclosure of the fact that there had been previous similar floods was not a concealment which defeated the policy.

J. HOWARD GENDALL, *for Appellant*.

FRANCIS S. CANTRELL and FRANCIS S. CANTRELL, JR., *for Appellee*.

McCOLLUM, J.

The policy in suit contains two distinct contracts of insurance. In the one on which the claim in this case is made the company agreed to indemnify the plaintiff against all loss arising from any accidental damage to or destruction of his stone mill, and warehouse, machinery and stock, stable and other outbuildings, located at No. — Ridge Avenue, Manayunk, Philadelphia, "excepting only damage or destruction by fire or lightning." The insurance was for one year from the 22d of June, 1895. On the 6th of February, 1896, "by reason of a sudden rise of the water in the Schuylkill River," certain property in the buildings mentioned, consisting of machinery, stock, etc., was damaged, destroyed, or carried away by the water which came in and upon the buildings. The plaintiff, in his statement of claim, specified the items of damage and the amount thereof. The company, in its affidavit of defense, disclaimed liability for the loss, alleging as grounds for the disclaimer that it did not arise from accidental damage to or destruction of the buildings, machinery, stock, etc., and that the plaintiff did not state in his application for insurance that the property insured was on the bank of the Schuylkill River. The company also averred in its affidavit of defense that the amount claimed in the plaintiff's statement was an overestimate of his loss, and that there should be deducted from it the sum of \$2,176.21. The plaintiff agreed to the deduction claimed, and the court, having made it, entered judgment for the balance. If there was no misrepresentation or concealment which vitiated the contract and the language of the latter fairly includes and imposes a liability

\* Decision rendered, May 17, 1897.



for the loss caused by the flood or freshet, the judgment should be sustained. The defendant company's main contention is that damage to or destruction of property by flood is not accidental damage or destruction, within the meaning of its contract. This leads us to consider what an accident is. The definitions of an "accident," as given in the Century Dictionary, are, among others, as follows: "(1) In general, anything that happens or begins to be without design, or as an unforeseen event. (2) Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap." In Bouvier's Law Dictionary, "accident" is defined as "an event which, under the circumstances, is unusual, and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency." In Anderson's Law Dictionary the following definitions of "accident" are given, with citation of authorities: "An event or occurrence which happens unexpectedly, from uncontrollable operations of nature alone, and without human agency; or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. An event from an unknown cause or an unusual or unexpected event from a known cause; chance, casualty." A definition corresponding substantially with those quoted above may be derived from our own case of *Insurance Co. vs. Burroughs*, 69 Pa. St., 43. The principle of that decision is that an accident is an unusual or unexpected result attending the operation or performance of a usual or necessary act or event. To the same effect is *Burkhard vs. Insurance Co.*, 102 Pa. St., 262. Further reference to the authorities which define an "accident" is unnecessary. It must be and is admitted by the defendant company that accidental damage to or destruction of property is the result of an accident. It may be the consequence of a tornado, a flood, or a thunderbolt. These, as causes of the damage or destruction, may be considered as in the same category. The destruction of a building by flood or freshet is as clearly accidental as the destruction of it by lightning. If damage to or destruction of the property by lightning was not regarded by the defendant company as accidental damage or destruction within the meaning of its contract, it would not have excepted from the same "damage or destruction by lightning." The exception of one from a number of like causes of damage to or destruction of property was a recognition by the insurer of its liability for loss arising from other causes of the same nature. The fact that there had been floods in the Schuylkill before the occurrence of the one in question cannot affect

the construction of the contract, or the liability of the defendant company under it. The company is presumed to know that which is obvious in regard to the property insured, including the natural perils to which it is exposed: *Western & A. Pipe Lines vs. Home Ins. Co.*, 145 Pa. St., 346, and *Louck vs. Insurance Co.*, 176 Pa. St., 638. In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insurer or his agent, or which he ought to know, is no concealment. The insurers are presumed to be skilled in their business, and to know those general facts which are open to the public, and may be known to all who are interested to inquire. *May, Ins.*, § 207; *Insurance Co. vs. Paul*, 91 Pa. St., 520; and *Insurance Co. vs. Hoffmann*, 125 Pa. St., 626, are to the same effect. In the case in hand there was no concealment or misrepresentation by the assured. The hazards affecting liability to the public related to another branch of the indemnity promised by the insurer, and obviously had no connection with the contract in question. Our conclusion is that there was nothing in the affidavit of defense which constituted a complete or partial defense to the action, and that the judgment appealed from was properly entered. Judgment affirmed.

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## COURT OF APPEALS OF KENTUCKY.

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MUTUAL LIFE INS. CO., OF KENTUCKY, }

vs. }

GORMAN.\*

The plaintiff executed a note for the first premium payable to the agent, believing it was to the company, and the note was discounted by the agent, the agent agreeing that it should be returned if the application was not accepted. The policy proved to except death from small-pox and the plaintiff refused to accept it.

*Held*, That as the exception was not stipulated for, the plaintiff was not bound to accept the policy.

*Held*, That the agreement to return the note was the agreement of the company, which rendered it liable for the amount of the note.

J. BARBOUR and J. W. JONES, *for Appellant*.

W. H. HOLT and DOHONEY & DOHONEY, *for Appellee*.

HAZELRIGG, J.

Believing that he was executing his note to the Mutual Life Insurance Company, of Louisville, for the first premium on a policy

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\* Decision rendered, April 29, 1897.

of insurance to be issued to him, providing against death from any cause, the appellee, who was ignorant, and could only read printed matter, signed and delivered a note for \$225.45, payable to S. C. Walker, who was the agent of the company, and discovered, when the policy came later on, that it had a proviso in it exempting the company from liability in case appellee should die from small-pox or varioloid. He refused to accept it. In the meantime Walker discounted the note before maturity, in the Glasgow Deposit Bank. This suit was thereupon instituted in equity, by appellee against the company, seeking to cancel the contract, and compel the company to pay the note to the bank. A jury was called to try the question whether, under the contract in pursuance of which the note was executed, the company was to insure against death from any cause, or was entitled to except small-pox and varioloid from the assumed risk. The verdict was against the exception or exemption, and thereupon the court rendered judgment in appellee's favor against the company for the amount of the note and interest, providing, however, that execution should not issue until appellee filed in the clerk's office, within 30 days, a receipt from the bank showing payment of the note.

We do not think this verdict is contrary to the evidence, as contended by the company. What occurred at the time of the medical examination of the appellee, and when the note was executed, is told by the appellee, by Walker, and by the medical examiner. These witnesses differ materially in their statements, and we therefore find, as the jury found, that appellee was entitled to a policy insuring him against death from any and every cause. It follows that, upon such a policy not being forthcoming, appellee was entitled to a return of the note which had been executed and delivered to the agent of the company. On getting the note, the agent executed a writing showing that appellee "was entitled to an ordinary life policy in accordance with the application," provided it was accepted by the company, and, if not accepted, "the note was to be returned." The application contained no hint of a limited risk, and the appellee was not bound to accept a policy different from that for which he contracted. Under such circumstances, the agreement of the agent to return the note was the agreement of the company. The chancellor did not confer judicial powers on the clerk by directing no execution to issue until a receipt was filed in his office showing payment of the note. Judgment affirmed.

## SUPREME COURT OF IOWA.

GREENLEE

vs.

IOWA STATE INS. CO.\* }

The insured building was described as situated on lot 2, block 3. There was evidence of an incumbrance on the west 77 feet of the east 90 feet of block 2, and all buildings thereon.

*Held*, That this was not evidence of the incumbrance of the insured building.

McVEY & McVEY, *for Appellant*.

J. J. MOSNAT, *for Appellee*.

LADD, J.

The clause in the insurance policy describing the property is this:

\$2,500.00 on his three-story brick building, occupied by tenants for store and office purposes, situate on lot 2, block 3, Hutton's addition to Belle Plaine, Benton County, Iowa.

The defendant, to sustain the allegation of its answer alleging the existence of incumbrances rendering the policy void, offered in evidence a mechanic's lien claimed by Robert F. Smith, filed September 2, 1893, against

The west 77 ft. of the east 90 ft. of lot 2 in block 3 of Hutton's addition to the town of Belle Plaine, and all buildings situated thereon, and a decree foreclosing the same; also, a mechanic's lien claimed by J. F. Atkinson, filed September 4, 1893, against "the west 78 feet of the east 98 feet" of the same lot, with buildings thereon, the decree foreclosing this lien, and the record of sale thereunder. Objection to each of these offers, on the ground that the evidence "did not show or tend to show any violation of any of the terms or conditions of the policy," was sustained. There was no evidence that the building on the land described in the liens and decrees was the same as that covered by the policy of insurance, and no offer was made to prove this. Whether it was the same, we have no means of ascertaining. The fact that only a part of the lot is described in the liens and decrees seems to indicate that it was subdivided, or that there may have been more than one building on the same lot. That several buildings are often erected on a single lot is a matter of common observation. There is no more reason for supposing a portion of the lot vacant, and only one building thereon, located on the part described, or a single building covering the entire lot, than that several buildings were on the same lot. One of the objects in describing the building was for the purpose of identi-

\* Decision rendered, May 17, 1897.

fication; and, had that insured been the same as that against which liens were filed, such fact could have been readily proven. As the evidence offered did not establish any breach of the conditions of the policy against incumbrances, it was not error to exclude it. What has been said disposes of the case, and other questions argued are not considered. Affirmed.

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UNITED STATES CIRCUIT COURT.

D. RHODE ISLAND.

ST. ONGE

vs.

WESTCHESTER FIRE INS. CO.\*

The plaintiff assigned the property and policy to B. with the company's consent. Afterwards B. reassigned to plaintiff without the company's knowledge. Subsequently a loss occurred and, after the proof had been submitted but no payment having been made, an agent indorsed on the policy that it should cover the property in the first and second stories of the building.

*Held*, That this was simply an assumption of future liability and did not estop the company from claiming release from its prior liability on account of the transfer of title.

DEXTER B. POTTER, *for Plaintiff*.

COMSTOCK & GARDNER, *for Defendant*.

BROWN, D. J.

This is an action on a fire insurance policy issued by the defendant to the plaintiff September 3, 1893, upon a stock of merchandise and fixtures in plaintiff's shop, partially destroyed by fire on June 5, 1894. A decision upon the demurrers now before the court requires the assumption of the following state of facts: Before the date of the loss, the plaintiff, to whom the policy was originally issued, with the consent of the company, assigned the policy to one Bouvier, together with the property covered thereby. Prior to the loss, Bouvier, without the knowledge or assent of the defendant, reassigned the policy to the plaintiff, and reconveyed to him the insured property. The policy stipulated that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, took place in the interest, title, or possession of the insured property. Subsequently, on June 5, 1894, the loss occurred, and plaintiff gave to the company the notice required by the policy. The defendant refused or neglected to make payment to the plaintiff. On July 10, 1894, more than a month after the loss, and at least 10 days after

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\* Decision rendered, May 5, 1897.

the plaintiff had made proof of claim, one W. A. Lester, an agent of the defendant corporation, made the following indorsement upon the policy:—

Providence, R. I., July 10, 1894.

It is understood and agreed that on and after date this policy will cover the within-described property while contained in first and second stories of within-described building. Attached to and forming a part of policy No. 5,822.

Westchester Fire Insurance Co.,

W. A. Lester, Agent.

By his fourth replication, the plaintiff, though confessing the unauthorized transfer to Bouvier, and the conditions of the policy making such transfer a forfeiture, claims that by the above indorsement the company acknowledged said policy to be in force between the company and himself. In other words, that the indorsement not only waived the forfeiture, but transferred the title from Bouvier to the plaintiff. Even were the indorsement a waiver of a prior forfeiture, the plaintiff, upon the state of facts set up in his replication, can have no cause of action, since he has averred the existence of a title in Bouvier; and the indorsement in no way refers or relates to a change of title. The waiver, if one were made, was merely a confirmation of Bouvier's title, and not a transfer of it. But upon examining the terms of the indorsement it is manifest that it does not relate to a change, past or future, in the interest, title, or possession of the insured property, and therefore that it is not such an agreement as by the terms of the policy is necessary to obviate a forfeiture. Neither can it be considered in the light of an independent agreement inconsistent with a denial of liability for a prior loss. By the transfer from Bouvier the liability of the company at once ceased, and did not exist at the date of loss. The company was under no liability whatever until July 10, 1894, when, by the indorsement, it assumed a liability by express language made entirely prospective. There is no inconsistency between a denial of the prior liability and this agreement to be liable in future. Neither from the terms nor from the substance of this agreement can an estoppel or waiver be inferred. The loss had already occurred, and the indorsement induced no action of the plaintiff at all affecting his prior rights, if any, to compensation for that loss. In *Insurance Co. vs. Wolff* (95 U. S., 326), Mr. Justice Field says: "The doctrine of waiver, as asserted against insurance companies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow this conduct and enforce the conditions."

The decision that the indorsement effected no waiver or estoppel of course disposes of the subordinate question of the authority of Lester to make a waiver.

The fifth rejoinder alleges that Lester had no authority to make the indorsement. The surrejoinder avers that Lester was a general agent, and therefore had authority, and concludes with a verification. This is merely an argumentative denial of the allegation of the rejoinder, and, amounting merely to a simple traverse, should have concluded to the contrary.

The defendant's demurrers to the fourth replication and to the last surrejoinder must therefore be sustained.

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## SUPREME COURT OF VERMONT.

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GARFIELD ET AL.

vs.

RUTLAND INS. CO. ET AL.\*

The trustees of an insurance company were its agents to receive applications, fix rates, and issue policies which provided for cancellation and return of unearned premiums. It was sometimes necessary for the trustees to guaranty the solvency of the company and the return of unearned premiums, and in view of this the company agreed to allow a commission of 20 instead of 15 per cent on premiums received. The trustees sought to retain, from moneys in their hands, money which they had actually paid to parties as return premiums on their oral guaranty.

*Held*, That such oral contracts under the statute of fraud were not enforceable, and, if voluntarily fulfilled, the trustees could not claim reimbursement from their creditor, the company, unless the latter has placed funds for the purpose in their hands.

*Held*, That the extra commission allowed was not of the nature of such funds.

*Held*, That the commission allowed on premiums actually received was on gross premiums and was not subject to deduction for subsequent cancellations.

WATERMAN, MARTIN & HITT, *for Plaintiffs*.

CLARKE C. FITTS, *for Trustees*.

MUNSON, J.

The trustees were the agents of the defendant company, with power to receive proposals for insurance, to fix rates of premiums, to receive moneys, and to issue policies and consent to their transfer. The policy used by the company contained provisions for its cancellation, and for a return of the unearned portion of the premium. In the transaction of their business the agents sometimes found it necessary to guaranty the solvency of the company, and the repayment of premiums in the event of cancellation. In view of

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\* Decision rendered, July 19, 1897.

this situation the company agreed to give the agents a commission of 20 per cent in place of the 15 per cent before allowed. Subsequent to this the trustees, in consideration that certain parties would take policies on the defendant company, "guarantied with each, by parol, the solvency of said company, and to refund to them the amount of unearned premiums" if the company should cancel their policies. The trustees seek to retain from the moneys in their hands the amount paid by them under these agreements. The plaintiffs claim that these promises were collateral undertakings, and not enforceable, and that the payments made upon them cannot be considered in determining the amount for which the trustees are chargeable. It is held in this State that a trustee cannot be allowed amounts which he has paid out or become chargeable for on agreements not binding upon him because of the statute of frauds: *Hazeltine vs. Page*, 4 Vt., 49; *Strong vs. Mitchell*, 19 Vt., 644. So it becomes necessary to determine whether these promises were original or collateral undertakings. It has recently been said, upon a review of the cases involving this question, that both the English and American authorities are hopelessly in conflict, and that it can scarcely be said that any construction of the statutory provision on which the question arises is settled law: *Packer vs. Benton*, 95 Am. Dec., 251, note. This being the condition of the law, there is little inducement to depart from the decisions of our own State. It is clear that there were two promises in this case, and that the second was not made original by an abandonment of the first. The liability of the company was contemplated by the arrangement, and its promise was tendered and taken with that of the agents. It is doubtless true that the main purpose of the agents was not to procure a benefit for the company, but to subserve a business interest of their own. In some jurisdictions this might be deemed sufficient to give the promise the character of an original undertaking. But we cannot give it that effect without ignoring the doctrine of *Fullam vs. Adams*, 37 Vt., 391. It was held in that case that, when the agreement is one which leaves the original obligation in force, it is to be regarded as collateral, unless the promisor receives something from the debtor to be applied upon the obligation, so that it becomes the duty of the promisor, as between him and the debtor, to make the payment. It is clear that, as between the company and the trustees, it remained primarily the duty of the company to refund the unearned premiums. There was nothing placed in the hands of the promisors as a provision for the payment. The extra commission was merely to compensate the agents for the risks of a guaranty, and did not put them under an



obligation to make the payment in discharge of the company. So the trustees can retain nothing on account of payments made in fulfillment of these promises.

A question is raised as to what the trustees are entitled to retain on account of their services. They were to have 20 per cent of the moneys received by them on account of premiums actually paid. We think this refers to the money received in regular course, and not to a balance determined by future cancellations. This view seems to be supported by the use of the same phrase in the cancellation clause of the policy, which refers to the contingency of cancellation, "the premiums having been actually paid."

Judgment affirmed. Taft, J., doubting.

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## SUPREME COURT OF NEBRASKA.

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HOME FIRE INS. CO., OF OMAHA,

vs.

SKOUMAL\*

In a case submitted, under rule 2, on an agreed printed abstract, the court will not look beyond the abstract; and, in order to a reversal of the judgment below, error must affirmatively appear from the abstract itself.

The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but, in order to have such effect, it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness.

In an action on a policy of insurance written on real property, the court, in rendering judgment against the insurance company, may allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs.

But, on a review of the judgment in this court, an additional sum will not be allowed as attorney's fees for conducting the proceedings here.

GREENE & BRECKENRIDGE, *for Plaintiff in Error.*

A. N. SULLIVAN and J. M. LEYDA, *for Defendant in Error.*

IRVINE, C.

This case has been submitted on an agreed printed abstract under rule 2. It appears from the abstract that the case was begun in the county court, where judgment was rendered in favor of Skoumal, the plaintiff. It was taken by appeal to the district court, where judgment was again rendered for the plaintiff. The action was on a policy of fire insurance upon a dwelling house to the amount of \$500 and upon personal property to the amount of \$200. In de-

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\* Decision rendered, May 18, 1897. Syllabus by the Court.

fense of the action the insurance company pleaded that proofs of loss were furnished claiming a loss to the building of \$337.10 and on personal property of \$162.90,—in all, \$500,—at which amount the loss was then and there adjusted; that the loss was payable 60 days after proofs of loss were furnished, and within that time a draft for \$500 was tendered the plaintiff but by him refused. The tender was made in court of \$500, and an offer was made to confess judgment for that amount. By the reply it was pleaded that the proofs of loss were prepared by the agent of the insurance company, who fraudulently inserted the amount specified, and who threatened the assured that he would receive nothing whatever unless he signed said proofs; that the assured had a very limited knowledge of the English language, and had had no experience with insurance companies, and relied on the acts and representations of the agent. The case was tried on a stipulation of facts, by which it appeared that a policy had been issued whereunder \$500 was written on the house and \$200 on the personalty; that the property was destroyed September 1, 1895, and that the house was totally destroyed; that proofs of loss were submitted as pleaded, and that the insurance company agreed to pay within 60 days \$500, and the assured agreed to accept the same, but the assured supposed that it was to be paid forthwith; that the proofs of loss were prepared by the adjuster of the insurance company; that the damage to the dwelling house was \$337.10 and to the personal property \$162.90; that the assured objected to accepting less than the face value of his policy, and that the adjuster threatened him with litigation that would last four or five years unless he agreed to take said sum of \$500; that the assured could not tell how the fire originated; that the adjuster told him that if he could tell the origin of the fire it might be different, and he might be entitled to the face value of his policy, and, relying on and believing said statements, the assured made the agreement hereinbefore stated.

The first question presented is as to the binding force of the adjustment or agreement pleaded and established by the stipulation. It will be observed that the amount for which the house was insured was \$500; that the loss was total, and if the company was liable at all it was bound to pay the face of the policy on account of the house: *Comp. St., c. 48, § 43*. It was also agreed that the loss to the personalty was \$162.90, so that on the same assumption of liability the company was bound to pay \$662.90. The amount of the judgment does not appear in the abstract, but presumably it was for more than the \$500 which the company was willing to pay, or the company would not be here seeking to reverse the judgment. It

will also be observed that the stipulation contains no facts in support of averments of fraud in procuring the adjustment of proofs of loss. To support the validity of this adjustment or settlement, the insurance company cites a large number of cases. A case chiefly relied on is *Insurance Co. vs. Bredehoft* (Neb.): In that case, however, it appeared that there was a bona fide dispute between the parties as to the liability of the company, and in addition the amount agreed upon in settlement had been actually paid and received in discharge of the contract by the insured. In all the other cases cited, the demand was either unliquidated as to the amount of recovery, or there was an actual dispute as to the rights of the parties, or there had been a satisfaction as well as an accord. In this case the law fixed the amount of recovery so far as the house was concerned, and as to the personal property the stipulation shows that there was no dispute. Nor does it appear there was any dispute as to the liability of the company. The adjuster did not claim that the company was not liable, nor does it seem that he claimed that the company hoped to be successful in case of litigation. He merely threatened the assured with a delay of four or five years as the result of litigation. It is true that by the stipulation it appears that the insured could not tell how the fire originated; but nothing with regard to the terms of the policy appears in the abstract, and we cannot presume that the policy was effective only in case the insured was able to account for the origin of the fire. In a case submitted under rule 2 on agreed printed abstracts, this court will not look beyond the abstracts to ascertain the facts. *Closson vs. Roman* (Neb.) So far as appears by the abstract, then, there was no actual dispute between the parties, either as to the amount of the loss or the liability of the insurance company. There was nothing but the threat of an agent of the company to delay the plaintiff by protracted litigation unless he compromised the claim. The law on this subject is now well settled, and a case precisely in point is *Fitzgerald vs. Construction Co.*, 41 Neb., 374; *id.*, 44 Neb., 463. From the syllabus of the latter opinion we quote as follows: "The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but, in order to have such effect, it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness." This case falls entirely within the principle so stated.

The district court allowed an attorney's fee of \$75 as part of the costs, and its action in this regard is complained of. Section 45, c. 43, Comp. St., provides that "the court upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs." It has already been held that the words "such policy" in this section refer to policies written on real property, and include policies covering both real and personal estate: *Insurance Co. vs. Gustin*, 40 Neb., 828; *Insurance Co. vs. Thompson* (Neb.), 70 N. W., 30. It is suggested that the amount allowed was too large in view of the real sum in controversy. But there was evidence to support the finding of the court in this respect. We are asked by the defendant in error to allow an additional sum for services in this court. This cannot be done. *Insurance Co. vs. Eddy*, 37 Neb., 461. Affirmed.

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## MISCELLANY.

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Cases to which an insurance company may or may not be a party, which are not actions on policies, but which relate to matters outside of insurance proper; as, jurisdiction, receiver, injunction, pleading, practice, mandamus, wills, usury, lodges, the relations of statute laws to corporations, laws of sister states, etc., where the principles and practice of insurance, as such, are not specifically involved; and other cases of incidental interest to underwriters, or where for special reasons a full report has been deemed unnecessary. These sketches are given merely as chapters of current information, and are not intended as digests, nor for citation.

### ALIENATION IN CASE OF USURY.

In the case of *Phoenix Ins. Co. vs. Asbury*, decided by the Supreme Court of Georgia, May 22, 1897, the following syllabus was prepared by the court, which rendered no written opinion:—

When this case was here at the March term, 1895 (95 Ga., 792), it was held that a conveyance under section 1969 of the Code of 1882 (Civ. Code, § 2771) was an alienation of the property, passing title to the grantee, and that, consequently, the making of such a conveyance by the insured vitiated a policy stipulating that it should be void "if the property should be sold, or the title or possession of the property, or any part thereof, transferred or changed, whether by legal process, judicial decree, conveyance or otherwise." At the trial now under review, it was affirmatively and conclusively shown that the deed made by the plaintiff below was void for usury. This being so, it did not pass title out of him, and therefore presented no obstacle to a recovery by him from the company.

This case is controlled by what is above stated. The trial judge committed no error in instructing the jury that the company was liable, leaving them to fix the amount; and, it appearing that the verdict as to amount was sufficiently supported by the evidence, there is no cause for granting another hearing.

## INDEX TO VOL. XXVI. NEW SERIES, VOL. 6.

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### ACCIDENT.

#### 1. CONSTRUCTION OF POLICY.

The indemnity stipulated for in an accident policy was divided into two categories. The first provided for full indemnity in cases of death or injury leaving a visible, external mark. The second provided for the payment of one-tenth where the injury left no external mark, and was found sufficient to cause death, or if such injury or death was caused by rupture, or poison, or strain, or explosives, or if such injury or death be caused by the intentional act of another.

*Held*, That the second category referred to such intentional acts of another as left no visible, external mark, and where the insured died from injuries at the hand of another, leaving a visible, external mark, the whole amount was payable. *Stephens vs. Railway Officials' & Employers' Acc. Ass'n*, 540.

#### 2. DEATH FROM DISEASE.

An accident policy provided that it should not cover injuries or death resulting from, or caused directly or indirectly, wholly or in part, from certain diseases nor while effected by them.

*Held*, That the word "effected" could not be construed as intended for "affected," though that might be what was meant by the insurer.

*Held*, That there could be no recovery if death would not have resulted except for one of the diseases enumerated; and an instruction that the finding should be for the plaintiff if the accident was sufficient to have caused death in case of a diseased heart, though not sufficient to cause death if the heart was sound, was erroneous. *Commercial Travelers' Mut. Acc. Ass'n of America vs. Fulton et al*, 565.

#### 3. DEATH FROM DISEASE.

An accident policy excepted from liability death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary over-exertion. The insured fell over and shortly after died, after running rapidly up a hillside in connection with his work. According to the uncontradicted testimony of two physicians, death was due to apoplexy, to which the insured was predisposed by a bodily infirmity.

*Held*, That as a matter of law a verdict should have been directed in favor of the company. *Travelers Ins. Co. vs. Selden*, 704.

#### 4. DEATH FROM POISON.

Death due to shock from taking, by mistake, a burning liquid, aqua ammonia, is death from poison within the policy.

Where the policy insured against injuries from external, violent, and accidental means, but excepted death caused by poison, it did not cover death from poison accidentally taken. *Early vs. Standard Life & Acc. Ins. Co.*, 820.

#### 5. DROWNING—CAUSE OF DEATH.

The body of the insured, under an accident policy, was found floating in the water near where he had been bathing shortly before. The company was at once notified and the body was buried five days later. Ten days after the burial the company demanded to examine the body. The policy insured against death by external, violent, and accidental means, provided for immediate notice of any accident, and for proof of death within six

months; also, that it should be permitted to examine the body as a condition precedent.

*Held*, That the cause of death was for the jury.

*Held*, That in the absence of any reason for the delay, it was too late after the burial and unreasonable to demand the right to an examination, and its refusal would not defeat the policy. *Wehle et al. vs. United States Mut. Acc. Ass'n*, 817.

#### 6. EVIDENCE OF CAUSE OF DEATH.

The action was brought upon a policy of accident insurance. Plaintiff, under the circumstances of the case, gave notice of death sufficiently in time.

The policy did not require, as a condition precedent to recovery by the beneficiary, proof positive and direct of the cause of death, as is required in some casualty and surety companies.

There was enough to prove that death was the result of accident, rather than natural causes or design. *Konrad vs. Union Casualty & Surety Co.*, 536.

#### 7. EVIDENCE OF SUICIDE.

Where, in an action on an accident-insurance policy to recover for the death of the assured, there is but little evidence to justify a jury in deciding which one of a half dozen or more possible theories as to the cause of death is the correct one, but what evidence there is supports the theory of suicide rather than accidental death, a verdict for plaintiff must be set aside. *Merrett vs. Preferred Masonic Mut. Acc. Ass'n of America*, 126.

#### 8. INHALING GAS.

The insured was asphyxiated by illuminating gas which escaped into his sleeping room.

*Held*, That this was not within a policy provision that it did not cover injuries fatal or otherwise, from the taking of poison or from anything accidentally or otherwise inhaled or taken.

The company was incorporated in New York, and issued its policy in that state to a resident of Illinois, subsequent to a decision of the highest court of New York that the policy in such case was not exempt.

*Held*, That the effect of a similar decision in Illinois was not to place a construction on the contract not contemplated by the parties. *Fidelity & Casualty Co., of New York, vs. Waterman*, 63.

#### 9. INTENTIONAL KILLING.

The policy provided that it did not cover intentional injuries inflicted by the insured or any other person. The insured was shot at night while working in a coal shed, with a light near him, by some person from behind, and so near that the powder burned his clothes.

*Held*, That this was sufficient proof that the insured was intentionally murdered, and the policy was not liable.

*Held*, That a preponderance of evidence in favor of murder instead of accident was all that was necessary to release the policy from liability. *Butero vs. Travelers Acc. Ins. Co.*, 805.

#### 10. RETROACTIVE BY-LAW.

M. was a member of the defendant association, and received an injury in June, 1893, which resulted in the loss of the sight of his right eye. One of the objects of the association is to transact the business of life and accident insurance. M. brought suit to recover on two of its policies, basing his action on a by-law which provides that "any member, while engaged in any lawful vocation, receiving any bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This by-law was adopted on May 26, 1894, after M. received his injury. *Held*, That the by-law is not by its terms retroactive, and, considered by itself, does not include a case where the injury which caused the loss of eyesight occurred prior to its passage; there being no reference in the pleadings to any other by-law which would authorize the inference that the one in question was to apply to such a case. *Held*, further, that the finding of the court that another by-law was

in existence, when there was no reference to it in the pleadings, was a finding of fact outside of any issue, and that such finding cannot be considered, although, if the by-law had been properly pleaded, it would have an important bearing in the determination of the case. *Maynard vs. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n*, 579, 580.

#### 11. RIDING ON PLATFORM OF CAR AS VOLUNTARY EXPOSURE TO DANGER.

The assured was riding on the platform of a car moving about twenty-five miles per hour. Part of the time he had his hands in his pockets, and part of the time he was standing on the steps of the platform holding on to the railings. While so standing, he fell or jumped from the train and was killed. The chief contention of the company was that he voluntarily exposed himself to unnecessary danger and that his death resulted therefrom. The pleas of suicide and intoxication and breach of the railroad company's rules, which forbade passengers to ride on platforms, were also set up. The suicide and intoxication were held not to be proven, and the rules of the railroad company forbidding passengers on the platforms was found to be one that the railroad company did not itself enforce, and so was not binding on passengers.

Under a rule that all language in insurance policies limiting the liability of the company should be construed favorably for the insured and that all doubts or ambiguities should be resolved against the insurer, it was held that mere negligence, inattention or thoughtlessness is not a voluntary exposure to danger within the meaning of the policy, but there is required a degree of appreciation of the danger at the time to make it voluntary. A bodily injury, therefore, not intentionally inflicted on the assured but which may have been due wholly to negligence and thoughtlessness was covered by the contract.

The words, "voluntary exposure to unnecessary danger" are to be held as importing an exposure by the assured to unnecessary danger with the intention or design to risk the consequence of such exposure—consciousness of the danger and intention to risk the consequences of exposing one's self to it.

Repeating, the court said further, that there could be no voluntary exposure to unnecessary danger, within the meaning of the contract, unless the assured was conscious of the danger and intended,—that is, purposely determined, to risk it.

The voluntary riding upon the platform of a rapidly-moving railroad car, although there may be no necessity therefor, is not in itself, and as a matter of law, exposure to unnecessary danger within the meaning of the contract, but presents a question of fact for the jury.

If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides. *Travelers Ins. Co., of Hartford, Plaintiff in Error, vs. W. M. Randolph, Executor of A. G. Mitchell, Defendant in Error*, 273.

#### 12. SUNDAY VIOLATION—WHAT IS OCCUPATION.

The plaintiff was thrown from a bicycle while riding on Sunday, and injured. He rode about six miles, to attend the funeral of his friend, and was injured when returning by another road, four miles longer than the direct road to his home. *Held*, That the act was not prohibited by Rev. St., c. 124, § 20, relating to the Lord's day, and did not avoid a clause of an accident policy which prevents recovery for an injury received "while or in consequence of violating any law."

As the plaintiff, after attending the funeral, returned home by a circuitous route, which increased the distance by several miles, *held*, that this was done as a recreation, and for health or pleasure, and brings the claim for compensation within the marginal clause of the policy which provides that, "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting), yachting, fishing, or gunning, indemnity will be paid at fifth-class rates, as given in the company's latest manual."

The same policy contained a clause "that, for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous," the insured should be entitled to receive only such amount as the company pays for such increased hazard. *Held*, That this clause relates to an occupation, employment, or business—a vocation, and not an avocation—occasional, exceptional, and outside of his usual and regular vocation. *Eaton vs. Atlas Acc. Ins. Co.*, 577, 578.

#### 13. VOLUNTARY EXPOSURE TO DANGER.

In an action on an accident policy, it appeared that assured undertook in the daytime to cross railroad tracks at a station at a place where they were commonly crossed by people with the permission of the company, and that he was struck and killed by detached freight cars which had been "kicked" along the track, the sight of which was cut off by an umbrella he was carrying to protect himself from rain. *Held*, That the assured's acts were not necessarily a violation of conditions in the policy providing that no claim under it should be valid in case of death resulting from "any voluntary exposure to unnecessary danger, hazard, or perilous adventure," and requiring the assured "to use all due diligence for personal safety and protection;" and the question of such violation was for the jury. *Keene vs. New England Mut. Acc. Ass'n*, 401.

#### 14. WAIVER OF LIMITATION—TOTAL DISABILITY.

The attorneys of a claimant, under an accident policy, notified the company of an accident, and received a reply denying liability, but stating that an adjuster would call in a few days and discuss the matter and endeavor to show that there had been a breach of warranty, and requesting that the matter rest until he should call. No adjuster called and suit was not brought until about a year and a half, whereas the policy stipulated that unless brought within a year all claims should be forfeited.

*Held*, That the limitation was waived and the suit was in time.

Where the insured was in the real-estate business, evidence that, through a dislocation of the arm, though he was able to go to his office every day for a short time, he was unable to do any business but had to get it done by another during ten weeks, was evidence of injuries which wholly disabled him "from prosecuting any and every kind of business pertaining to his occupation." *Turner vs. Fidelity & Casualty Co.*, 657.

See FLOOD; PREMIUM 4.

ACCIDENT ASSOCIATION. See SURETY 1.

ACTION. See ASSIGNEE; LIBEL; MORTGAGE 3; MORTGAGE 1; PREMIUM 1; SUBROGATION.

#### ADJACENT BUILDING.

##### KNOWLEDGE OF COMPANY.

A car barn had been built within nine feet of the insured building and the owner notified the agent and asked him what the additional premium would be. The agent named three different sums, and finally wrote to the company about it and nothing further was done up to the time of the fire. *Held*, That notwithstanding the policy provisions the company had knowledge of the increased risk and allowed the policy to remain uncanceled, thereby estopping itself from claiming a forfeiture on account of the barn, although consent for its erection was not given in writing. *Schmurr vs. State Ins. Co.*, 373.

ADJUSTER. See LEX LOCI 4; PROOFS OF LOSS 10; TITLE 7, 15.

ADJUSTMENT. See PROOFS OF LOSS 1.



# AGENT.

## 1. AUTHORITY TO CONTRACT.

A mere agreement of a soliciting agent to procure to be issued a policy of insurance does not create a present liability against the insurance company, his principal.

Proof that an insurance agent has solicited and forwarded risks and collected premiums is not such evidence as will justify an inference, against positive, uncontradicted evidence, that the powers of such agent were in excess of those above indicated. *Farmers & Merchants' Ins. Co. vs. Graham*, 711.

## 2. CANNOT INSURE HIS OWN PROPERTY.

The local agent stated to a general agent that he desired to write a policy on his household goods and a barn that he was building, and was told to write it in the usual way; and after the barn was completed, the policy was written.

*Held*, That where the company was not notified of the risk there was no valid contract. An agent cannot insure his own property without notice to the company. *Zimmermann vs. Dwelling-House Ins. Co., of Boston*, 77.

## 3. CONTRACT WITH PARTNER FOR COMMISSIONS.

A general agency firm contracted with a new partner to give him half the renewal commissions on new business secured thereafter so long as he remained with the agency.

*Held*, That the right to such commissions terminated upon the dissolution of the partnership by the partner's retirement.

*Held*, That a custom of the business could not be invoked to change the contract. *Houghton vs. Bradley et al.*, 1004.

## 4. LIABILITY FOR MONEY DUE TO NON-COMPLYING COMPANY.

The statute of Oregon of 1874, requiring a deposit by foreign companies of United States bonds, and to appoint a resident agent to accept service, was repealed by the laws of 1887, p. 118, providing that companies might do business on certain conditions.

When compliance had been made with the latter statute, failure to maintain a general office in the state in charge of a general agent, as required in laws of 1889, p. 64, does not render void a contract made with an agent to faithfully pay over premiums collected, nor a suit for foreclosure of a mortgage given as security for such payment. *Continental Ins. Co. vs. Rigger*, 590.

See APPLICATION 2; BROKER; CANCELLATION 1, 2; CONTRACT 4; INCUMBRANCE 5; LEX LOCI 3; LIMITATION; MORTGAGE 1, 2, 3; MUTUAL COMPANY 2; OTHER INSURANCE 1, 4, 5; POLICY 2; PREMIUM 5, 6; PREMIUM NOTE 1, 3; PROOFS OF LOSS 1, 2, 11; REFORMATION 1; REMOVAL 1, 2; RENEWAL 1; REPRESENTATION 1; REPRESENTATIONS 1, 3; RISK 1, 6; SERVICE; SURETY 1, 2; TITLE 5, 6, 8, 9, 15; TRUSTEES.

ALCOHOLISM. See PROOFS OF DEATH.

# APPLICATION.

## 1. EXAMINATION FOR OTHER INSURANCE.

An examination was begun by the medical examiner of another company a year prior to the application to defendant company, but was abruptly terminated by said examiner, who, on putting his ear to the applicant's breast found his pulse running at over one hundred beats per minute, and told him it was useless to proceed further as the rapid pulse would reject him. This examination was not written down and no written application for insurance was made at that time.

In his application for the policy sued on, the question was asked "if any proposition or negotiation or examination for life insurance has been

made in this or any other company or association on which a policy has not been issued, state when and in what company;" to which the applicant answered "None other." *Held*, That the answer made by N. was warranted to be true and was in point of fact untrue in that the information of the prior examination was withheld, which might have influenced the company to decline the risk. The question referred to any and any sort of examination by any other company. A warranty was broken and the policy was void. *Mutual Life Ins. Co. vs. Nichols*, 443.

## 2. FALSE ANSWER AS TO HEALTH—AUTHORITY OF AGENT.

The application was clear and stringent in regard to the materiality of the answers given by applicant to the questions therein, and warranted all to be true by whomsoever written. Applicant did not disclose the true condition, but signed leaving the solicitor to fill in as he pleased, and false answers were made stating that applicant was in good health, free from any and all diseases, and had never been afflicted with any sickness, when in fact he was subject to epilepsy, fits, habitual constipation, drunkenness, and had softening of the brain, and other disorders. The evidence of the solicitor himself showed that if the real facts had been disclosed the company would have declined the risk. Pretty much all the essential statements in the application were untrue. *Held*, That applicant was bound to read the application and the answers. His attestation of the application by his signature was a representation to the company that the answers were true, for which he was responsible. As the issue stipulated that his statements, which were the foundation of the application, were true, by whomsoever the statements were written, and as a contract of insurance was consummated on that basis, the court cannot disregard the express agreement between the parties and hold the company liable if the statements of the assured touching matters material to the risk are found to be untrue.

The assured by examining his policy and the copy of application thereto annexed would have discovered that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the actions of the agent, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statement.

When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein, either by parol or writing, and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy. *Elizabeth Maier, Plaintiff in Error, vs. Fidelity Mutual Life Ass'n, of Phila., Defendant in Error*, 292.

## 3. FALSE ANSWER TO.

An application for life insurance, which was agreed to be a part of the contract, warranted the answers of the assured to questions asked therein to be "full, true, and complete," and the policy was conditioned to be void if they were not so. One of the questions demanded the name and address of each physician who had attended the assured within a given period; and the answer gave the name and address of a single physician. As a matter of fact three physicians had attended the assured within the period named.

*Held*, That the answer was untrue and, being a breach of the warranty, vitiated the policy and destroyed the right to recover thereunder. *Brady vs. United Life Ins. Ass'n*, 138.

## 4. FALSE ANSWER TO.

The application and policy contained the usual strict provisions in regard to warranty. One of the questions propounded by the medical examiner to the applicant was, "When and by what physician were you last attended, and for what complaint?" To which applicant replied, "Never called

a doctor in his life." It appeared in the evidence that about three weeks before the application was made the insured had been attended by a regular physician upon six successive days.

*Held*, That the answers were warranties, and must be literally true, and that the fact of medical attendance and its concealment was a breach of warranty, and voided the policy. *Provident Sav. Life Assur. Soc. vs. Reutlinger*, 141.

#### 5. MISREPRESENTATION OF FAMILY HISTORY.

An application for a life insurance provided that the policy should be void if the statements in the application were untrue, and declared that the applicant knew that untrue answers or suppressions of facts as to her health would vitiate the policy.

*Held*, That where both the mother and sister of an applicant, who afterwards died of consumption, had died of that disease, the applicant's failure to mention the sister's death avoided the policy, though the doctor who examined her had previously rejected her, during her mother's life, as being liable to contagion from the latter. *Jerrett et al. vs. John Hancock Mut. Life Ins. Co.*, 529.

#### 6. MISSTATEMENTS AS TO HEALTH.

The policy provided that the statements in the application as to health should be warranties, and if untrue the policy should be forfeited, and that it should not take effect unless the health was in accordance with the health certificate attached.

*Held*, That the papers referred to were part of the contract and the court could not consider the question of materiality in case their statements were not in accord with the facts.

The health certificate also provided that it was a warranty, and if the statements therein and in the original application were untrue the policy should be forfeited.

*Held*, That a statement that the insured had never made application to another company and been rejected, whereas he had made such application and without his knowledge had been rejected, avoided the policy. *Kelly vs. Life Ins. Clearing Co.*, 892.

#### 7. NOT A CONTRACT.

Restrictions in an application for accident insurance, providing that the company should not be liable until after the receipt and acceptance of the application, and that it was not responsible for money paid to any one but its treasurer, held to be good. The mere signing of an application and payment of money to an agent does not constitute a contract of insurance.

The express stipulation, which the applicant has filled up and signed, overrides conversations with the agent and other parties. *Allen vs. Massachusetts Mut. Acc. Ass'n.*, 316.

#### 8. RESPONSIBILITY OF MEDICAL EXAMINER.

The application stipulated that the answers were warranted to be true and that the medical examiner should be held to be the agent of the applicant.

*Held*, That the applicant was not bound to know and state all his ailments when asked so to do. The utmost good faith was all that was required.

*Held*, That, if the work of the examiner was accepted and ratified by the company, he acted as its agent notwithstanding the stipulation.

*Held*, That the mere omission to state a disease which did not cause death was immaterial. *Endowment Rank, Knights of Pythias vs. Cogbill*, 920.

#### 9. USE OF INTOXICANTS.

*R.*, in his application, answered the question in regard to the use of ardent spirits by saying "glass of beer once in a day or two," when in fact he was an habitual drinker and got intoxicated now and then. *Held*, that such answer as a matter of law avoided the policy.

The jury was out nearly six hours unable to agree, and the trial judge sent for them and directed them to find for the defendant. *Held*, that the judge was right; that he did not lose his control over the jury because they had retired to a side room to deliberate. *Rainger vs. Boston Mut. Life Ass'n*, 188.

#### 10. WHEN ATTACHED TO POLICY—ANSWER IN.

An accident-insurance policy provided that, "in consideration of the warranties and agreements contained in the application indorsed hereon," the company accepted him as a member, "subject to all the conditions indorsed hereon." One of the conditions indorsed on the policy was that "the application for membership is made a part of this contract, and printed thereon." *Held*, That attaching a copy of the application to the back of the policy with mucilage or some similar substance, and delivering the same to the insured, constituted an "indorsement" of the application upon the policy, within the meaning of the contract.

The answer to a question required to be answered categorically was indistinctly written in the original application, appearing to consist of the letter "n" and a part of the letter "o," but in the copy attached to the policy and delivered to the insured the answer was clearly and distinctly written "No." The insured retained this for over three years, and until his death, without objection, and without suggestion that it did not correctly state his answer to the question. *Held*, That there was no error in refusing to submit to the jury the question what the answer actually was; that, even if the answer as written in the original application was illegible, the insured, by retaining the copy of the application attached to the policy without objection, must be held to have approved of it, and accepted it as containing his answer to the question. *Reynolds vs. Atlas Acc. Ins. Co.*, 778.

See CONTRACT 1, 3; MORTGAGE 2; PREMIUM NOTE 2; RENEWAL 2; REPRESENTATION 1; REPRESENTATIONS 3.

APPORTIONMENT. See CONTRIBUTION; OTHER INSURANCE 3.

APPRAISEMENT. See ARBITRATION.

#### ARBITRATION.

##### 1. IN CASE OF TWO FIRES.

A provision in a policy that differences between insurer and insured shall, at the request of either party, be submitted to arbitration, does not justify the insurer, after the property has been damaged by two different fires, in demanding that the loss caused by the first fire be submitted to arbitration, since the damage done by both fires constitutes but one loss, to be settled in one proceeding. *Mechanics' Ins. Co., of Phila., vs. Hodge*, 406.

##### 2. PLEADING.

It is the duty of the company to propose arbitration in case of disagreement, and the insured need not plead performance of such provision. *Sun Mutual Ins. Co. vs. Crist*, 695.

##### 3. PLEADING—INTEREST.

An answer which simply alleges that the loss had not been fixed by appraisers, but fails to state that the defendant asked for their appointment, or to show any difference of opinion as to amount of loss calling for their appointment, is bad on demurrer.

It is proper for a jury to find interest from date of filing suit. *Citizens' Ins. Co. vs. Bland*, 615.

##### 4. REVOCATION OF.

An agreement to arbitrate which does not provide for submitting to a particular person or tribunal, but to parties mutually chosen, is revocable by either party. *Yost vs. McKee et al.*, 716.

##### 5. RIGHT TO.

The plaintiff sued for amount due on property insured, destroyed by fire.

Having in the answer denied all liability, the defendant was without right to sustain the plea of want of appraisal as a condition precedent to filing suit, although the policy contained a stipulation relating to appraisal.

If the defendant was not liable there was nothing to appraise. Moreover, there was no such demand made to at once proceed with an appraisal as the law contemplates should be made by the one claiming an appraisal under the terms of a policy. *Lewis Baille & Co. vs. Western Ass'e Co.*, 497.

#### 6. VALIDITY OF AWARD.

The rule applied that, where an insurance company objects to the sufficiency of proof of loss on one ground alone, this amounts to a waiver of all other objections.

The evidence considered, and held sufficient to invalidate an award on the ground of the partiality and misconduct of the arbitrators.

Held, also, that the defendant company had by its conduct waived its right to a new appraisal as a condition precedent to plaintiffs' right of action on the policy.

Also, that by its conduct on the trial it waived its right, if any, to have any of the issues in the case tried by a jury.

The fact that the judgment entered by the clerk does not conform to the court's order for judgment cannot be raised by appeal without first applying to the trial court to have the judgment corrected. *Levine et al. vs. Lancashire Ins. Co.*, 36, 37.

#### 7. VALIDITY OF AWARD—VALUE OF BUILDING.

In the absence of fraud or mistake, the written agreement of the assured and several insurers for the appraisal of a fire loss is the best evidence of the intent of the parties in entering into it.

For the purpose of testing the validity of an award of appraisers of a fire loss, it is improper to submit to the jury whether the appraisers were in possession of the facts necessary to an intelligent conclusion, or whether they took into consideration all the items of the loss covered by the policy. Such an award is valid and binding if the proceeding is honestly and fairly conducted, but, in the case of destroyed property, which an appraiser had never seen, fairness would require that he be informed by evidence of some sort (not necessarily under oath) as to the character and value of the property; and, unless an opportunity is afforded to impart such information, the award will not be binding.

Evidence of the cost of a building is not usually evidence of its value at a particular time; but witnesses who are not architects, builders, or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction, such inability affecting the weight, but not the competency, of the testimony.

Although a submission to appraisers may not be a condition precedent to the commencement of an action, for the reason that neither party made a written demand therefor, yet, when an appraisal is agreed upon, the parties are bound by the award, unless the same is invalid; and the burden of proof in that respect rests upon the party who challenges it. *Springfield Fire & Marine Ins. Co. vs. Payne et al.*, 46.

#### 8. WAIVER OF.

A provision in the policy that the damage "may be determined by mutual agreement, \* \* \* or, failing to agree, the same shall be submitted to \* \* \* arbitration," does not require arbitration unless the parties fail to agree; and the fact that the company, when proofs of loss to a certain amount were furnished, made no objections to the amount, but denied its liability on other grounds, and denied the existence of the policy, is sufficient proof that the company acquiesced in the amount of the loss, and waived submission to arbitration. *Farnum et al. vs. Phenix Ins. Co.*, 473, 474.

## 9. WAIVER OF.

The policy stipulates that the loss should be estimated by appraisalment, and that any proceeding relative to an appraisalment would not waive any of the policy conditions.

*Held*, That denial of liability after an appraisalment on the ground of a breach of policy conditions did not waive the company's right to insist on the appraisalment as conclusive of the amount of loss. *American Central Ins. Co. vs. Brass et al.*, 718.

See LEX LOCI 1, 2; OTHER INSURANCE 6; PROOFS OF LOSS 3, 13; TOTAL LOSS.

## ARSON

## EVIDENCE OF—ASSESSMENT AS A WAIVER.

Where the defense to a policy was that the property was wrongfully fired by the plaintiff, evidence as to tracks which might have been made by the plaintiff, and as to his conduct, statements, and appearance relating to the fire, are admissible.

A refusal to charge that the verdict must be in accordance with the weight of evidence given was not error when the court had already charged that the verdict must be for the plaintiff, unless the defense be established by a fair preponderance of evidence.

Notice of assessment for losses inadvertently sent by the secretary in the course of a general assessment after the fire was not a waiver of the defense. *Agnew vs. Farmers' Mut. Protective Fire Ins. Co.*, 671.

See INCENDIARISM.

## ASSESSMENT.

## 1. ABSENCE OF NOTICE.

The by-laws of a mutual company provided that failure to pay an assessment within ninety days after notice thereof should forfeit the policy.

*Held*, That in the absence of notice until after suit was brought to recover for a loss on the policy, there was no forfeiture, but any assessment due should be deducted in case of recovery. *McMahon vs. Sewickley Mutual Fire Ins. Co.*, 721.

## 2. BY-LAWS CONSTRUED—WAIVER OF.

The articles of defendant, a life-insurance association upon the assessment or co-operative plan, provided that all assessments for death losses should be made by resolution of the board of trustees, and a by-law had been adopted which read "until, and unless otherwise ordered by the board of trustees," mortuary assessments shall be made only on the first secular days of April, July, and December in each year, and by special resolution. On November 6, 1893, the board, by resolution, made and levied the regular December assessment for death losses which had actually occurred, and from that time on until the last day of November the secretary and his clerks were actually engaged in preparing, causing to be printed, and in preparing for the mailing of necessary notices of assessments for over 12,000 members of the association. These notices bore date December 1st, and were mailed to members November 30th. *Held*, That the articles and by-laws were substantially complied with, and that the December assessment was regularly and properly made.

On being admitted, each member was required to deposit with the association as many dollars for each certificate of \$2,000 as he was years of age, in pledge to secure the payment of all assessments occasioned by death of members made against him. *Held*, Taking into consideration the general plan of the association and the articles relating to this deposit, that a member who had defaulted in the payment of his assessments was not entitled to have his "guaranty deposit" applied in payment of such assessment.

If in negotiations or transactions with a member after knowledge of a ground of forfeiture of his membership such an association recognizes the con-

tinued validity of the certificate, or does acts based thereon, the forfeiture is, as a matter of law, waived, and such a waiver need not be based on any new agreement or on estoppel. The forfeiture may be waived although the maker was in ill health at the time, and could not have furnished evidence required by the association as to his continued good health.

A secret intention on the part of the association not to waive a forfeiture cannot defeat the legal effect of unequivocal and deliberate acts of its officers.

*Held*, Taking into consideration all of the circumstances appearing on the trial, that there was evidence which would have warranted a finding that defendant association, by its conduct subsequent to knowledge of a forfeiture, had waived the same, and had concluded to treat its contract as still in force. *Ince vs. Bankers' Life Ass'n*, 853, 854.

See ARSON ; BENEVOLENT SOCIETY 10, 12, 13 ; MUTUAL COMPANY 1 ; POLICY 1 ; RAILROAD.

### ASSIGNEE.

#### ACTION IN CASE OF.

It is no cause for dismissing, on motion, an action founded upon a policy of insurance which has been assigned in writing, that the assignor sues for the use of the assignee, both these parties being before the court as such by virtue of the petition thus brought, and the petition being amendable by striking out the assignor. A recovery may be had without amendment, the defect not being one which could prejudice the defendant on the merits of the litigation. The pleading, being bad in form, was open to special demurrer to enforce correction by amendment. *L. & L. & G. Ins. Co. vs. Ellington*, 492, 493.

### ASSIGNMENT.

#### 1. AND RE-ASSIGNMENT.

A life policy was assigned bona fide and absolute in form to a party who again assigned in absolute form to another. In an action by the first assignee in which the original beneficiary and the second assignee were made parties.

*Held*, That the assignee need not have an insurable interest, and the second assignment could be shown by parol to be given only for security as a mortgage.

*Held*, That after the payment of the debt to the second assignee, the first was entitled to the remainder. *Dixon vs. National Life Ins. Co.*, 776.

#### 2. OF ENDORSEMENT—LEX LOCI.

An endowment policy provided that the balance of the year's premium and all other indebtedness of the assured should be first deducted in making payment at maturity of the policy. The man died before the expiration of the endowment term. Meantime he had obtained a loan of \$2,300 from the company, but this loan and a premium note were merged into a judgment and secured by a mortgage on other property of assured, leaving, however, an unpaid balance after foreclosure proceedings. The policy was also jointly assigned by Woods and his wife. *Held*, That the assignment was invalid and the wife could recover the full amount of the policy less unpaid premiums, if any.

*Held*, That while the policy was an Ohio contract the assignment was an Indiana contract and governed by the law of the latter state.

*Held*, That an assignment of a policy is not a chattel mortgage and, even if it were in Ohio, this assignment was made in Indiana and is void under the laws of that state. *Union Cent. Life Ins. Co. vs. Woods*, 151.

#### 3. OF PROPERTY.

A transfer of property subject to consent of insurer, followed by an assignment of the policy with the consent of insurer indorsed, does not avoid

the policy which inures to the benefit of the assignee. *Clifton Coal Co. vs. Scottish Union & National Ins. Co.*, 1007.

#### 4. SURRENDER OF ENDOWMENT.

An endowment policy was assigned as security for an indorsement of a demand note by the assignee. Subsequently it was assigned to another party subject to the prior assignment as security for note given to the second assignee. Neither assignment provided for the surrender or sale of the policy. Afterwards, on the request of the second assignee, the policy was surrendered by the first to the company, without notice to the assignor or demand made on him, and the proceeds were applied to liquidate the claims of the assignees.

*Held*, That the surrender was unauthorized and the first assignee was liable. *Manton vs. Robinson*, 595, 596.

#### 5. WHEN VALID.

An assignment of a life-insurance policy, if in legal form of words and not in conflict with the provisions of the policy, is valid, especially as between assignor and assignee. *Richardson vs. White et al.*, 542.

See BENEVOLENT SOCIETY 1; CANCELLATION 1; EVIDENCE 3; PREMIUM 2; TITLE 1.

ATTORNEY'S FEES. See COMPROMISE.

AWARD. See ARBITRATION.

BENEFICIARY. See BENEVOLENT SOCIETY.

BENEVOLENT ASSOCIATION. See ASSESSMENT.

### BENEVOLENT SOCIETY.

#### 1. ASSIGNMENT—INSURABLE INTEREST.

Nye was a member of the Ancient Order of United Workmen, and had a certificate of \$2,000. Desiring to raise money for business purposes he put said certificate in the hands of a broker for sale. The broker found one Clark, who was willing to pay the required sum, and pay all future dues and assessments. Clark applied to the officers of the local lodge, who told him the transaction would be valid, and then Nye and his wife and children all joined in the necessary assignment, and the certificate (which heretofore had been in blank, not naming any beneficiary) was surrendered to the Grand Lodge of the order, and a new one was issued, naming Clark as the beneficiary. No evidence appears as to the age of Nye, either at the issue of his first or second certificate, or at the date of his death, nor as to his expectancy of life at the time of the sale. The Grand Lodge interpleaded, paid the money into court, and withdrew from the suit.

*Held*, That the transaction was not a wager, nor a cover for a wager,—the doctrine that a life policy, valid at its inception, may be assigned to one not having an interest in the life of the insured, when not used as a cloak for a wager, being sustained by abundant authority.

Clark paid \$900, and agreed to pay the dues and assessments for the policy. In the absence of the proof of any age or expectancy of life of the insured, such sale or assignment was not tainted with the vice of gambling. Clark will take the money. *Nye vs. Grand Lodge, A. O. U. W. et al.*, 419.

#### 2. ASSIGNMENT WHEN VOID.

The certificate of a benevolent association was payable to the wife of the member. The latter finding it too costly, caused the certificate to be cancelled and a new one issued in accordance with the rules, payable to himself. This one by agreement he assigned to a party having no insurable interest, who repaid to him the assessments already expended and afterwards himself paid the assessments.

*Held*, That the assignment was against public policy and void. The assignee could only legally advance the sums needed for assessments to the member and take a lien on the certificate for the amount.



*Held*, That the representative of the member was entitled to the money from the assignee who had received it, less the sums paid by the latter. *J. Quinn vs. Supreme Council, Catholic Knights of America et al.*, 988.

### 3. BY-LAW IN CASE OF SUICIDE.

Where the charter of a benevolent order restricts the legislative power to the supreme lodge, a by-law against suicide passed by a subordinate administrative board of control is invalid, until sanctioned by the supreme lodge.

Where in such case the original certificate obtained before any such by-law had been passed was exchanged for another, the insured desiring an increase of insurance, and the new application contained a provision against suicide, and that the insured should be bound by the laws of the board of control, which had just passed the by-law against suicide.

*Held*, That such by-law was no part of the contract, and the suicide of insured did not affect the liability on the certificate. *Supreme Lodge Knights of Pythias vs. Stein*, 557.

### 4. CHANGE OF BENEFICIARY.

L. joined the Order of Chosen Friends and received a certificate for \$2,000. He named his nephews and nieces as beneficiaries. He subsequently married and spoke of changing his certificate so as to make his wife the beneficiary. He was taken ill and before he died supposed he had made arrangements to have the certificate changed, but the status was actually unchanged; and it was held that the beneficiaries named were entitled to the money.

Where the laws of a benefit society prescribe a mode of changing the beneficiary, that mode must be followed, and no change can be made in any other manner. The councils have no power, by stipulation or otherwise, to change or effect the right of beneficiaries after the insured's death. The insured himself could not make any change except by compliance with the rules of the order; and oral declarations are of no effect. *McLaughlin vs. McLaughlin et al.*, 501.

### 5. CHANGE OF BENEFICIARY.

Where the rules as well as the certificate of a benevolent society reserve to a member the right of cancellation and disposition of a certificate, the beneficiary has no vested interest.

Where, in such case, the society pays the money into court and itself makes no issue, the rights of claimants, in case of a certificate cancelled and a new one issued to a different beneficiary, must be determined by the power given to insured under the rules of the order, and the beneficiary under the substituted certificate is entitled to the fund. *Sofge et al. vs. Supreme Lodge Knights of Honor et al.*, 682.

### 6. CHANGE OF BENEFICIARY—HEIRS.

The beneficiary in the certificate of a benevolent society in Ohio, under the statutes of that State, could be changed to any other of his family or heirs. The member wrote to the society to change it, and make it payable to his heirs, executors and assigns. The change having been made, the certificate was lost, and a new one was issued to him, payable to his heirs. The application was made and the insurance was taken out by the member in New York, where he was a resident. The member left a widow, mother, and brothers and sisters, but no children, all in New York.

*Held*, That the word heirs must be regarded as the language of the insured, and must be construed as if used in a testamentary way, according to the laws of New York, subject to the limitations of the Ohio statute as to who may be beneficiaries.

*Held*, That in New York the heirs were those who would take personal property, in case of intestacy.

*Held*, That the insured, judging from his correspondence with the company, desired his widow to share in the distribution. *Knights Templar and Masonic Mut. Aid Ass'n vs. Greene et al.*, 947, 948.

## 7. DELIVERY OF CERTIFICATE.

By-laws of an organization which expressly and exclusively relate to persons who become applicants for membership after the organization has been completed are not applicable to those who participate as charter members in forming the organization.

If a "benefit certificate," in the nature of a policy of insurance, was delivered by the corporation which issued it, the same being the grand conclave of a certain brotherhood, to an individual or his duly-authorized agent, no fraud or fraudulent concealment to obtain the delivery of such certificate having been practiced, and if then or afterwards the insured or the beneficiary paid or tendered all dues demandable up to that time, the insurer was bound by, and estopped from denying, recitals therein to the effect that the insured was a duly-initiated member of a subordinate conclave, and entitled as such to receive the certificate in question.

As the controlling question in the present case was whether or not the "benefit certificate" had ever in fact been delivered to one who was a duly-authorized agent of the insured, and who obtained possession of the certificate in good faith, and without fraud, the case ought to have been made to turn mainly upon the determination of this issue, and should have been submitted to the jury accordingly. The court therefore erred in presenting for their consideration various other questions relating to matters antedating the alleged delivery of the certificate, and which could not in any view properly affect the result.

If there was no lawful delivery of the certificate, there was no contract on the part of the defendant, and it was not liable. If there was a lawful delivery, the questions last above indicated were immaterial. At the next trial, the question of forfeiture after delivery, in case there was a delivery, can be passed upon and adjudicated. *Shackelford vs. Supreme Conclave Knights of Damon*, 561.

## 8. GARNISHMENT BY PHYSICIAN.

The certificate of a benevolent society stipulated that \$1,500 should be paid to a member in the event of his total disability, or to his wife in the event of his death. The member was injured and received the money, which was given to be deposited by his wife in the bank in her own name. The money was garnished by a physician for medical attendance on the husband on an action brought against the husband and wife.

*Held*, That the certificate was a contract of insurance, and the wife could not claim to be entitled to the money exempt to her husband.

*Held*, That the claim for medical attendance was a family expense for which husband and wife were jointly and severally liable.

*Held*, That the case did not come under the statute exempting the avails of policies paid to the surviving widow.

*Held*, That an agreement by the member to pay the physician out of the proceeds was legal and would defeat any exemption, and, where the action was on a note given by the member, such oral agreement may be shown by parol. *Murdy vs. Skyles et ux*, 607.

## 9. HEIRS—DESIGNATION OF BENEFICIARY.

The by-laws of a mutual benefit society, whose expressed object was "to aid and assist the widows and orphans of deceased members," provided that every applicant for membership should designate in his application the person or persons to whom, in the event of his death, the benefit should be paid; also, that any member might change his beneficiary by sending to the secretary a written application acknowledged before a notary, and surrendering his certificate; that, if such change was approved by the board of managers, the secretary should issue him a new certificate; and that no change of beneficiaries should be made in any other way. The by-laws also provided that the benefit should be paid to such person or persons as the deceased member may have designated, as the same shall appear on the books of the association, and, if no designation had been made, then to his legal heirs or devisees. A certificate of membership was issued to the deceased without his having designated

any beneficiary. Subsequently, he went to the office of the association, and verbally designated to the secretary four of his children as beneficiaries, and requested the secretary to make or enter such designation. Thereupon the secretary, in his presence, entered or recorded, in the book of the association kept for that purpose, the names of the four children as the beneficiaries, and assured the member that this was all that was necessary to be done. This entry remained in the records of the association, without objection, until the death of the member, six years afterwards. In a controversy between the four children and the other heirs of the deceased as to who were entitled to the benefit, *held*:

1. That a widow is an "heir," within the meaning of the by-laws.
2. That the act of the member was an "original designation," as distinguished from a "change," of beneficiaries, within the meaning of the by-laws.
3. That the requirement of the by-laws that the designation of beneficiaries shall be made in the application for membership is a mere formality, designed for the protection of the association, and may be waived by it; and if it has done so, and accepted something else as a sufficient designation, the heirs, who have no vested right in the benefit during the life of the member, cannot be heard to object.
4. That, if any approval of the designation by the board of managers was necessary, their approval must be presumed from the fact that the designation remained so long in the records of the association without objection. No formal vote was necessary. *Hanson vs. Minnesota Scandinavian Relief Ass'n et al.*, 488, 489.

#### 10. LIABILITY FOR ASSESSMENT.

The certificate of a benevolent society agreed to pay a specified sum at the end of the endowment period. But it further provided that in case the membership fell below a certain number at the time of maturity, the amount which a full assessment would bring should be payment in full.

*Held*, That this provision was not repugnant to the original promise, and was valid. *Theunen vs. Iowa Mut. Ben. Ass'n*, 586.

#### 11. MEASURE OF RECOVERY.

The by-laws of a benevolent association at the time of insuring promised the nominee of a member a certain sum for each standing in good standing at time of death, also in case of a certain period of membership, a specific sum in case of death regardless of membership.

*Held*, That the by-laws were part of the contract.

*Held*, That a subsequent change of by-law, stipulating that the specific sum in excess of a certain amount was payable only when there should be a certain surplus fund and out of that fund, was also part of the contract, and in the absence of any specially defined reserve fund that fund should be deemed to consist of moneys not specially appropriated to other purposes. *Hass et al. vs. Mutual Relief Ass'n of Petaluma*, 992, 993.

#### 12. NON-PAYMENT OF ASSESSMENT.

K., a member of the Knights of Honor, defaulted in his payment of dues and assessments and was suspended by his local lodge and stood suspended for three months, during which time there were no monthly meetings of the lodge. Then K. asked for re-instatement, offering to pay all dues and assessments, and was informed that, sixty days having elapsed, he must present a health certificate. Such certificate was furnished by the local examiner, giving him a clean bill, and this under the rules and regulations of the order was forwarded to the medical examiner of the grand lodge, but before it was returned K. was killed by a train of cars. *Held*, That the question of suspension was determined by his failure to pay assessments, which, ipso facto, worked his suspension; that his death occurred before he was reinstated; that he was not a member at the time of his death; and that his widow could not recover.

The laws of the order are intended to compel the members to comply with their obligations to pay their monthly assessments; and these laws form a part of the contract which each member makes with his brother member

when he enters the order, and public policy requires that these laws be upheld and enforced by the courts. *Supreme Lodge Knights of Honor vs. Keener*, 413.

### 13. NON-PAYMENT OF DUES—WAIVER BY SUBORDINATE GROVES—EVIDENCE.

In an action brought upon a certificate issued by defendant association to a member of a subordinate grove, and certifying that the beneficiary therein named was entitled to the benefits of a specified fund, known as the "Widows' and Orphans' Fund," upon the death of the member, certain articles of the constitution of the association considered and construed. *Held*, That the "monthly contributions" provided for in section 1, art. 5, are the "monthly dues" required to be paid by the terms of section 2, same article.

And *held* that, according to these articles, the member must be "in good standing" at the time of his decease, to entitle his beneficiary to share in the benefits of this fund. The beneficiary of a member who is in arrears for nonpayment of monthly dues for more than thirty days, and whose name has properly been stricken from the rolls, is not a member in good standing.

When joining defendant association, each member paid as a fee into its treasury, and into the fund before mentioned, a small sum of money. He thereafter paid monthly dues to the treasurer of the subordinate grove, and special assessments, if required. At the death of a member in good standing, defendant's secretary was by the articles authorized and required to collect from each subordinate grove a sum equal to one dollar for each of its members; and the amount thus collected, coming out of the treasuries of the subordinate groves, constituted the fund out of which the beneficiary was paid. *Held*, that if the subordinate groves have, by a long-continued course of conduct, misled their members respecting the payment of monthly dues; have created a belief that payment need not be made in strict accordance with the articles, and will not be exacted on the day stipulated; have thus led the members to rely upon a belief that delay in payment is unobjectionable, and will not affect their good standing, or their rights and interests in the fund in question,—payment in strict compliance with the articles has been waived, and the defendant association cannot claim that such members are not in good standing, if delinquent in accordance with the custom, and is estopped from insisting upon a forfeiture.

*Held*, in the case at bar, that the evidence was sufficient to support a finding that, within this rule, there had been a waiver, and that the deceased member, although delinquent as to his dues, was a member in good standing when he died.

Assignments of error relative to the admission of certain letters in evidence discussed, the same having been admitted as tending to support an allegation in the complaint that defendant had been duly notified of the death prior to the commencement of the action. *Held*, in view of the vagueness of the article relating to proof of the death of a member, and the fact that the letters were treated by the board of directors of the association as a compliance with the articles, and as sufficient proof of the fact therein stated, that they were properly admitted in evidence as tending to prove the allegation in the complaint as to notice. *Mueller vs. Grand Grove, State of Minnesota, United Ancient Order of Druids*, 870, 871.

### 14. REPRESENTATION AS TO HEALTH—EVIDENCE OF PHYSICIAN.

The certificate of a benevolent society was issued on the strength of an application which stated that the applicant was in sound health and the answers were warranted to be true.

*Held*, That if not in sound health there was a fatal breach of warranty, though the insured believed her answer to be true.

A statutory provision that no physician shall be compelled to disclose information acquired in his professional capacity which was necessary to enable him to prescribe for a patient, not only relieves from obligation to disclose, but will not allow such disclosure without the consent of the patient. *Boyle et al. vs. Northwestern Mutual Relief Ass'n*, 758.

15. RIGHTS OF CREDITORS—TITLE TO INSURANCE MONEY.

Under the statutes of Massachusetts a mere creditor could not, prior to May 21, 1895, be named as a beneficiary in a certificate issued by an assessment association, even though the indebtedness was proved and the certificate specified as a collateral for its payment and had been in the possession of the creditor for eight years. It does not appear that subsequent legislation has changed the statutes in that respect.

The certificate being issued to the insured the money must be paid to his wife as executrix and held in trust for the benefit of those who, at the time the contract was made, were entitled to be named as beneficiaries. *Clarke vs. Swartsenberg et al.*, 521.

16. TITLE TO BENEFIT.

The Minnesota Odd Fellows' Mutual Benefit Society issued to one Gazett a certificate of membership, by which it agreed to pay, within sixty days after notice and satisfactory proofs of his death, to his wife if living, if not living, then to his heirs or assigns, a sum equal to one dollar for each full member of the society at the time of his death, etc. He died, leaving his wife surviving him. Six days afterwards, and before proofs of his death had been made to the society, his widow also died. *Held*, That the words "if living" and "if not living" refer to the date of his death, and not to the date when the proofs of his death were furnished, or to the date when the money became payable according to the terms of the certificate; that the widow's right as beneficiary became vested at the date of the death of her husband, and the money belongs to her heirs, and not to the heirs of her husband. *Kottman vs. Minnesota Odd Fellows' Mut. Ben. Soc.*, 235.

17. TITLE TO INSURANCE MONEY.

A mutual benefit certificate was payable to insured's wife, E., or to such other person as might be entitled to the insurance. The by-laws of the association declared that its object was to afford financial aid to the widows, orphans, and heirs of deceased members, or to such other person as might be designated by the insured member, and that on the death of a member his widow or designated heirs should receive the insurance. After the death of E., the beneficiary named in the certificate, the insured married plaintiff, but made no change as to the beneficiary.

*Held*, That, on the death of insured, plaintiff, and not the children of E., was entitled to the insurance. Following *Given vs. Insurance Co.*, 37 N. W. Rep., 817. *Riley vs. Riley et al.*, 118.

18. WAIVER OF BY-LAW.

The principles which apply to ordinary mutual insurance companies in regard to the waiver of by-laws are equally applicable to a mutual beneficiary association.

Officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity.

An applicant, over the age fixed by the by laws of a mutual insurance company, who understates his age, invalidates his contract. *McCoy vs. Roman Catholic Mut. Ins. Co.*, 237.

19. WHO MAY BE BENEFICIARY.

A benevolent society of another State may contract in Massachusetts with a citizen of that State, naming a beneficiary not a relative, if allowed under the laws of such other State, though not permitted to a Massachusetts society. *Gibson vs. Imperial Council of Order of United Friends*, 815.

See ACCIDENT 10; ASSESSMENT 2; CONSTRUCTION 2; RAILROAD; REPRESENTATIONS 1.

BICYCLE. See ACCIDENT 12.

BOOKS OF ACCOUNT. See PROOFS OF LOSS 3, 6, 10.

VOL. XXVI.—66.

## BROKER.

## AGENCY OF—CANCELLATION.

The policy was procured by a broker and on its termination the renewal receipt was forwarded to the broker by the general agent and delivered to the insurer who paid the premium to the broker, but the latter through illness failed to remit. A notice of threatened cancellation was thereupon directed to the broker, and subsequently a letter was sent to insured, whose interests had meanwhile passed to receiver. The party receiving this letter replied that the premium should be paid. But, not receiving it, the general agent made entries on his books understood to be equivalent to cancellation.

*Held*, That the broker is the agent of the insured, but his agency terminates upon the delivery of the policy.

*Held*, That acts relied on to establish that the broker is the agent of the insurer may be shown, although the policy stipulates that no person shall be deemed an agent unless duly authorized.

*Held*, That the questions whether the broker delivered the renewal and received the premium as the agent of the company was for the jury.

*Held*, That the burden of showing compliance with conditions requisite to cancellation was on the company.

Notice of cancellation by mail is not effectual unless received. Where five days previous notice was requisite and the notice was not received until after the date fixed for cancellation, such cancellation on the date fixed would be ineffectual. *American Fire Ins. Co. vs. Brooks et al.*, 3.

See LEX LOCI 1, 2.

## BUILDING.

## DESCRIPTION OF—MEASURE OF DAMAGES.

The policy insured a one-story frame building and additions, to be occupied as a dwelling and greenhouse, with permission to complete. The agent was told of the intention of the owner to move the building to an adjacent lot to connect with a greenhouse being built. It was moved to the lot and enlarged from four to nine rooms but not connected with the greenhouse. The building burned.

*Held*, That the identity of the building with that described was a question for the jury.

*Held*, That evidence of cost of building at the time of trial is not admissible. The question is as to value at time of loss, and in determining the measure of damages the cost of building at such time is one of the factors. *Holter Lumber Co. vs. Fireman's Fund Ins. Co.*, 10.

See ADJACENT BUILDING.

BUILDING IN COURSE OF CONSTRUCTION. See TITLE 18.

BY-LAW. See ACCIDENT 10; BENEVOLENT SOCIETY 3, 11, 18.

BY-LAWS. See ASSESSMENT 2.

## CANCELLATION.

## 1. AT REQUEST OF DISCHARGED AGENT.

The agent quit the employment of the company and presently persuaded seventy-three of his customers to cancel its policies and insure with him in other companies, and to assign to him their claims on the plaintiff company for the return premiums.

*Held*, That the policyholders had the unquestioned right to cancel and demand return premium, and an equal right to assign their causes of action; and that their assignee had also the same right to sue and must be permitted to recover. The other points in contention are subordinate. *Scottish Union & National Ins. Co. vs. Dangair*, 305.

2. BY AGENT ABOUT TO BE DISMISSED.

A fire-insurance agent issued policies on behalf of his principal, the premiums of which amounted to \$——. Learning that his agency was, or was about to be, revoked, he cancelled such policies, and issued in lieu thereof others, on behalf of insurance companies of which he was also agent. He did not cancel any of said policies at the request of his principal, at the request of the insured, nor because an exigency had arisen which made it necessary for him to cancel them for the protection of his principal's interest. His principal sued him for the premiums collected, and he interposed the cancellation of the policies as a defense. *Held*, That the defense was untenable, and that the agent was liable for the premiums of the policies cancelled. *Northern Assurance Co. vs. Hamilton et al.*, 824.

See ADJACENT BUILDING; BROKER; PREMIUM 6.

CHARTER. See CORPORATION; MUTUAL COMPANY 2.

CLEARED SPACE. See RISK 1.

COLLISION.

COLLISION—PARTICULAR AVERAGE—DAMAGE FROM STORM—SALVAGE.

Where a vessel fully loaded and cast off is again made fast to correct some trifling disarrangement of her machinery and is run into by a scow and damaged, but not rendered unseaworthy, she is in collision within the particular average clause.

A marine contract made by an English company in Philadelphia, to be performed in England, loss to be reported at London and paid there, and claims to be adjusted according to the usage of Lloyds, is an English contract, to be governed by English law.

The risk was "free of particular average unless the vessel be sunk, burned, stranded, or in collision." The vessel was detained by a collision, and afterwards damaged by a storm.

*Held*, That after a collision has occurred, liability attaches for subsequent loss under the English rule.

The vessel, loaded with wheat, was bound from New York to Portugal, and was forced by a storm to put in at Boston, where the wheat was found so damaged that by agreement of the parties it was sold, and the voyage ended. Damaged wheat was unsalable in Portugal.

*Held*, That the sale must be treated as for the benefit of all concerned, and the insurer was liable as for a salvage loss, for the difference between the amount realized and the valuation named in the policy. *London Assurance vs. Companhia De Moagens Do Barreiro*, 833.

COMBINATION STATUTE. See TRUST.

COMMISSION. See TITLE 9.

COMMISSIONS. See AGENT 3; TRUSTEES.

COMPROMISE.

WHAT WILL SUPPORT—ATTORNEY'S FEES.

The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but, in order to have such effect, it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness.

In an action on a policy of insurance written on real property, the court, in rendering judgment against the insurance company, may allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs. *Home Fire Ins. Co. vs. Skoumal*, 1021.

CONCURRENT. See OTHER INSURANCE 5.

CONCURRENT INSURANCE. See MORTGAGE 1.

## CONSTRUCTION.

### 1. INCONTESTABLE.

A certificate of life insurance was indorsed, "Incontestable after one year from date, as provided in the by-laws," and the by-laws provided that "all deaths which shall occur within three years from the date of the approval of the application, \* \* \* or from date of last revival of said certificate, shall be incontestable." *Held*, That a claim for a death occurring over three years from the approval of the application, or revival of the certificate, is contestable. *People's Mut. Ben. Society vs. Templeton*, 484.

### 2. POOLING PREMIUMS.

The by-laws provided that the premiums should be accumulated bi-monthly in a pool, and claims maturing during such period should be paid out of the pool then forming, if approved, but if contested and won by plaintiff, then out of the pool contemporary with the judgment.

*Held*, That the last provision was void. All claims were entitled to be paid out of the pool where they belonged, regardless of any contest. *Redmond vs. Industrial Benefit Ass'n*, 812.

### 3. RISK—IN SOUND HEALTH.

The policy provided that no obligation was assumed by the company prior to the date of issue, nor unless on said date the insured was alive and in sound health. The company's medical examiner examined the assured twelve days prior to the date of the policy and found her in sound health, but, it being proved by another physician that she was not so at the date of the policy, it was held that the company was not bound by the prior finding of its medical officer, when the facts were against such finding, and the company is not liable. *Gallant vs. Metropolitan Life Ins. Co.*, 543.

### 4. WHAT IS INCLUDED IN TIN SHOP.

Insurance on a tin shop covers the making of tin cans and the soldering of strips of tin for roofing, this being the obvious daily work of a tin shop.

The oft-decided points were repeated in this case; that an insurance contract is to be considered as a whole, not literally nor severely as to either side, but accurately so as to carry into effect the real purpose and understanding of the parties; but all conditions involving forfeitures as well as all exemptions will be considered strictly and most favorably to the assured.

Also, in a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, the one is to be adopted which is most favorable to the insured. and in case of doubt as to the meaning of terms employed by an insurance company they are to be considered most strongly against the insurer. *Virginia F. & M. Ins. Co. vs. Thomas*, 396, 397.

See ACCIDENT 1; CREDIT INSURANCE 2; EXPLOSION.

CONTAINED IN. See RISK 2.

## CONTRACT.

### 1. APPLICATION IS NOT.

An order sustaining a demurrer to a declaration, though not expressly dismissing the action, is a final judgment, and appealable, when leave to amend is not obtained during the term.

An insurance company is not liable where the application provides that there shall be no liability until it is approved and accepted, and the applicant dies pending its consideration. *Jacobs vs. New York Life Ins. Co.*, 163.



2. WHEN COMPLETE—NON-PAYMENT OF PREMIUM—NOTICE.

Application was made for \$20,000 life insurance in two policies of \$10,000 each, and the applicant gave two notes to the local solicitor for the two first premiums. On the arrival of the policies, one of them was returned to the company and one of the notes was returned to the applicant, but the other note was retained and the other policy delivered. The note was for six months. At its maturity, the applicant came to the local solicitor and stated that he could not pay the premium nor meet the note, and he asked for a return of the same while he gave up the policy. The exchange was made and the second policy was returned to the company. It was an admitted fact that the company never received or authorized any one to receive for it anything but money in the payment of premiums, and where agents took notes as above they did so on their own responsibility. It was also admitted that the company never received any payment whatever on either of said policies. The applicant died about thirteen months after the policies were issued and about six months after the surrender of the second policy.

*Held*, That the first policy, not having been delivered, was void, but the second was in force for the following reasons: (1) The act of delivery with intent that it shall take effect constitutes a waiver of the policy provision that the company shall not be liable until the premium is actually paid, and raises an estoppel against the insurer. (2) A legal delivery of a policy vests the beneficiary with rights that the insured may not destroy, and his surrender of the second policy in exchange for his note was void.

The second premium would be due in July, 1890. There is a law of New York that no policy shall be forfeited or lapsed for non-payment of premium unless the company has given the assured notice of the amount due, the place where, and the person to whom payment is to be made. The company did not send any such notice of the second premium on this second policy. *Held*, (1) That the non-payment of the second annual premium did not defeat the right of plaintiff to recover. (2) A corporation, being the creature of law, must confine its functions strictly within the law, and cannot declare policies void for non-payment except in the prescribed mode. The full amount of the second policy with interest thereon must be paid. *Griffith vs. New York Life Ins. Co.*, 212.

3. WHEN COMPLETE—SUBSEQUENT MORTGAGE.

Defendant signed a written application at Bennington, Vt., for insurance in the plaintiff company. Application was transmitted to the New York office of the company, where a policy was executed and mailed back to plaintiff.

*Held*, That the contract was completed and the premium was due and payable. A report of an examination by plaintiff of defendant's boilers and a suggestion in regard to the resetting of a boiler, mailed along with the policy, was not a condition precedent. The contract was completed without it.

Mortgages on the property subsequent to the insurance held not to change the title or invalidate the insurance. *Hartford Steam Boiler Inspection & Ins. Co. vs. Lasker Stocking Co.*, 207.

4. WHEN DECLINED BY MAIL IN CASE OF AGENT—WAIVER OF PROOFS OF LOSS.

J., the agent of an insurance company, was the cashier of one bank and the president of another. W., a dealer in grain and seeds, was indebted to the banks in an amount exceeding the value of the property in store, and she issued warehouse receipts to them, covering substantially all of it. J. wrote for W. a policy of fire insurance upon said property, and duly notified the company, but gave no information touching the relation of himself and the banks to the insured property. The risk was declined for other reasons, and J. was so notified by mail, but he did not receive the notice until two or three days before the destruction of the property by fire, and he did not notify W. until after such destruction. W. had not actually paid the premium, but it was advanced by J., and, on the declaration of the risk, was passed to his credit by the company, and afterwards returned to him. *Held*, That on account of the dual relations of

J., whereof W. had knowledge, the policy cannot be enforced against the company.

W. made only informal proof of the loss, and it is *held*, that, upon the facts stated, there was no waiver of formal proof by the company. Martin, C. J., dissenting. *Rockford Ins. Co. vs. Winfield*, 785, 786.

See APPLICATION 7; BENEVOLENT SOCIETY 7; COLLISION; LEX LOCI; MUTUAL COMPANY 2; REPRESENTATION 1.

## CONTRIBUTION.

### BETWEEN SPECIFIC AND FLOATING POLICY.

A floating policy of insurance, which declares that it does not cover cotton on which there is any more specific insurance, does not embrace or apply to any cotton which is specifically insured in another company, and therefore is not subject to share with the other company the burden of loss sustained by the latter or by the insured in respect to the cotton covered by the more specific insurance; and for this reason, the company issuing the floating policy cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance, although the policy, touching the latter, contained a clause declaring that "in case of any other insurance upon the property hereby insured, whether made prior to or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies. *United Underwriters' Ins. Co. et al. vs. Powell et al.*, 526.

See OTHER INSURANCE 3.

## CORPORATION.

### DENIAL OF, AS A DEFENCE.

A fire-insurance company, which contracts with and receives money from certain persons acting as a corporation under an invalid charter granted under a general law, but acting within both charter and general law, cannot, after the property insured has been burned, and its time to pay has come, avoid payment by denying the corporate existence of the insured. *Bon Aqua Improvement Co. vs. Standard Fire Ins. Co.*, 506.

See TITLE 10.

COTTON. See WAREHOUSEMAN.

## CREDIT.

### INSURANCE—EFFECT OF RENEWAL—LOSSES AS PAYMENT OF PREMIUM.

1. Where a party was the holder of a certificate of guaranty or policy of insurance against the loss of credits for goods shipped and loss occurring between the commencement and expiration thereof, and which contained a provision that "if this certificate is renewed by the said above-named party, on or before the date of its expiration, at the regular terms of the company in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate on goods shipped between the commencement and the expiration thereof shall be provable under the renewal in the same manner as if losses occurred on goods shipped after the commencement of the renewal,"—upon which original policy losses occurred in accordance with its terms and conditions, and which, upon adjustment and allowance by the insurers, were not paid to the insured, but retained by the insurers, under an agreement, made subsequent to the expiration of the policy, that upon the cancellation thereof such losses should answer the payment of a premium for a renewal policy,—*held*, that the retention of these losses under such an agreement constituted payment, "on or before the date of the expiration" of the original policy, of the guaranty fee or premium of the renewal policy, and was a compliance with the condition therein that "if this certificate has been

paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate on goods shipped during the term of the last prior one shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the loss had occurred during the life of this certificate," although the adjustment of the losses under the prior certificate, and the cancellation thereof, and the execution and delivery of the renewal, did not take place until after the expiration of the original certificate. The two certificates or policies of insurance were connected together, and had reference to each other, and the adjustment of loss, cancellation, agreement aforesaid, and the execution and delivery of the renewal had relation to the life of the prior certificate, the losses upon which, by virtue of the agreement, constituted the payment of the premium of the renewal, by reason of the situation which existed before the expiration of the prior one, and to which the renewal had reference; and it was immaterial, under such circumstances, that the execution and delivery of the renewal was postponed until the adjustment of the losses and cancellation of the former policy could be accomplished.

2. The obligation of the insurer to issue and deliver the certificate of renewal, accepting, as payment of the premium therefor, the losses owing to the insured upon the prior policy when adjusted and the policy canceled, being established, the payment related back to the life of the prior policy, and was of the time during which such losses occurred, and the mere delay during negotiations of putting the obligation into a written agreement or contract, or embodying it in a formal certificate of renewal, did not alter or extinguish such obligation. Equity will impute the intention to fulfill the obligation, and, if necessary to protect and enforce the just rights of the parties, it will assume the obligation to have been fulfilled in accordance with the principle or maxim that equity looks upon that as done which ought to be done. *Lauer et al. vs. Gray*, 956, 957.

#### CREDIT INSURANCE.

##### 1. CONSTRUCTION OF POLICY—RISKS ASSUMED.

The policy insured against loss from the insolvency of debtors owing for merchandise delivered between April 1, 1893, and March 31, 1894, inclusive. It provided that notice should be sent within ten days of knowledge of insolvency, and final proofs must be presented within ninety days of the expiration of the policy. No loss would be payable unless proof was made within such time. But should the policy be renewed on or before its expiration, a loss occurring after its expiration should be payable on the same terms as if it occurred under the renewal.

*Held*, That losses occurring after its expiration on sales made while it was in force were payable provided proofs were made within the ninety days.

Proofs of loss are not evidence of the facts of loss, but where there was other uncontradicted evidence of such loss a failure to so instruct is not harmful.

The court instructed that the amount of authorized sales, so far as the contract bore on the losses, was \$70,000, and there was to be deducted from these losses three-fourths of one per cent.

*Held*, That where it appeared that all understood correctly the amount of deduction to be allowed, and no objection was made, it will not be deemed error because the percentage might be erroneously construed to refer to the losses instead of the sales. *Sloman et al. vs. Mercantile Credit Guarantee Co.*, 665.

##### 2. RECOVERY OF PREMIUMS IN CASE OF INSOLVENCY.

The plaintiff was insured in a credit company against losses through insolvency of his customers. The scheme involved no surrender values, reserve fund, or method of reinsurance; the contracts running only for a year.

*Held*, That in the event of the company's insolvency no recovery could be had for losses occurring after insolvency, although the sales had been made prior to that event; but only for unearned premiums. *Gray vs. Reynolds*, 937.

## CREDITOR.

## INSURABLE INTEREST OF.

While a general creditor cannot insure specific property of his debtor, the latter may insure for the benefit of a creditor, and a policy so issued, loss payable to the creditor as interest may appear, as security for advances, is valid regardless of insurable interest of the creditor in the property where the company consents to the arrangement, and the creditor can recover according to his general interest. *Guterman et al. vs. German-American Ins. Co.*, 727.

See MORTGAGE 3.

CREDITORS. See BENEVOLENT SOCIETY 15.

DANGER. See ACCIDENT 11, 13.

DEATH. See ACCIDENT 2, 3, 4, 5, 6; TITLE 2.

DELIVERY. See BENEVOLENT SOCIETY 7; POLICY 2.

DESCRIPTION. See BUILDING; INCUMBRANCE 2.

DISEASE. See ACCIDENT 2, 3; APPLICATION 2, 5, 6, 8; EVIDENCE 2.

DROWNING. See ACCIDENT 5.

DUES. See BENEVOLENT SOCIETY 13.

DWELLING. See VACANT 1.

ELEVATOR. See VACANT 2.

ENDOWMENT. See ASSIGNMENT 2, 4.

ESTOPPEL. See APPLICATION 2.

## EVIDENCE.

## 1. DECLARATIONS OF INSURED.

A beneficiary in a certificate of insurance in the defendant company has no vested interest until the death of the insured; and, therefore, the declarations of the insured made subsequent to the issuing of the certificate are admissible against the beneficiary in an action on such certificate. *Laura A. Steinhausen, Respondent, vs. The Preferred Mutual Acc. Ass'n, Appellant*, 454.

## 2. OF DISEASE—PROOFS OF DEATH.

When doctors disagree as to whether assured did, or did not, have a certain disease, credence will be given, as in other phases of insurance litigation, to the testimony which leans against the corporation.

"Satisfactory proof of death" need not be satisfactory to the company, provided it is satisfactory to the court. *Flynn vs. Massachusetts Ben. Ass'n*, 438.

## 3. OF EXECUTION AND ASSIGNMENT.

Where a policy purports to be signed by an agent in compliance with its requirements, no further proof aliunde of such execution is required in the absence of a denial properly verified by affidavit.

Where the action is brought by the insured, the fact that it was for the use of another and proof of the assignment of the policy are immaterial, where there is no evidence of a transfer of the property subsequent to the insurance. *Firemen's Ins. Co. vs. Barusch*, 101.

## 4. OF PHYSICIAN.

The sworn statement of the attending physician, furnished as a part of the required proofs of loss, stating the disease for which he treated insured, is not conclusive against the claimant. Proof of the same fact personally

by attendant physician is privileged and not admissible. *Redmond vs. Industrial Benefit Ass'n*, 812.

#### 5. OF VALUE.

From necessity, the opinion of ordinary witnesses, acquainted with the value of property, is admitted, although they are not experts in matter of value. *Lewis Bailie & Co. vs. Western Ass'e Co.*, 497.

#### 6. WAIVER OF—PHYSICIAN PRIVILEGED.

The application of the insured for a policy of life insurance (made a part of the contract of insurance), among numerous other questions and answers as to the health, habits, and history of the insured, contained the following: "Does the person expressly waive all provisions of law forbidding any physician or surgeon from disclosing any information which he has acquired? Ans. Yes." The policy having lapsed by reason of the non-payment of a premium, it was subsequently reinstated upon the faith of the following certificate of the insured and the beneficiaries, but the language of which was prepared by the insured: "In consideration of the restoration and renewal of policy No. \* \* \*, the undersigned hereby renews, reaffirms, and warrants each of the statements, answers, and representations as expressed in the original application for said policy, and doth further warrant that the person whose life was desired to be insured under said policy has been and continued since the time of said original application, and now is, of good health, and of correct, sober, and temperate habits." *Held*, That the waiver in the original application applied only to the past, and did not include information thereafter acquired by a physician in attending the insured as a patient. Also, that the effect of the reinstatement of the policy upon the certificate was merely to revive the original policy as it existed before the lapse, modified only by the representation as to the health and habits of the insured subsequent to the original application. Hence the waiver does not extend to information acquired by an attending physician prior to the date of the renewal certificate, but subsequent to the date of the original application. *Geare et al. vs. United States Life Ins. Co.*, 317.

See ACCIDENT 6, 7; AGENT 1; ARBITRATION 7; ARSON; BENEVOLENT SOCIETY 13, 14; BUILDING; LETTER; MORTGAGE 1; MUTUAL COMPANT 2; OTHER INSURANCE 2; POLICY 1, 2; PROOFS OF DEATH 1, 2; PROOFS OF LOSS 13; RENEWAL 2; RISK 1; SALVAGE 1; SUICIDE 2; SURETY 1; TITLE 8; VACANT 1; VALUE.

EXECUTION. See EVIDENCE 3.

#### EXPLOSION.

##### CONSTRUCTION OF POLICY.

The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as inconsistent with other provisions unless no other reasonable construction is possible.

A special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained.

A fire-insurance policy on a house and contents contained, in the printed portion, a provision that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only," and had attached thereto a special clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." There were stored in a certain powder house, situate across the street from the building insured, and seventy one feet distant therefrom, over which house neither party had any control, two tons of powder. The powder house was struck by lightning, causing an explosion of the powder, by force of which explosion the insured house and contents were totally destroyed. *Held*, That, within the meaning of the clauses recited, the loss

was occasioned by explosion, which was not included in the risk, and that the company is not liable. *German Fire Ins. Co. vs. Roost*, 699, 700.

FIRE. See MORTGAGE 1.

FIREWORKS. See RISK 4.

FIXTURE. See MORTGAGE 2.

#### FLOOD.

##### AN ACCIDENTAL DAMAGE.

The insurance was against accidental damage to property except by fire or lightning.

*Held*, That damage from flood through the rise of a river was covered.

*Held*, That the non-disclosure of the fact that there had been previous similar floods was not a concealment which defeated the policy. *Hoy vs. Guarantors' Liability Indemnity Co.*, 1012.

#### FOREIGN COMPANY.

##### JURISDICTION IN CASE OF INSOLVENCY.

A foreign insurance company which maintains an agency in this state, in charge of agents having general authority to receive premiums, fill out, countersign, and issue policies of insurance, furnished them by the company for that purpose, is subject to the jurisdiction of the courts of this state, and service on the chief officer of the agency is service on the company.

Actions against foreign insurance companies maintaining agencies in this state are not limited to suits on policies of insurance, but the courts have jurisdiction to enforce other contracts as well.

In an action against a foreign insurance company to charge it on its liability as a stockholder in an insolvent domestic corporation, service of summons may be made on the chief officer of an agency in the county where the action is brought, and jurisdiction thereby obtained to render a personal judgment against the defendant. *German Ins. Co. vs. First Nat. Bank of Boonville, N. Y.*, 600.

See AGENT 4; INSURANCE SUPERINTENDENT; SURETY 2.

FRAUD. See APPLICATION 2; PROOFS OF LOSS 13; TITLE 15; VALUATION.

GARNISHMENT. See BENEVOLENT SOCIETY 8.

GAS. See ACCIDENT 8.

#### GENERAL AVERAGE.

##### STRANDING.

A steamer stranded in a fog where she could have been easily pulled off by a tug, but while help was coming a storm arose and the vessel began to pound, and to save her from going to pieces she was scuttled.

*Held*, That the storm rather than the stranding was the cause of loss; that the negligent stranding did not operate to suspend the policy as to the subsequent disaster, which made a proper case for general average. *Northwest Transp. Co. vs. Boston Marine Ins. Co.*, 239.

GIN HOUSE. See RISK 2.

HEALTH. See DISEASE; SICKNESS.

#### HEIR.

##### IN CASE OF WIDOW.

A technical word when used in a legal instrument where there is no context to explain it should be understood in its legal and technical sense.

"Heirs" are those who would under the statute of distribution be entitled to the personal estate of the decedent. Under the statutes of Arkansas the widow without issue is not an "heir," and the money goes to the brothers and sisters of the assured. *Johnson vs. Supreme Lodge of Knights of Honor et al.*, 434.

## HEIRS.

### LEGAL REPRESENTATIVES.

The words "legal representatives" in a life-insurance policy construed as meaning heirs or next of kin, and not executors or administrators. *Schultz et al. vs. Citizens' Mut. Life Ins. Co.*, 387.

See BENEVOLENT SOCIETY 6, 9; TITLE 13.

ICE HOUSE. See VACANT 3.

## INCENDIARISM.

### DISCLOSURE OF.

It is not the duty of an applicant to disclose a recent attempt to burn his property unless he is asked about it. *German-American Ins. Co. vs. Norris et al.*, 384.

INCENDIARY. See VACANT 5.

INCONTESTABLE. See CONSTRUCTION 1.

## INCUMBRANCE.

### 1. CONCEALMENT—CHANGE OF TITLE.

The policy provided that it should be void in case of concealment or misrepresentation, or if the interest be not truly stated.

*Held*, That failure to state incumbrance in the application filled out by the agent in the absence of any inquiries by him was not a violation.

A mortgage is not a change of interest, title or possession within the meaning of the policy. *Koshland vs. Hartford Fire Ins. Co.*, 945.

### 2. DEFECTIVE DESCRIPTION.

The insured building was described as situated on lot 2, block 3. There was evidence of an incumbrance on the west 77 feet of the east 90 feet of block 2, and all buildings thereon.

*Held*, That this was not evidence of the incumbrance of the insured building. *Greenlee vs. Iowa State Ins. Co.*, 1016.

### 3. FICTITIOUS MORTGAGE.

A fictitious mortgage made and recorded by a partner and always kept in his custody, there being no debt or obligation, no mortgage or delivery, is not such an incumbrance as violates the policy. *Fitchner et al. vs. Fidelity Mut. Fire Ass'n*, 326.

### 4. MORTGAGE NOT DELIVERED.

A mortgage drawn, but never delivered so as to become effectual, is not an incumbrance within the policy. *Clifton Coal Co. vs. Scottish Union & National Ins. Co.*, 1007.

### 5. OF PART OF PROPERTY—KNOWLEDGE OF AGENT.

The insured house stood on a forty-acre tract, and there were three other tracts, making in all one hundred acres. In the policy the house was described as situated on a one-hundred-acre tract of land. Insured mortgaged the house and its forty acres, and obtained written endorsement from the company consenting. He also separately mortgaged the other sixty acres and informed the local agent, who told him that it was only necessary to get consent for the forty acres on which the house stood. Two years thereafter the house burned. *Held*, Not such a lien or incumbrance as would void the policy. *Held*, That in this state (Illinois) the

decisions are uniform; that notice to the agent at the time of the application for insurance of facts material to the risk is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent, and that the company is estopped from asserting a forfeiture. The agent of the company, and therefore the company, knew of the second mortgage. *Phoenix Ins. Co. vs. Hart*, 391.

#### 6. REMOVAL OF MORTGAGE—SEPARABLE CONTRACT.

Where an insurance policy provides against future incumbrances, the policy may be avoided if a subsequent incumbrance is created, or if the incumbrances existing at the time of the application for the insurance are materially increased by a new or additional debt, but a mere subsequent renewal of a prior lien or mortgage, with accrued interest, is not an increase of such pre-existing indebtedness or the creation of a new or an additional incumbrance.

Where an insurance policy covers a dwelling-house and various classes of personal property, including household furniture, beds, books, etc., describing them separately, and specifies different and separate amounts on the dwelling and on the personal property,—as, \$1,900 on dwelling and \$600 on furniture, beds, books, etc.,—such contract is severable, and the execution of a mortgage on the real estate, in violation of a condition of the policy against subsequent incumbrances on the property insured in whole or in part, is no defense to an action for the loss of the personal property not incumbered. *Kansas Farmers' Fire Ins. Co. vs. Saindon*, 197, 198.

#### 7. SUBSTITUTION OF MORTGAGE.

The property was incumbered by mortgage with the knowledge of the company at the time of insuring. Subsequently, the mortgagee demanding payment, the mortgagor executed a new mortgage to other parties covering this and other property and with the proceeds discharged the prior mortgage.

*Held*, That this was not a violation of a policy provision against incumbrance. *Koshland vs. Home Mut. Ins. Co.*, 946.

#### 8. SUBSTITUTION OF, NOT INCREASE OF RISK.

A policy provision against increase of hazard is not violated by a mortgage given to discharge existing incumbrances known to the insurer.

A complaint may be amended by alleging insurable interest after motion for a nonsuit based on the absence of such allegation in Oregon. *Koshland vs. Fire Ass'n of Phila.*, 943.

See MORTGAGE.

### INDUSTRIAL POLICY.

#### INSURABLE INTEREST—RECOVERY BACK OF PREMIUMS.

Where a party applies for an industrial policy, but upon its execution changes her mind and refuses to receive it or pay any premiums on it, but the premiums were paid by another party having no interest, there is no completed contract of insurance.

But such third party, if induced to pay the premiums through mistake or misrepresentation, may recover them back on repudiating the policy, even though the company, through its acts, may be estopped to deny its validity. *Hogben vs. Metropolitan Life Ins. Co.*, 998.

INJUNCTION. See INSURANCE SUPERINTENDENT; MUTUAL COMPANY 1.

INSANITY. See SUICIDE 1, 2.

INSOLVENCY. See CREDIT INSURANCE 3; FOREIGN COMPANY.

#### INSURABLE INTEREST.

##### 1. OF SON IN MOTHER.

A complaint to recover on a policy issued to plaintiff on the life of his mother alleged that plaintiff was liable for the support of the assured



under the laws of Illinois, where they lived when the insurance was effected; that plaintiff supported and maintained the assured until her death; that under the same law the assured was liable for the maintenance of plaintiff; and that thereby plaintiff had a valuable pecuniary interest in her life. The statute of Illinois, a copy of which was filed with the complaint, gives no right of action by the son against the mother, or vice versa, for nonsupport, but creates a legal liability in behalf of the town or county. The exhibits filed with the complaint showed that the assured was 76 years old when the policy was issued, and there was nothing to show that plaintiff expected any benefit from her in the way of service or maintenance. *Held*, That the complaint failed to show that plaintiff had an insurable interest in the life of the assured. *People's Mut. Ben. Society vs. Templeton*, 484.

## 2. WAGER POLICY.

The statutes of Michigan forbid insurance on the life of any person more than sixty-five years old, or in favor of any one not having an insurable interest. They also provide that the person insured must have signed the application for the insurance. The Old People's Mutual Benefit Society, of Elkhart, Ind., doing business in Michigan, issued a certificate there on a woman seventy years old, to a beneficiary having no insurable interest, and the insured did not sign the application. The society paid the money to the beneficiary illegally named, but it was held that as the contract was one which could not be enforced between the parties in courts of justice, and one of the parties to the illegal contract had seen fit to pay over to the other, the wager does not afford a basis in equity for outside parties to lay claim to the reward of iniquity. The contract was merely a wager upon the life of the assured which could not be enforced either at law or in equity, and the heirs cannot recover. *Smith et al. vs. Pinch et al.*, 353.

## 3. WHAT IS NOT.

Insurance effected by parents for the benefit of their children on the life of one in whom neither has any insurable interest is a wager and void. *Whitmore et al. vs. Supreme Lodge Knights & Ladies of Honor*, 514.

See ASSIGNMENT 1; BENEVOLENT SOCIETY 1; CREDITOR; INCUMBRANCE 8; INDUSTRIAL POLICY; LIBEL; PARTNERS; TITLE 8.

## INSURANCE SUPERINTENDENT.

### INJUNCTION AGAINST REVOCATION OF AUTHORITY TO DO BUSINESS.

A Federal Court may interpose by injunction to prevent the illegal or wrongful administration of a state law by an officer of such state where the aggrieved party is a citizen of another state.

The Insurance Superintendent of Kansas notified a company of another state, duly authorized, that certain death claims must be settled if it desired to remain. The company replied that it should contest them in the courts, and the superintendent thereupon revoked its authority, assigning its refusal as the cause.

*Held*, That the superintendent had no power under the laws of Kansas to arbitrarily revoke its authority for such a cause, and may properly be enjoined from so doing. *Metropolitan Life Ins. Co. vs. Webb McNall*, 641.

## INTEREST. See ARBITRATION 3.

## INTOXICANTS. See APPLICATION 9.

## INVENTORY.

### WHAT IS.

An invoice of goods purchased is not an inventory of stock to be produced under the "iron-safe clause" of a fire policy. *Home Ins. Co., of New York, vs. Delta Bank*, 233.

See IRON SAFE 1.

## IRON SAFE.

## 1. COMPLIANCE WITH CLAUSE.

A new inventory made simultaneously with the insurance and a new set of books transcribing the accounts from the old and duly kept thereafter; these kept in an iron safe, and produced after the fire, are compliance with the iron-safe clause notwithstanding the old books were outside the safe and were burned. *Liverpool & London & Globe Ins. Co. vs. Sheffy*, 349.

## 2. WHEN NOT MATERIAL.

The policy stipulated that the books should be kept in a fireproof safe or other secure place.

*Held*, That being without consideration, and not affecting the risk, its violation would not work a forfeiture. *Phoenix Ins. Co. vs. Angel et al.*, 722.

See INVENTORY.

JURISDICTION. See FOREIGN COMPANY.

KEEPING. See RISK 4, 5.

KEROSENE. See PROOFS OF LOSS 14; RISK 5.

## LETTER.

## EVIDENCE AS TO.

When a letter properly addressed is mailed, the presumption that it is received is not overcome by the testimony of the party that he did not remember receiving it. *East Texas Fire Ins. Co. vs. Perkey*, 53.

LETTERS. See BENEVOLENT SOCIETY 13.

## LEX LOCI.

## 1. OF CONTRACT.

A St. Louis, Mo., broker requested a St. Paul, Minn., agent to insure property located in Minnesota, for a Missouri owner, a customer of said broker. The St. Paul agent applied to one of his companies located in Hartford, Conn. The company accepted the risk, and the president signed a policy ("not valid until countersigned by the agent of the company at St. Paul,") and sent it to his St. Paul agent who countersigned it and sent it to the St. Louis broker, who delivered it to his customer, the Missouri owner of the Minnesota property. The policy was the regular "Minnesota Standard Policy" and was so stamped on the folded document in large plain type. It was held for over two years without objection when the loss occurred.

Preliminary discussion over an adjustment being unsuccessful, an arbitration was agreed to, contrary to the laws of Missouri, but after the arbitrators had entered upon the discharge of their duties, the plaintiff, fearing that their finding would be less than he claimed, protested that he made claim under the Missouri statute, and contended that the policy was a Missouri contract, and subject to the operation of the valued-policy laws of that state because he lived there, and the completion of the transaction was only reached when the policy was delivered to him. This was the contention before the court. As stated in the first paragraph below a verdict for plaintiff was entered, and the case considered on its merits on a motion for new trial.

*Held*, When this policy was issued by the defendant, countersigned by its only recognized agent at St. Paul, insuring a house situated in Minnesota, and when it was accepted by the plaintiff there was no fact or circumstance to give color to a supposition that the company was making a contract subject to the local insurance laws of the state of Missouri; nor did the plaintiff believe so for two years thereafter, and until after the time elected to submit the matter to arbitration.

Therefore, to hold the defendant amenable to the greater liability imposed by the Missouri statute would, in my judgment, be little less than a fraud on

the defendant. Motion for new trial sustained. *Chas. Gibson, Plaintiff, vs. Connecticut Fire Ins. Co., Defendant*, 86, 87.

2. OF CONTRACT.

The facts in this case are substantially the same as those in the one which precedes it (which see), except that the agent of the Connecticut company in St. Paul was at the same time the secretary of this defendant company, and obtained from his Connecticut agency company \$2,500 and issued in his own Minnesota company \$2,500 on the Minnesota property and sent (both policies together) to his St. Louis agent (who was the broker in the other case) who countersigned this policy, and then delivered them both to plaintiff. This policy as well as the other was held for two years without objection and like the other was plainly stamped "Minnesota Standard Policy."

A further and special difference relied on in order to make this policy a Missouri contract, and subject to the valued-policy laws of that state, is the fact that it was countersigned by a Missouri agent, and so became a Missouri contract notwithstanding it was written in Minnesota and applied to property located in Minnesota, and not in Missouri.

It is held that this contract by its "four corners," taken in connection with the locus of the company and situs of the property, clearly evince that the defendant intended to issue a Minnesota policy, while the plaintiff by accepting it, and holding it two years, and then by recognizing the right of arbitration, placed the same interpretation upon it and should be estopped from now contending that it is a Missouri contract.

Motion for new trial accordingly sustained. *Chas. Gibson, Plaintiff, vs. St. Paul Fire and Marine Ins. Co., Defendant*, 94, 95.

3. OF CONTRACT.

The insured requested by letter the policy from an agent living in another county, by whom it was issued.

*Held*, That the transaction took place in the county of the agent, within the meaning of a statute requiring suit to be brought where the transaction took place. *Sun Mutual Ins. Co. vs. Crist*, 695.

4. OF CONTRACT—KNOWLEDGE OF AGENT—WAIVER BY ADJUSTER.

A policy written in Massachusetts by a company resident there and sent to its agent in New Hampshire becomes a New Hampshire contract upon delivery to the insured, and the rights of parties under it are to be determined by New Hampshire laws.

Insured's agreement that his statements in the application shall be promissory warranties is invalid under the New Hampshire statute.

The company's policy provision that it shall not be bound by any act done or statement made by or to any agent or other person, which is not contained in the application, is also invalid; it has no legal effect in New Hampshire.

A company is chargeable with its agent's knowledge of facts the same as if the facts were stated in the application.

The statements or conduct of an adjuster for an insurance company may operate as a waiver of the making of formal proof of loss within the time fixed in the policy, though contrary to the terms of the policy.

An action on an insurance policy is properly brought in the name of the insured property owner, though the policy is assigned to a mortgagee to the extent of her interest. *Perry vs. Dwelling-House Ins. Co.*, 120.

5. OF CONTRACT—NOTICE OF PREMIUMS.

A policy applied for in New York and delivered there, and the premiums paid there, is a New York contract notwithstanding it is issued and signed in another state by a company resident in another state. Such a policy is dominated by New York statute law, and although forfeited by its own terms, is not forfeited until the New York law is complied with. Notice as under such law must have been mailed to the insured by the New York agent of the company. Omission of such notice leaves the policy intact

for thirty days notwithstanding the premium has not been paid. *Hicks et al. vs. National Life Ins. Co.*, 134.

See ASSIGNMENT 2.

### **LIBEL.**

#### **RIGHT OF ACTION—INSURABLE INTEREST—SEAWORTHINESS.**

Upon a marine insurance policy issued to "A. E., upon account of whom it may concern, in case of loss, to be paid to him or order," where the insurance was effected for the benefit of the libelant, the owner at the time, *held*, that the suit was rightly brought in the name of the libelant, who was the insured under the policy.

The libel should show insurable interest in a vessel at the time the policy purports to take effect.

It being settled in this circuit that seaworthiness is presumed, a libel on a marine policy need not allege seaworthiness. What need not be proved need not be averred. This rule promotes simplicity and certainty as to the real issue intended to be tried. The plea of unseaworthiness, if that issue is desired to be raised, comes more properly from the defense. *Earnshaw vs. California Ins. Co.*, 116.

### **LIMITATION.**

#### **WAIVER BY AGENT.**

Where a policy provides that no action shall be sustained unless commenced within six months after a loss shall occur, if the insured is reasonably induced by the conduct or statements of the company's agents to believe that the claim will be paid without suit, and therefore withheld bringing suit until after that period, the insurer will, in such case, be estopped from claiming the benefit of such clause in the policy. *Phoenix Ins. Co., of Brooklyn, vs. Rad Bila Hora C. S. P. S.*, 190, 191.

See ACCIDENT 14; MORTGAGE 3.

**LUMBER.** See RISK 1.

**MACHINERY.** See MORTGAGE 2; RISK 3.

**MAGISTRATE.** See PROOFS OF LOSS, 7.

**MAIL.** See CONTRACT 4.

**MEASURE OF DAMAGE.** See BUILDING; MORTGAGE 1.

**MEASURE OF RECOVERY.** See BENEVOLENT SOCIETY 11; WAREHOUSEMAN.

**MECHANICS' LIEN.** See TITLE 11.

**MEDICAL EXAMINER.** See APPLICATION 1, 8.

**MISTAKE.** See REFORMATION 1, 2; TITLE 16.

### **MORTGAGE.**

#### **1. KNOWLEDGE OF AGENT—EVIDENCE OF CAUSE OF FIRE—WHAT PROPERTY COVERED—MEASURE OF DAMAGES.**

Where an insurance company defended an action on the ground that when the policy was issued there was, contrary to its provisions, a chattel mortgage on the property insured, evidence that plaintiff told defendant's agent to make the policy payable to the mortgagee as his claim might appear, as in a former policy, of which the one in suit was a renewal, was admissible to show that the agent had actual knowledge of the mortgage when he delivered the policy.

Evidence that the plaintiff told defendant's agent to go to the office of another company, in which plaintiff's goods were insured, and make the

policy correspond with the one there recorded, and that said agent examined the record of the existing policy, which recited: "Mortgage Clause. Loss, if any, payable to M.," renders the entry competent on the issue as to the agent's knowledge that the property insured was mortgaged to M., though such entry referred to a former mortgage which had been satisfied.

In an action on a policy of insurance, defendant's denial of an allegation that the fire was without fault or negligence on plaintiff's part does not raise an issue as to the cause of the fire, so as to admit of testimony concerning the amount of plaintiff's indebtedness at the time of the loss, for the purpose of proving that the fire was purposely set.

A policy on "carriages, \* \* \* and all such goods usually kept in a livery barn and sale stable," does not include goods held in trust or on commission.

Where a policy insuring "carriages, \* \* \* and all such goods usually kept in a livery barn and sale stable," prohibits other insurance without permission therefor indorsed on the policy, but permits "\$3,000 additional concurrent insurance," the fact that the insured procures policies in other companies to the authorized amount, which cover, not only the goods insured in the first company, but also "goods held in trust or on commission," does not render the subsequent policies nonconcurrent.

Where plaintiff claimed that he notified the agent who issued the policy that there was a mortgage on the property insured, and requested him to provide for it in the policy, but that the agent failed to do so, an instruction that the jury "should consider the fact that plaintiff retained said policy without having an indorsement thereon as to said mortgage, in determining whether he notified" the agent of its existence, was properly refused.

Where an insurance company refuses to pay on the basis of the amount of loss stated by the insured in his proofs, the latter is not concluded by such statement, but may recover on the basis of the actual value of the property destroyed. *Corkery vs. Security Fire Ins. Co.*, 331.

## 2. RESPONSIBILITY OF AGENT WHO FILLED THE APPLICATION.

The policy provided that any false answer in the application should render it void, and that no agent could alter or waive its terms. The applicant told the agent, in answer to the question whether the property was mortgaged, that it was mortgaged for \$1,000, but he was going to pay it off. The agent said it was then not material, and he filled in the answer as "No." The fire occurred about two months later, when all but \$300 of the mortgage had been paid.

*Held*, That where there was no evidence that the company would have declined the risk, or that any fraud was intended, the company was liable. *Phenix Ins. Co. vs. Warttemberg*, 552.

## 3. WAIVER OF CHATTEL BY AGENT'S SOLICITOR—CREDITORS AS PARTIES.

The policy provided that it should be wholly void if the subject is personal property and is incumbered by a chattel mortgage.

*Held*, That the provision was not waived by failure of the insurer to inquire regarding the interest. The Statute of South Dakota declaring that such information need not be disclosed except when inquired after does not relate to chattel mortgages.

An agent authorized to accept applications, receive premiums, fix rates, and to issue and renew and countersign policies when signed by the resident manager of a foreign company, is a general agent.

Such agent may employ a solicitor without the knowledge of his principal, whose waiver of a provision against incumbrance, when already existing, will be binding.

Where, before suit, the company had been served with notice of levy at the suit of judgment creditors for anything it might owe the insured and denied any indebtedness, the company cannot insist that such creditors were necessary parties to the suit against itself. *Harding vs. Norwich Union Fire Ins. Soc.*, 901.

See CONTRACT 3; INCUMBRANCE.

VOL. XXVI.—87.

## MORTGAGEE.

## 1. ACTION BY.

The policy, taken out by the mortgagor, was payable to mortgagee as interest might appear.

*Held*, That where the mortgage debt exceeded the amount of the policy and the value of the property, the mortgagee might sue in his own name alone. *Lowry et al. vs. Insurance Co. of North America*, 618.

## 2. EFFECT OF INSURANCE BY—MACHINERY AS FIXTURE.

Where a mortgagee is authorized under the mortgage to insure in case of failure by the mortgagor, and to charge the expense to the latter, such insurance by the mortgagee in the name of the mortgagor, with loss payable to the mortgagee, will be presumed to have been procured in accordance with the mortgage. The intention of the mortgagee to insure for her own benefit will not affect the case, where no notice was given to the mortgagor.

Where the policy included machinery not covered by the mortgage, the mortgagee had no interest in claims arising on account of such machinery.

Where machinery was put in a mill and a chattel mortgage given therefor, and was not so attached as to make the intention appear to be to make it a permanent part of the building, it will not be treated as a fixture. *Washington Nat. Bank, of Seattle, vs. Smith et al.*, 183.

## 3. LIMITATION—PROOFS OF LOSS.

Where an insurance policy contains the provision "that when a policy is issued upon the interest of a mortgagee the assured must first exhaust the primary security before he can recover the amount of insurance," and another clause, providing "no suit or action against this company upon this policy shall be sustainable in any court of law or equity unless commenced within six months after the loss or damage shall occur," such provisions being inconsistent, the ordinary statute of limitation would be applicable to such cases.

The mortgage clause sued on is an independent contract. The mortgagee was not bound to bring suit within six months limited by the conditions of the policy, because the provision requiring the primary security to be first exhausted is inconsistent with such limitation, and the six-months' limitation was not intended to apply. The mortgagee was not bound to make proof of loss. The policy imposed that duty upon the owner, and the mortgage clause freed the mortgagee from the consequences of the owner's neglect. *Dwelling-House Ins. Co. vs. Kansas Loan & Trust Co.*, 603.

## 4. RECOVERY BY.

The policy, payable to mortgagee as interest might appear, provided that no act of any other person should defeat his rights in case it was not liable to the mortgagor; but that when liable to the mortgagee the company might elect to pay the full amount of the mortgage and receive an assignment of the mortgage in case of a transfer of the property by the mortgagor in violation of the policy. Afterwards the mortgagee took additional mortgages on the property from the owner.

*Held*, That the mortgagee could only recover the amount of the original mortgage, and if demanded must be able to subrogate the company to the original mortgage, and, whereby a release of part of the mortgaged property this was impossible, there could be no recovery. *Attleborough Savings Bank vs. Security Ins. Co.*, 620.

See OTHER INSURANCE 3 ; TITLE 3, 4, 10.

MORTGAGEE CLAUSE. See PROOFS OF LOSS 5.

MOTHER. See INSURABLE INTEREST 1.

MURDER. See ACCIDENT 9.

MUTUAL COMPANY.

1. INJUNCTION AGAINST ASSESSMENT BY

Allegations that plaintiffs are members of a mutual company, holding policies specified, and are contributing to its funds, and interested in the funds so collected by the society, are sufficient to show that they are members entitled to bring action to restrain an unlawful assessment and payment of a claim. It is not necessary to specify all the steps taken to become members nor the amount of contributions.

Such members have a right to enjoin the society from assessing and paying a fraudulent claim, where the officers have refused their request to resist the payment and insist on recognizing the validity of the claim. *Martha A. Carmien et al. vs. Jacob B. Cornell et al.*, 648.

2. WHEN ILLEGAL—EFFECT ON CONTRACTS—EVIDENCE.

One who attempted to enter a mutual insurance association which had no legal existence at the time his policy was issued, and did so relying on mistaken misrepresentations of those who held themselves out as agents of the association, is not estopped from denying its corporate existence. To make a failure of the court to give a proper instruction available error, there must have been a request for it.

A charge that, "if the jury believe, from the evidence, that the defendants," etc., "then the defendants are liable," etc., is not within the constitutional inhibition against charging on the facts.

Parties who hold themselves out as agents of a mutual insurance association, which, in fact, has no legal existence, and enter into a contract of insurance, signed by themselves as agents, are personally liable for the performance of the contract, though they acted in good faith, and believed that their statements were true.

A corporation to whom such power has not been given in its charter, either in express terms or by necessary implication, cannot organize a subordinate corporation.

In an action on a policy of insurance, purporting to be a contract with an association named therein, the by-laws of an organization, to which no reference is made in the policy, are not pertinent to the issue. *Gary, J.*, dissenting.

A policy purporting to be issued by an association which had no legal existence could not render any of the parties agents of such non-existent corporation.

In an action on a written contract of insurance, evidence of what occurred before, at the time, or after, the policy was issued, is inadmissible to vary the contract. *Lagrone vs. Timmerman et al.*, 15.

See BENEVOLENT SOCIETY 18.

MUTUAL LIFE INSURANCE. See RAILROAD.

NEGLIGENCE.

IN CAUSING FIRE.

The fact that the owner of an insured building started a fire for the purpose of burning rubbish, which escaped, and consumed the building, does not constitute a defense to an action to recover the insurance, in the absence of any design to burn the building. *Des Moines Ice Co. vs. Niagara Fire Ins. Co.*, 378.

See PREMIUM 3; SALVAGE 2.

NON-FORFEITURE. See PREMIUM 7.

NOTICE. See ASSESSMENT 1; CONTRACT 2; LEX LOCI 5; PREMIUM 8; PROOFS OF LOSS 2.

OCCUPATION. See ACCIDENT 12.

## OTHER INSURANCE.

## 1. CONSENT BY AGENT.

An insurance company is an artificial creature acting through human agencies, and that which a general agent does, the company itself may be said to have done. Oral assent to additional insurance by a general agent is equivalent to written assent. *Liverpool & London & Globe Ins. Co. vs. Sheffy*, 349.

## 2. EVIDENCE OF PAROL AGREEMENT.

A provision in a policy of insurance that "this entire policy unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," is valid and enforceable when not waived or abrogated in any manner.

Where there is endorsed on a policy containing such a provision, written consent for the procurement of a stated amount of additional insurance, the procurement of insurance in excess of the amount authorized will void the policy.

Where such a policy of insurance is endorsed with permission for \$32,500 additional and concurrent insurance, and other insurance to the amount of \$35,800 is taken out, \$16,000 of which was procured after the date of the policy in controversy, and all in force at the time of the loss, it is incompetent for the purpose of avoiding the forfeiture of the policy to show a parol agreement between the agent of the insurance company and the insured made prior to the date of the policy that the assured should be permitted to carry policies to the amount of \$40,000, such evidence being solely for the purpose of varying the terms of the written contract, made in pursuance of the prior agreement. *Commercial Union Assurance Co. vs. O. F. and E. R. Norwood*, 177.

## 3. IN CASE OF MORTGAGEE—APPORTIONMENT.

Question presented is whether insurance effected by mortgagee is "other insurance" in the sense prohibited by prior policy taken out by owner of property.

*Held*, That the interest of mortgagee is distinct from that of mortgagor and is insurable.

That where mortgagee, of his own notion, takes out insurance in name of mortgagee or owner of property, without authorization of latter, and causes the loss, if any, to be made payable to him, mortgagee, it is in effect insurance by mortgagee of his interest for his account.

That such insurance is not "other insurance," which vitiates prior policy of mortgagor.

That to constitute "other insurance," avoiding previous policy, the additional insurance must be upon the same subject, risk and interest, effected by the same insured or for his benefit, or with his knowledge or consent; that neither identity of name nor identity of property is decisive upon the question. The interests covered by the policies must also be identical.

That the rule governing a provision for apportionment of the loss, where there is no other insurance, is that such apportionment only takes place where the insurance covers the same interest. *Clifton Cannon vs. Home Ins. Co.*, 737.

## 4. KNOWLEDGE OF AGENT.

Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy.

A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained.

A fire-insurance policy provided that it should be void if other insurance was subsequently obtained without the consent of the company. The insured



did thereafter procure other insurance on the same property without such consent or knowledge of the insurer of its existence.

*Held*, That there was a breach of the condition of the first policy, and a recovery can not be had thereon. *Home Fire Ins. Co. vs. Wood et al.*, 686.

#### 5. KNOWLEDGE OF AGENT—CONSENT TO.

An agent's daily report, containing among other things, an unfilled blank regarding other insurance, is not admissible to confirm his testimony that he had no knowledge of other insurance. At best, it was but a memorandum to refresh his memory.

Where the agent issued a policy on a personal inspection without a written application, an instruction that any misstatement regarding the risk or overvaluation by the insured would avoid the policy is error.

Where knowledge of other insurance by the agent was knowledge by the company that it waived written consent required by endorsement, and the jury were so instructed, it was error also to instruct that the policy provision prevented any waiver by the agent except by written endorsement.

The policy limited its liability to three-fourths of the value, or its pro rata share of such three-fourths, and also that the "total insurance permitted is hereby limited to three-fourths of the cash value of the property herein described, and to be concurrent herewith."

*Held*, That this was consent to concurrent insurance up to three-fourths of the value. *Strauss et al. vs. Phenix Ins. Co.*, 676.

#### 6. WITHOUT KNOWLEDGE OF INSURED—ARBITRATION.

After the loss the plaintiff sent proofs of loss to another company from which he claimed he had received a policy issued without his knowledge or consent, containing a statement to that effect.

*Held*, That the insured could not, after a loss, accept a policy so issued, and which he did not intend to accept at the time, and the question of whether such policy was other insurance was for the jury.

*Held*, That the fact that such other insurance would reduce the actual liability of the defendant did not make a dispute as to whether the policy was void because of other insurance a disagreement as to the amount of loss. *Nelson et al. vs. Atlanta Home Ins. Co.*, 913, 914.

#### 7. WRITTEN CONSENT.

The provision in a policy that written consent for other insurance must be obtained is good. Presumption is against waiver by company. Such provision is for the benefit of the insurer, to protect the company from the hazard of overinsurance, and the law will not presume that the company waived a provision intended for its protection. *Eliza M. Sisk vs. Citizens' Ins. Co.*, 369.

See APPLICATION 1; MORTGAGE 1; REFORMATION 1.

PAROL AGREEMENT. See OTHER INSURANCE 2.

PARTICULAR AVERAGE. See COLLISION.

PARTNER. See AGENT 3; REMOVAL 2.

#### PARTNERS.

##### TRANSFER OF TITLE BETWEEN—INSURABLE INTEREST IN INDIVIDUAL PROPERTY.

A policy of insurance upon partnership personalty, taken out by the partners in their firm name, is not vitiated by a contract between them, made while the policy was in force and before any loss was sustained, by which one of the partners agreed to sell his interest in the property insured to the other, reserving the title to such interest until the purchase money should be paid, the loss occurring before payment in full had been made, the stipulations in the policy bearing upon the subject being that the policy should be void if there be a mortgage, bill of sale, or other lien

upon the property insured, or any part of it, either prior or subsequent to the issuance of the policy, without the fact being indorsed thereon; or if any change takes place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree; or if the policy, before loss, be assigned without the consent of the company indorsed thereon; or if the insured is not the sole, absolute, and unconditional owner of the property insured.

A partnership has no insurable interest in household, ornamental, and kitchen furniture of one of the partners and his wife, or in their wearing apparel. A policy embracing these articles, as well as property of the firm, is void as to the former, though valid as to the latter. *Georgia Home Ins. Co. vs. Hall et al.*, 202.

PAYMENT. See PENALTY.

#### PENALTY.

FOR NON-PAYMENT OF LOSS.

The laws of the state in which an insurance company is chartered apply to its contracts made outside the state.

Rev. St., art. 2953, which provides a penalty for a failure on the part of insurance companies to pay a loss within the time specified in a policy, is not unconstitutional, as being special legislation. *Manhattan Life Ins. Co. vs. Fields*, 164.

PERIL OF THE SEAS. See GENERAL AVERAGE.

PHYSICIAN. See APPLICATION 3, 4; BENEVOLENT SOCIETY 8, 14; EVIDENCE, 4, 6.

PLEADING. See ARBITRATION 2, 3; PROOFS OF LOSS 10.

PLEDGE. See TITLE 19.

POISON. See ACCIDENT 4.

#### POLICY.

##### 1. EVIDENCE OF WHEN IT TAKES EFFECT.

Where, by reason of omission or ambiguity in a written policy of insurance, the time when such instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission.

The parties to a contract of insurance may stipulate that such contract will not become operative as an indemnity until payment in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer.

*Held*, From an examination of the evidence, that the receipt of payment by the defendant association, subsequent to the injury claimed for, applied to future indemnity only, and was not a waiver of payment in full, as a condition to the taking effect of the certificate or policy of insurance. *Modern Woodman Acc. Ass'n vs. Kline*, 724.

##### 2. VALID DELIVERY BY AGENT—EVIDENCE—WAIVER OF PREMIUM.

The agent testified that he had ordered the policy on his own responsibility and had simply handed it to the insured, telling him that if he would accept it to sign his name to it and send a check for the premiums, otherwise to return it. No premium was ever paid and the policy was found among the papers of the insured.

Proof that a wife previously objected to her husband taking a policy on his life was not evidence that he did not afterwards accept it.

Subsequent statements of the agent to other parties that he had insured the deceased was admissible to contradict the agent's evidence that the policy was never delivered to the insured as a binding contract.

*Held*, That the finding of the policy among the papers of insured was evidence for the jury as to a valid delivery.

The policy provided that it was issued in consideration of a written application therefor.

*Held*, That this provision was waived by its delivery with a provision stamped on it that it was based on the application for a previous policy.

The delivery of a policy on the promise of a future payment of premium is a waiver of premium payment in cash in the absence of a provision making such payment a condition precedent. *Jones vs. New York Life Ins. Co.*, 1009.

See APPLICATION 10.

## PRACTICE.

### MEMORANDA BY JURORS.

In a suit on a fire-insurance policy to recover the value of a large number of insured articles destroyed, the court permitted jurors during the trial to make memoranda of such articles, and the value placed thereon by the evidence. *Held*, That the court did not abuse its discretion. *Omaha Fire Ins. Co. vs. Crichton*, 791.

## PREMIUM.

### 1. ACTION TO RECOVER BACK.

The policy provided that it should not be in force until payment of premium, and that no agent could extend the time of payment.

*Held*, That where the agent accepted the insured's note for the premium, and delivered the policy, the policy was in force, and, where an action was brought to recover the premium by the insured on the ground of false representations, no such recovery could be had without the consent of the beneficiary, or the making of the latter a party to the action. *Jurgens vs. New York Life Ins. Co.*, 103.

### 2. PLACE OF PAYMENT.

Where an insurance company, for a long time, notifies the insured to pay the premiums at a certain Texas bank, a clause in the policy requiring all premiums to be paid at the company's office in New York City is waived.

A tender of a premium to the bank on the day before it fell due prevents a forfeiture of the policy, though the bank has made an assignment, and its business is being carried on by its assignee, if the company has not notified the insured to cease paying to the bank. *Manhattan Life Ins. Co. vs. Fields*, 164.

### 3. RECOVERY IN CASE OF NEGLIGENCE.

Plaintiff instructed defendant, a correspondent and a holder of an open marine policy, to insure \$50,000 on cotton in presses against fire, such cotton being also insured by plaintiff. Defendant procured policies which had clauses exempting the companies issuing them from loss if the property was covered by any marine policy. Defendant charged the premiums to plaintiff in open account and plaintiff sued to recover. *Held*, That defendant in procuring worthless policies was careless and negligent, and that he must bear the penalty and pay back the money. *London Assurance Corp. vs. Cowan*, 358.

### 4. RENEWAL AS WAIVER OF—ACCIDENT.

Where the company, in the usual course of business, transmitted the renewal receipt to the agent and charged him with the premium, and the agent delivered the receipt to the insured, this was a waiver of a provision in an accident policy that it should not take effect unless the premium was paid prior to an accident. *Fidelity & Casualty Co. vs. Willey et al.*, 897.

### 5. RENEWAL RECEIPT BY AGENT AS A WAIVER.

Where the usual course of dealing between the company and its general agent was for the former to charge the latter with renewal receipts forwarded for delivery, and this was done in this case, and the renewal was countersigned by the agent and delivered to the policyholder, the insurance will

remain in force according to the terms of the receipt, although the premium was unpaid through the sudden death of the insured. *Willey et al. vs. Fidelity & Casualty Co.*, 713.

#### 6. WAIVER BY AGENT.

- An express provision in an insurance policy, that the company shall not be liable thereon until the premium is actually paid, is waived by the unconditional delivery of the policy to the insured under an agreement that a credit shall be given for the premium.
- An agent who has power to countersign and deliver policies, and who is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, though he is expressly authorized to give such credit only for a shorter time.
- An insurance company cannot cancel a policy for failure of insured to fulfill certain conditions, without giving notice to the insured; and a notice sent by mail is ineffectual unless received.
- A tender of the full amount of the premium within the term of the credit allowed is a sufficient compliance with the condition of payment to sustain an action on the policy.
- A provision in the policy that "the use of general terms, or anything else less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver" of any condition, did not have the effect to render the waiver invalid, as not indorsed on the policy, since the agent had ostensible authority to waive the indorsement. *Farnum et al. vs. Phenix Ins. Co.*, 473, 474.

#### 7. WAIVER OF NON-FORFEITURE ACT.

- The policy provided that if the premium was not paid when due, it should cease except as provided in the Mass. Act of 1861, to which it was subject; also that no claim should exist unless notice and proofs of death were given within two years. The Mass. Act among other things required notice and proofs of death to be submitted within ninety days.
- Held*, that the limitation of the Act was waived by the policy, although the non-forfeiture provisions of the act in case of non-payment of premium remained in full force. *Ellis vs. Massachusetts Mut. Life Ins. Co.*, 97.

#### 8. WAIVER OF STATUTE AS TO NOTICE.

- Policy provisions do not avoid statutory requirements. A contract made within a state is the contract of that state, and notices sent to policyholders under such contracts must comply with the laws of such state. Such statutory provisions form a part of the contract of insurance and cannot be waived by the parties. A notice not in conformity with the statute is insufficient and does not bind the policyholder, who may pay a belated premium at any time within the life of the statutory notice. *Warner vs. National Life Ass'n, of Hartford*, 345.

See CANCELLATION 2; CONTRACT 2; CREDIT INSURANCE 1, 3; POLICY 2; REINSURANCE 1; RENEWAL 1.

#### PREMIUM NOTE.

##### 1. EFFECT OF NON-PAYMENT—WAIVER BY AGENT.

- The policy by its terms was suspended in case of nonpayment of note when due, but the note could be collected by suit. The insured when threatened by the agent with suit, claimed that his understanding was that the policy could be dropped. The agent told him he was liable on the note and he requested postponement until the next premium came due, saying he would then pay "if he had it to pay." The agent agreed to submit his request to the company, telling him, however, that he would have to carry his own risk. The loss occurred pending the company's decision.
- Held*, That the agreement of the insured to pay was only conditional upon his obligation to do so, which he doubted, and the suspension of liability on the policy was not waived.

*Held*, That a promise by the agent to suspend suit pending submission to the company did not waive suspension of liability on the policy, where sufficient time had not elapsed before the loss for the company to decide. *Home Ins. Co. vs. Karn*, 545.

## 2. RECOVERY BACK OF—POLICY NOT CONFORMING TO APPLICATION.

The plaintiff executed a note for the first premium payable to the agent, believing it was to the company, and the note was discounted by the agent, the agent agreeing that it should be returned if the application was not accepted. The policy proved to except death from small-pox and the plaintiff refused to accept it.

*Held*, That as the exception was not stipulated for, the plaintiff was not bound to accept the policy.

*Held*, That the agreement to return the note was the agreement of the company, which rendered it liable for the amount of the note. *Mutual Life Ins. Co. vs. Gorman*, 1014.

## 3. WAIVER BY AGENT.

The policy stipulated that if any note given for the premium was not paid when due it should become void and the insured should be liable on the note for the time that it had been in force. When a note became due the insured requested an extension from the local agent, but added that he would pay on notification of its refusal. The agent replied that he had no power but would write to the company and inform him of its decision. Nothing further was heard and the note remained unpaid.

*Held*, That silence on the part of the company was not a waiver of forfeiture and did not estop the company to set up such forfeiture. *East Texas Fire Ins. Co. vs. Perkey*, 53.

PREMIUMS. See CONSTRUCTION 2; INDUSTRIAL POLICY; LEX LOCI 5.

## PROOFS OF DEATH.

### 1. AS EVIDENCE OF ALCOHOLISM.

Admission by claimant in the papers presented to the company's agent that the assured died from alcoholism and extreme prostration was held to be conclusive against the claim; an express condition of the policy had been violated and the company was not liable. *Hanna vs. Connecticut Mut. Life Ins. Co.*, 312.

### 2. EVIDENCE OF SUICIDE.

The proofs of death contained, as required, a copy of the verdict of a coroner's jury that the deceased committed suicide, and also to the question in the proofs as to cause of death, the answer by the claimant was, "supposed to have suicided with a pistol."

*Held*, That, while this might be assumed to have put the burden of proving the contrary on the plaintiff, it was not a conclusive admission as to cause of death.

The insured was found dead in a spring from a pistol bullet behind the ear. He had gone to the spring shortly before with the pistol as was his habit to shoot squirrels that were digging and injuring the spring. There was evidence of a previous threat of suicide on account of stomach troubles and of other causes of worry; there was also evidence of accidental shooting from the position of the body.

*Held*, That a verdict for the plaintiff on the theory of accidental death will not be disturbed. *Cochran et al. vs. Mutual Life Ins. Co.*, 661.

### 3. SUFFICIENCY OF.

In an action on a life-insurance policy, where there is no conflict in the evidence as to the death of the insured, it is not error for the court, in charging the jury, to assume that the death has been proved. *Manhattan Life Ins. Co. vs. Fields*, 164.

See EVIDENCE 2.

## PROOFS OF LOSS.

## 1. ADJUSTMENT BY AGENT AS WAIVER OF.

The policy stipulated that no agent should have power to waive any of its provisions.

*Held*, That the stipulation applied only to conditions to be performed before a loss, not to such as were required for purposes of bringing suit after a loss.

*Held*, That the adjustment of a loss by an agent authorized to contract, and his notification to the insured to do nothing further until he heard from the company, was a waiver of a provision that proofs of loss must be furnished in thirty days. *Snyder vs. Dwelling House Ins. Co.*, 905, 906.

## 2. AND NOTICE—SUFFICIENCY OF.

Where a policy of insurance simply requires that notice of loss shall be given to the company at a specified office in writing, and that payment shall be made upon receipt of proper proof, and does not specify otherwise of what such notice and proof shall consist, if notice of the loss be sent in writing to the office specified, and the company makes no objection on account of the form of the notice, and makes no demand for other or further proof, such notice is a sufficient compliance with the terms of the policy.

This rule *held* to apply where oral notice was given to the local agent of the company, and he, at the request of the insured, communicated the fact of the loss, in writing, to the specified office of the company; it being *held* that, without regard to his authority as agent of the company, the facts proved constituted him the agent of the insured to give notice of loss.

A clause in a policy prohibiting agents from waiving any of its terms or conditions does not prevent the insured from showing that the company, through its proper agents, accepted acts of the insured as a sufficient compliance with the terms of the policy. *Phoenix Ins. Co., of Brooklyn, vs. Rad Bila Hora C. S. P. S.*, 190, 191.

## 3. BOOKS OF ACCOUNT—ARBITRATION.

Where on the trial a party objected to the admission of certain books of account on the ground that they were not properly authenticated under the statute, he cannot be heard to urge on appeal that the statute was inapplicable, and that they should have been authenticated according to the common-law rule.

In an action against an insurance company for the value of a stock of merchandise destroyed by fire, day books, ledgers, and other books of account, kept in the usual course of business, showing the amount and value of the goods, are competent evidence, when properly verified or authenticated.

The fact that some entries were made by the bookkeeper from temporary slips furnished by salesmen will not affect their character as original entries.

The fact that books of account contain some errors affects their credibility, but, in the absence of evidence that the books were fraudulently falsified, will not necessarily render them incompetent.

In an action to set aside an award, it is competent for one of the arbitrators (who refused to join in the award) to testify as to acts of partiality and misconduct on part of the other arbitrators. *Lerine et al. vs. Lancashire Ins. Co.*, 36, 37.

## 4. DEFECTIVE.

Where defects in proofs of loss could not be prevented, they are not a bar to recovery. *Sun Mutual Ins. Co. vs. Crist*, 695.

## 5. IN CASE OF STANDARD MORTGAGEE CLAUSE.

The so-called "New York Standard Mortgagee Clause" in a policy of fire-insurance, which declares, in substance, that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with making the proof of loss stipulated for in the policy, and within the time stipulated. If the mortgagee would not have the right in all cases to furnish the proof, he certainly would have it in a

case in which the mortgagor refused; but in every case, unless waived by the underwriter, it must be furnished by one or the other. *Southern Home Building & Loan Ass'n vs. Home Ins. Co.*, 524.

#### 6. LOSS OF BOOKS—SUFFICIENT COMPLIANCE.

The insured is obligated to show with reasonable exactness the possession of the property insured, and the amount of loss; but, when the principal books have been burned, evidence of the stock on hand when inventory was taken, and of his subsequent purchases and sales, and the average profits from auxiliary books, is admissible.

The policy required a copy of the schedules and descriptions of other policies insuring the property.

*Held*, That a list of the companies and their policies, giving number, amount, date of expiration, and copy of written portion was sufficient compliance. *Scottish Union & National Ins. Co. vs. Keene*, 963.

#### 7. NEAREST MAGISTRATE.

There being no law to compel "the nearest magistrate" to give the certificate required by the policy, the provision in regard to it need not be enforced. *German-American Ins. Co. vs. Norris et al.*, 384.

#### 8. OBJECTIONS TO SUFFICIENCY.

Proofs of loss were sent to the company, minus the certificate of the nearest notary public required by the policy and a builder's estimate also required, and the company sent them back as not showing whether the conditions of the policy had been violated, and as furnishing no proof as to the value of the house except the owner's statement, and as not complying with the terms and conditions of the policy. They were returned to the company with the certificate, as notary public, of one of the plaintiff's attorneys, and a request to specify what other defects, if any, there were, when the company sent them back as "declined and objected to." *Held*, Not such an irregularity in the proofs as to make them fatally defective. The company must specify what it wants supplied and not use language calculated to mislead and confuse. *Held*, That the objections to the notary as not being the "nearest" came too late and should have been specified at the time the proofs were returned. The proofs, as made, were a sufficient compliance with the policy. *Schmurr vs. State Ins. Co.*, 373.

#### 9. OBJECTIONS TO SUFFICIENCY.

The insurer should, within a reasonable delay, give notice of the insufficiency of proof, so as to afford a chance for correction, and this principle applies as well to indemnity insurance companies as any other kind.

Under a claim for indemnity insurance the indemnified must, by satisfactory evidence, establish his loss within the terms of the policy.

No printed clause in a policy can destroy the effect of the date of the policy as written therein. *Imperial Mfg. Co. vs. American Credit Indemnity Co.*, 626.

#### 10. PLEADING—WAIVER BY ADJUSTER—BOOKS OF ACCOUNT.

One of numerous conditions in the policy of insurance declared upon being that the assured was to furnish the company with proofs of loss, and the plaintiff's petition alleging in general terms that he "has complied with all the conditions precedent to a recovery, the petition, on being amended by setting out that the proofs furnished were not satisfactory, and were returned as objectionable and insufficient, that the company's adjuster absolutely refused to pay the loss, saying that it would have to be adjusted in the courts, and alleging that this refusal constituted a waiver by the company to insist upon or require the plaintiff to furnish the preliminary proofs of loss required by the policy, and consequently he did not furnish them," is consistent with itself, and contains no duplicity, inasmuch as the amendment qualified and virtually canceled pro tanto the general allegation of compliance with all conditions.

The legal evidence of agency for the company by the person who was called and recognized as an adjuster, and who, as such, examined somewhat into the loss, being wholly uncontradicted and unanswered, was

sufficient; and the absolute refusal of that person to pay, at the same time referring the assured to the courts for redress, was, *prima facie* and unexplained, a waiver on the part of the company of the preliminary proofs of loss. And although some illegal evidence was admitted and some error committed by the court in charging the jury, both as to agency and waiver, the verdict, save as to damages and attorney's fees, was obviously correct, and for this reason no new trial is awarded.

One of the stipulations in the policy being that the assured should "keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit," it was not indispensable that the set of books kept should embrace what is usually termed a "cash book," or that the books should be kept on any particular system or in a manner to render it easy, rather than slow or difficult, to ascertain the amount of purchases and sales, and distinguish cash transactions from those on credit. It was enough that these matters would be ascertainable from the books with the assistance of those who kept them or who understood the system on which they were kept. But the obscurity or complication of the books, and the probability of their not being understood by reason of not being kept on some clear and regular system, would furnish good cause for unwillingness on the part of the company to pay in full when the statement from the books furnished to the adjuster appeared to him to show a much less loss than that claimed; and in such case bad faith in refusing to pay the whole should be treated as negatived by an offer to pay a sum approximating the whole, but falling short thereof about 20 per cent. *Liverpool & London & Globe Ins. Co. vs. Ellington*, 492, 493.

#### 11. WAIVER OF.

Preliminary proof of loss will be treated as waived by an insurance company where its conduct was such as to induce delay, or to render the production of proof useless or unavailing, or as to induce in the mind of the insured a belief that no proofs would be required.

In this case the insured, immediately after the fire, applied to the local agent for blank forms of proof of loss, and was told by the agent that he had no blank forms, but would apply at the home office. The insured becoming restless at the delay in delivering to him the forms of proof, the local agent went to the home office and was there told that some one would be sent down to see about the matter or settle it, which was communicated to the insured. *Held*, That the preliminary proof of loss was waived by the company. *Kenton Ins. Co. vs. Wigginton*, 111, 112.

#### 12. WAIVER OF.

Proof of loss may be waived by parol. Where all the invoices called for and which could be procured were furnished, there is no reason why other methods of proving loss should not be received. *Citizens' Ins. Co. vs. Bland*, 615.

#### 13. WAIVER OF—ARBITRATION—EVIDENCE—FRAUD.

Plaintiff's evidence on the trial, and his examination before a notary, taken after a loss, pursuant to the terms of the insurance policy, related to the same matters, and most of the statements made on the one occasion are mere repetitions of those made on the other, but there were several material contradictions and discrepancies. Defendant offered in evidence the whole written examination, which was very long, and, when the offer was refused, proceeded to offer separately each question and answer, which was refused. *Held* no error; it was the duty of counsel to pick out and offer only those portions which contradicted in some degree the evidence so given on the trial.

Expert evidence as to whether a certain quantity of goods in a certain room could have burned up without destroying the floor, *held* incompetent.

A provision in an insurance policy, providing for submitting the amount of loss to arbitration, is valid: but *held*, the insurer waived this provision by denying its liability, and telling the insured, in substance, that if he got any insurance money he would have to recover it in court.



The policy provided that it should be void if the insured misrepresented material facts, or was guilty of fraud. *Held*, the court properly refused defendant's request to charge, in effect, that the slightest possible exaggeration of the amount or value of the property destroyed, made knowingly and willfully in the proofs of loss, avoided the policy.

The policy provided that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after loss. *Held*, such willful false swearing as to a material matter, on such examination of the insured after the loss, forfeited the whole sum due, and not merely the amount due on the particular item of damage, or for the loss of the particular article to which the false statement related. *Hamberg vs. St. Paul F. & M. Ins. Co.*, 782.

#### 14. WAIVER OF DEFECTS—USE OF KEROSENE.

The statute of South Dakota provides that all defects in proofs of loss which the insured might remedy and which the insurer fails to specify to him without unnecessary delay, are waived.

*Held*, That a delay of eighteen days after their receipt and five days after they were due when unexplained is a waiver of the defects of proofs of loss.

The fire resulted from carelessly pouring kerosene oil into a stove to start a fire already lighted. The company wrote that under such circumstances, if true, the company denied all liability.

*Held*, That this was a waiver of further proofs of loss.

*Held*. That such careless use of kerosene in a single instance was not a violation of a provision voiding the policy if the hazard were increased without knowledge of the insured. *Angier et al. vs. Western Ass'n Co.*, 795, 796.

See CONTRACT 4; EVIDENCE 4; INVENTORY; MORTGAGE 3; TITLE 7, 15.

### RAILROAD.

#### MUTUAL LIFE INSURANCE BY, CONSTRUED—MEMBERSHIPS—WAIVER OF RULES.

A relief department in the nature of a mutual insurance association was maintained in connection with a railroad company. The members of the relief department were employees of the railroad company. By their contract of membership they authorized the company to withhold from their wages certain sums to provide a fund for the payment of benefits in the case of sickness or death of members. The railroad company contracted to make up any deficiencies in the fund so provided. It also furnished the clerks and other employees for conducting the affairs of the department. The department was under the general management of a superintendent, and subject to the supervisory control of an advisory committee. The by-laws of the department required an employee who desired to become a member to make application in a prescribed manner, and submit himself to a physical examination. His application was then subject to the approval of the superintendent. W. was an employee of the railroad. July 21st he expressed to a soliciting agent of the department his desire to become a member. The agent gave written notice of W.'s application to the superintendent of the department, the paymaster of the road, and W.'s superior officer in the employ of the road. This notice specified July 21st as the day when the application was to take effect. July 22d W. was taken sick. No application was made in the form prescribed by the by-laws, and no physical examination was had. No demand was made upon W. either for such application or for such examination. W.'s name was placed upon the roll of members of the department, and from the July pay roll there was deducted by the company, for the benefit of the department, the assessment due from W. on the basis of membership from July 21st to September 1st. On August 7th, the officers of the department were notified of W.'s disability. September 19th, the superintendent wrote to W.'s superior officer, stating that W. was not a member of the department; that his contribution should be refunded by time check, and that the notice of disability should be canceled. September 20th, an instrument called a "time check" was tendered to W., and by him refused. A few hours thereafter W. died. *Held*:

That the department, by causing to be deducted from W.'s pay assessments on the basis of membership, with knowledge of the fact that no formal application had been made, and no examination had, was estopped from disputing W.'s membership.

That the fact that the relief department was a mutual insurance company did not relieve it from the operation of the rules of equitable estoppel.

That all of the transactions being with the knowledge of the superintendent of the department, there was no question of the authority of subordinate employees to waive requirements, their acts being in such case the acts of the department.

That the department was not relieved from reliability because of a rule which provided that where an employee had made a proper application, and passed a physical examination, the department should only be liable during a delay in the approval of his application for injuries or death caused by accident. The department, under the facts stated, was estopped, not only from denying that there had been an application, and examination, but from denying that the application had been approved.

The tender of the time check before W.'s death did not release the department from liability—First, because it was not a legal tender; and, secondly, because liabilities had already accrued against the department from which it could not discharge itself by refunding the assessment.

A rule of the department, providing that all questions or controversies arising between any parties or persons in connection with the relief department or operation thereof, whether as to the construction of language or the meaning of regulations or as to any right, decision, or act in connection therewith, should be submitted to the determination of the superintendent, whose decision should be final, subject, however, to an appeal to the advisory committee, did not prevent the maintaining of this action, for the reasons: First, that in disclaiming W.'s membership before his death the superintendent was not acting judicially after a hearing of a controversy upon the subject, but was acting in an administrative capacity on behalf of the department alone; and, secondly, that this was not a controversy with the department as to transactions between it and a member, but was an action by the widow, after W.'s membership had ceased, to enforce a liability accruing to her. *Association vs. Loomis*, 43 Ill., App. 599, followed.

No beneficiary having been designated by W., the rules of the department construed, and held to constitute W.'s widow his beneficiary. *Burlington Voluntary Relief Department of Chi., B. & Q. R. R. Co. vs. White*, 224, 225.

See ACCIDENT 11, 13.

RATE. See TRUST.

## REFORMATION.

### 1. MUTUAL MISTAKE—REASONABLE CARE—KNOWLEDGE OF AGENT.

The policy was for \$1,000 on building and \$1,000 on merchandise. In the application there was written, "\$12,000 total concurrent insurance permitted," when it was really the understanding between the insured and the agent that the limitation was to be on the merchandise only. Held, That it was a mutual mistake and the policy must be reformed by making it read "\$12,000 total concurrent insurance permitted on the merchandise."

The insured did not read the application at the time he signed it, nor his policy afterward which contained a copy of the application, and by which the mistake might have been discovered, but held it without complaint for fourteen months. Held, Not such a want of reasonable care as will defeat the right of reformation.

The knowledge of a soliciting agent who is not empowered to issue policies is the knowledge of the company, which must be bound by his mistakes. *Fitchner et al. vs. Fidelity Mut. Fire Ass'n*, 326.

2. WHAT WILL JUSTIFY.

To justify the reformation of a written contract for mistake, the mistake must be mutual, and be established by clear, convincing, and satisfactory evidence. *Home Fire Ins. Co. vs. Wood et al.*, 686.

See TITLE 16.

REINSURANCE.

1. CONTRACT CONSTRUED.

Under a contract between the National and Home Life Companies the former agreed to transfer, or cause to be transferred, its membership to the latter, according to the best of its ability, and the latter agreed to reinsure the members on execution of "satisfactory transfer applications," on the basis of the original applications at the same rates and amounts, payable at the same times as the original. The contract was made under a statute defining the equal right of all members to be transferred by such a contract when approved.

*Held*, That the Home Company cannot refuse to reinsure an applicant on the ground that his application for transfer is not satisfactory on account of age and physical condition. It is bound to insure all the members who may so elect. A refusal to accept the premium of such member waives a subsequent tender of premium. *National Mut. Ins. Co. vs. Home Ben. Soc.*, 917.

2. LIABILITY OF REINSURER.

Reinsurance is ordinarily of such portion of the amount the insurer deems proper to insure.

When the original insurer does not insure for the full amount of the risk in the event of total loss he pays that part, but when the loss is not total his claim on the reinsurer is for all the reinsurance.

The reinsurer must pay the entire sum reinsured up to the amount of his reinsurance, and has no concern with any arrangement between the first insurer and his creditors.

Certificates of reinsurance must stand as expressing the obligations of the parties against statements and expressions of agents and other officers of the insurance companies. *James A. Chalaron vs. Ins. Co. of North America*, 465.

REMOVAL.

1. AUTHORITY OF AGENT.

The consent of a fire-insurance company, given, whether in writing or in parol, by its duly-authorized agent, and acted upon by the insured, that the goods insured might be removed into another building without vitiating the policy, is, if sufficiently proved, binding upon the company, notwithstanding stipulations in the policy that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The evidence that the agent was duly authorized would, however, have to be such as to show that he had express authority in the given instance to represent the company in giving its consent otherwise than in the manner provided for in the policy, or that an implied authority so to do might rightly be inferred from some previous course of dealing in like cases by the agent with the company's knowledge and assent, manifest by ratification or otherwise. *Western Assur. Co. vs. Williams*, 338.

## 2. IN CASE OF PARTNERS.

Anticipating a dissolution of partnership, the two members of a firm made a division of the insured goods, and one-half was removed to a building across the street, the other half which was burned being in the sole custody of one of the partners, the partnership not yet having been dissolved. *Held*, Not essential, neither the rate nor hazard being increased. *Runkle et al. vs. Hartford Ins. Co.*, 320.

## 3. WAIVER OF ENDORSEMENT BY AGENT.

The property was removed from the building where it was destroyed. The agents were requested to transfer the policy so as to cover in the new location. The agents said they were willing to make the transfer of the policy, and the assured was told to bring the policy to the office, and they would make the indorsement thereon, consenting to the transfer. The assured failed to bring the policy; the agents went after it, but assured's agent said he was busy, and asked them to call again. They did so, but again failed to obtain the policy and the transfer was not indorsed. *Held*, That where an agent makes an agreement to change the terms and conditions of the policy, but only in conformity with its requirements, the company could not be bound as by any other waiver of the condition. That inasmuch as the agents made no agreement to consent to a transfer of the policy, except on performance of the conditions of the policy, to wit, by an indorsement thereon, the failure to show such an indorsement would bar the plaintiff's recovery because there was no waiver of the condition which the policy contained, requiring an indorsement to be made. *Connecticut Fire Ins. Co. vs. Mrs. E. H. Smith*, 929.

See VALUE.

## RENEWAL.

## 1. WAIVER OF PREMIUM BY AGENT.

A policy expired Nov. 1, 1887. The agents wrote plaintiff that it would be renewed unless they received notice to the contrary. No notice pro or con was received. A new policy was issued and sent to the agents who were accustomed to give plaintiff thirty days credit on premiums. In this case he was given until Nov. 10th. The property burned Nov. 26th, and on the 28th, the agents received plaintiff's check for the amount of premium. *Held*, That the authority of the agents to waive the policy condition in regard to payment of premium was conceded by the evidence, and that the state of the facts constituted an agreement for insurance, and the company was liable. *Long vs. Nor. Brit. & Mercantile Ins. Co.*, 356.

## 2. WHAT IS NOT.

It was claimed that the insurance was a renewal of a previous policy under an application for two years, for a different amount and period, in another company.

*Held*, That such claim could not be allowed, nor the application admitted as evidence. *Sun Mutual Ins. Co. vs. Crist*, 695.

See BROKER ; CREDIT INSURANCE 1 ; PREMIUM 4, 5.

REPAIRS. See RISK 6.

## REPRESENTATION.

## 1. AS TO PARTY INSURED.

The policy was procured by one T. on personal property belonging to L. The agent asked T. whose name to place it in and he replied in the name of L. The agent did not know that the name of T. was not L. L. was an infant in business and had engaged T. to procure the insurance. The company alleged misrepresentation and its rule not to insure infants.

*Held*, That the consent of the agent to issue the policy in the name of L. made a binding contract for such insurance.

*Held*, That under the statute of Wisconsin, failure to attach a copy of the application or the representations of the insurer to the policy precludes the company from setting up such application or representations.

A policy will not be avoided for the concealment of a material fact in the absence of any written application or question calling for the statement of such fact, unless such concealment was intentional.

*Held*, That instructions to the agent not to insure minors if unknown to the applicant would not affect the insurance. *Johnson vs. Scottish Union & National Ins. Co.*, 59.

## 2. WHEN NOT MATERIAL.

Where it did not appear that any inquiries had been made regarding stipulations in fine print on the policy, their violation does not render it void unless they are material, where the statute provides that all statements shall be regarded as representations, and shall not work a forfeiture if false unless material. *Sun Mutual Ins. Co. vs. Crist*, 695.

See APPLICATION 5; FLOOD; INCUMBRANCE 1; TITLE 12.

## REPRESENTATIONS.

### 1. AS TO MEMBERSHIP IN BENEVOLENT SOCIETY—KNOWLEDGE OF AGENT.

Where one residing in Atlanta, Ga., who was already a member of a beneficial society, having its headquarters and principal office in Baltimore, Md., and who was the holder of a certificate of membership which embodied and embraced a policy of insurance by the society upon his life, made at different times two written applications for membership in the same society, and in each of them made several material representations, among them that he was not a member of that society, and thus obtained on each application a separate certificate of membership and policy of insurance upon his life, which declared upon its face that, if the representations upon which the certificate was granted were not true, the certificate should be void, both these certificates should, after the death of the member, be treated as void, and of no effect, unless the company had notice at some time before receiving the last dues upon some one of the three certificates that the same identical person was a member when he applied for and procured one or both of the additional certificates, and the cumulative insurance which they provided for.

Notice to the society's local agents at Atlanta, who received the applications and collected the dues on all three of the certificates of membership, but who, so far as appears, had no power to represent the company in making contracts or in waiving conditions expressed therein, the applications having, separately and at different times, been forwarded to Baltimore for acceptance, and the certificates of membership having there, separately and at different times, been issued by the society's general officers, would not be notice to the society of the falsehood of the representation as to nonmembership contained in the applications, unless it appeared that no such representation was actually made to the agent who received and filled out the applications, but that he inserted the false statement without authority from the applicant, and without his knowledge.

Where two writings are in evidence, their construction being for the court, it is no invasion of the province of the jury for the presiding judge to announce that the writings are or are not necessarily inconsistent in substance and meaning as to a particular element, such as the representations they respectively make touching a person's age. *Home Friendly Society vs. Berry*, 341.

### 2. EFFECT OF FALSE.

Misrepresentations as to age, physical condition, or family history, in procuring a certificate, void the contract. *Whitmore et al. vs. Supreme Lodge Knights and Ladies of Honor*, 514.

### 3. WRITTEN BY AGENT IN APPLICATION.

The insured was unable to read and write, and the representations made by him to obtain the insurance were reduced to writing by the agent of the

insurance company. *Held*: (1) Whether the insured made the representations written in the policy was a question of fact for the jury; (2) That the insured was not bound by any representation written in the application which he did not make.

Evidence examined and *held* to sustain the finding of the jury (1) that the insured did not represent that his household goods were, at the date of his application for insurance, in the building mentioned in said application; (2) That there was no representation in the written application that said goods were at said time in said building. *Omaha Fire Ins. Co. vs. Crighton*, 791.

#### RISK.

##### 1. CLEARED SPACE CLAUSE—KNOWLEDGE OF AGENT—AGREEMENT OF AGENT FOR INCREASED RATE.

The policy of insurance was issued upon lumber, lath and shingles, and contained a warranty that a clear space of 100 feet should be maintained between the property insured and any wood-working or manufacturing establishment, and that the space should not be used for the handling or piling of lumber for temporary purposes, tramways upon which lumber was not piled alone being excepted.

*Held*, That such a provision is not one to be construed, and its length and breadth determined and measured, and there is no question of hardship or of equity involved. It is a naked matter of agreement, and the immateriality of it, or its importance to the insurer, do not concern the court, because the very object of the provision is to avoid any questions between the parties, respecting either its terms or its obligation. If the assured has violated it, he may not recover on his contract.

The policy was issued on June 3d, and the property destroyed on June 5th. The local agent, at Denver, reported the issuing of the policy contemporaneously with the report of the loss, to the general manager, at Chicago. The same agent represented various other companies, carrying insurance upon the same property, but whose policies were written some time prior to that of the appellant. On May 11th, the agent was informed by the inspector of the other companies of the condition of the property, and that the appellee was not observing the clear-space clause. An interview was on that day had between the agent and the officers of the lumber company, in which the lumber company were informed that, unless the property was immediately put in condition, the policies would be cancelled, or the mill rate of 9 per cent premium would be charged, instead of the lumber rate of 2½ per cent. The officers of the lumber company agreed to do whatever was necessary to comply with the terms of the insurance contract. When the policy in suit was executed on June 3d, thereafter, nothing was said about the condition of the property, and the warranty referred to was written into the policy.

*Held* That the knowledge of the agent, on May 11th, of the existing violation of the space clause, would not operate as a presumption of knowledge upon his part at the time the policy was issued. That it could not be presumed, because of such knowledge, that the agent, when he inserted an express condition into the policy, was without the intention to make that condition a binding part of the contract.

*Held*, further, that an intention to waive a provision of the policy may not be presumed from the mere possession of knowledge. There must be some evidence in the case tending to show an intention on the part of the agent to waive it.

The local agent of the insurance company was, by virtue of his letter of appointment, expressly authorized to write insurance and deliver policies in Denver and its immediate vicinity. As such agent, he was entrusted with policies already signed by the officers of the company, which he filled out, and delivered to parties with whom he did business. He had, at times, also issued policies in various other localities within the limits of Colorado, distant from Denver, which the company accepted and carried. He also, on various occasions after fires had occurred, estimated

and adjusted losses upon instructions from the general manager of the company, at Chicago, without waiting for the intervention of a special adjuster; and, in some cases, where small amounts were involved, the losses would be settled according to his report and representations.

**Held**, That these facts did not constitute an authority to compromise or waive a forfeiture caused by a breach of the warranty contained in the clear-space clause.

The local agent, some months after the loss, in connection with the representatives of other companies, assumed to accept on behalf of the appellant company, an additional premium, equivalent to the mill rate, at which rate the insurance would have been written, without the clear-space clause, and to agree that the loss would be paid. The insurance company repudiated this agreement, and denied the authority of the agent to make it, and refused to accept the additional premium which the agent had received from the insured.

**Held**, That the agent could not bind the company by such an agreement. An agreement to waive a forfeiture already incurred, or to waive a breach of warranty contained in the contract of insurance, cannot be made by an agent after the happening of a loss, unless the agent *pro hac vice* represents the company.

An instruction that a general agent has authority to waive a forfeiture, and, if the jury should find that S. was a general agent, they were at liberty to conclude that he had authority to make a settlement and accept the additional premium, was clearly erroneous.

In the absence of evidence in the case to warrant it, it was error to instruct the jury that if they believed from the evidence that when the policy was issued S. was a general agent, and had actual knowledge of the condition of the property insured, and knew that the warranty was not observed, the space clause was waived because of that knowledge.

In measuring the clear space between the wood-working establishment and the lumber, it is proper to measure not merely from the permanent corners of the mill, but from the projections, sheds or hoods, attached thereto, which really form a part of the structure.

It is not true, as a general proposition, that in order to insist on the invalidity of the policy, an insurance company must offer to return the premium.

The use of the words "general agent," in an instruction to the jury, has a tendency to mislead the jury, and cause them naturally to infer that the agent has a greater authority than the law would imply. The word "general" has a very broad significance to the lay mind.

Whether or not the waiver of a condition of the policy may be evidenced other than by indorsement upon the policy, in conformity to a provision to that effect, is not decided. *Merchants' Ins. Co. vs. New Mexico Lumber Co.*, 969, 970.

## 2. CONTAINED IN.

The policy on a paster denominated "Form for Gin Houses and Contents" insured cotton seed, and also cotton "in cotton house adjacent to gin," and following this in print after a blank for total loss and value of the things insured, were the words "all while contained in the above-described gin-house building." The gin-house building was not insured.

**Held**, That the policy when ambiguous must be construed most strongly in favor of the insured, and with regard to the nature and uses of the property and the custom of the country.

**Held**, That cotton in the gin-house building was covered. *Boyd vs. Mississippi Home Ins. Co.*, 532.

## 3. INCREASE BY MACHINERY.

In an action on an insurance policy, which contains no condition that it shall be void if the fire occurred while the machinery was being operated by steam, a requested instruction to that effect is properly modified by adding that the jury must believe that such condition was agreed to as a part of the contract. *Lagrone vs. Timmerman et al.*, 15.

## 4. KEEPING FIREWORKS.

The insured purchased and stored a lot of fireworks in his house for use on the following day, which was the Fourth of July. They took fire and caused the damage. The policy provided that it should be void if the hazard were incurred with the knowledge of the insured, or if fireworks, among other things, were allowed on the premises.

*Held*, That the policy was avoided. *Heron vs. Phoenix Mut. Fire Ins. Co.*, 590.

## 5. KEEPING OF KEROSENE.

The policy prohibited the keeping of petroleum products more inflammable than kerosene, which last could be used for lights only, provided the oil be drawn and lamps filled and trimmed only by daylight.

*Held*, That this did not prohibit the use of a kerosene oil stove, from which, apparently, the fire might have started. *Snyder vs. Dwelling-House Ins. Co.*, 905, 906.

## 6. KNOWLEDGE OF AGENT—REPAIRS.

A condition avoiding a policy if the insured fail to notify the insurer of any increase in the risk does not apply to increased risks which are at the time as well known to the company's agent, then engaged in adjusting another loss, as to the insured.

In the printed part of a policy insuring chattels belonging to a tenant of part of a building was a provision that "mechanics will be allowed to make ordinary alterations and repairs to buildings, not exceeding fifteen days, during the term of this insurance." It appeared that the same form of policy was used in insuring realty and personalty. *Held*, That the clause in question did not apply to repairs to the building made by the owner. *Mechanics' Ins. Co., of Phila., vs. Hodge*, 406.

See ADJACENT BUILDING ; CONSTRUCTION 3 ; CREDIT INSURANCE 2 ; INCUMBRANCE 8 ; MORTGAGE 1 ; PROOFS OF LOSS 14 ; TITLE 11 ; VACANT 1, 2.

## SALVAGE.

## 1. EVIDENCE OF MISCONDUCT.

The evidence showed that insured refused to make any efforts to save insured property, and endeavored to prevent others from making such efforts.

*Held*, That the company was not liable for property lost through such misconduct, but was not released from liability on other property whose loss was not due to this cause.

*Held*, That the burden of proving such misconduct was on the party alleging it. *Walters et al. vs. Western Assurance Co.*, 877.

## 2. NEGLIGENCE.

Failure on the part of insured to use the best endeavor in saving and protecting property at and after a fire, where the policy specifically calls for such care, leaves the result of such negligence resting upon the claimant. *Elisa M. Sisk vs. Citizens' Ins. Co.*, 369.

See COLLISION.

SEAWORTHINESS. See ~~Insurance~~ *Libel*.

SECRETARY. See TITLE 20.

SEPARABLE CONTRACT. See INCUMBRANCE 6 ; TITLE 7.

## SERVICE.

## WHEN NOT ON AGENT.

According to the decision of this court in *Insurance Co. vs. Collins* (54 Ga., 376), an insurance company cannot be sued in a county where it had no agent or place of business at the time when the action was brought, although it may have had an agency in that county at the time the cause of action arose.



The decision of this court in *Merritt vs. Insurance Co.* (55 Ga., 103), when considered in connection with its actual facts as disclosed by the record on file in the clerk's office of this court, does not conflict with the ruling made in the case above stated. All of the facts of the Merritt Case do not appear in the official report, but the record itself shows that the person served with the process against the insurance company was in fact its agent, and acting as such when the suit was begun and the service perfected upon him.

The court erred in overruling the motion to set aside the judgment, made in due time, and based upon the grounds that the defendant company had never been lawfully served, and that the court had no jurisdiction to render such judgment. *Atlanta Home Ins. Co. vs. Tullis*, 75.

See FOREIGN COMPANY.

SICKNESS. See BENEVOLENT SOCIETY 14 ; CONSTRUCTION 3.

SOLICITOR. See MORTGAGE 3.

SON. See INSURABLE INTEREST 1.

SPECIFIC POLICY. See CONTRIBUTION.

SPRINKLER.

WAIVER OF.

The policy stipulated that a sprinkler "now in use" should be maintained. The company accepted the premiums with knowledge of the fact that there was no sprinkler.

*Held*, That this was a waiver. *Milkman vs. United Mut. Ins. Co.*, 593.

STATUTE. See PREMIUM 7, 8; VALUED POLICY LAW.

STORM. See COLLISION.

STRANDING. See GENERAL AVERAGE.

SUBROGATION.

ACTION IN CASE OF.

An insurance company subrogated to the rights of the assured by paying a loss caused by the wrong of a third person cannot maintain an action against the latter in its own name if the loss exceeds the amount of the insurance paid, but in such case the action must be brought in the name of the insured. *Norwich Union Fire Ins. Soc. vs. Standard Oil Co. et al.*, 128.

See MORTGAGE 4.

SUICIDE.

1. IN CASE OF INSANITY.

The policy provided that it should be void in case of suicide, sane or insane.

*Held*, That the risks assumed in life policies may be limited by agreement of the parties, and the stipulation would exclude death by the insured's hand while insane. *Tritschler vs. Keystone Mut. Ben. Ass'n*, 693.

2. IN CASE OF INSANITY.

The policy stipulated that it should be void if within two years the insured should die by his own hand, sane or insane.

*Held*, That suicide while insane within the period avoided the policy, no matter what might be the degree of mental unsoundness.

The proofs of death, stating the cause to be a pistol shot from his own hand, were put in evidence by the company.

*Held*, That this shifted the burden of showing death from a cause not excepted, to the plaintiff, and when the statement in the proofs was not

contradicted, it was not error to direct a verdict for the company. The term death by his own hand is the equivalent of suicide. *Spruill vs. Northwestern Mut. Life Ins. Co.*, 881.

See ACCIDENT 7; BENEVOLENT SOCIETY 3; PROOFS OF DEATH 2.

SUNDAY. See ACCIDENT 12.

#### SURETY.

##### 1. IN CASE OF ACCIDENT ASSOCIATION.

An accident association executed a bond to the state with a guaranty company as surety, conditioned on the prompt payment of claims within the state. The association failing to pay a claim, action was brought against the surety by the claimant.

*Held*, As between the principal and surety, the method in which the former signs is of no consequence if it appears that the intention is to bind itself.

*Held*, That the bond was for the benefit of beneficiaries, though made to the state, and the former could bring suit for breach of condition.

*Held*, That judgment obtained against the association was prima facie evidence in an action against the surety.

*Held*, That the judgment with costs was the measure of damages against the surety.

*Held*, That proof of the admission of an agent is not evidence of his authority, but such proof is harmless when the authority is sufficiently shown otherwise. *Union Guaranty & Trust Co. vs. Robinson*, 582, 583.

##### 2. OF AGENT OF UNAUTHORIZED COMPANY.

The company, the defendant below, entered the State of Colorado without filing a certificate with the County Recorder or Secretary of State, designating its principal place of business and an agent to receive service of process, as is required by the statute of all foreign and non-resident corporations in general, although it had complied with the laws relating particularly to insurance companies, and had procured a certificate from the Superintendent of Insurance authorizing it to do business.

It appointed an agent, who gave a bond, with two sureties, for the honest performance of his duties, including the paying over to the company of all moneys due, monthly, or as demanded.

The agent failed to pay over a balance of \$927.62, and the bondsmen defended on the ground that the company was doing business in the state illegally. The district court sustained this defense.

*Held*, That, whereas the statute, requiring foreign corporations to file the certificate referred to, prescribed a penalty imposing a personal liability upon the officers and agents of the defaulting corporation; and whereas, there is no provision in the statute declaring the contracts into which such corporations may enter illegal or void, the courts will assume that the personal liability is the only penalty imposed by the statute, and that the legislature deemed this sufficient to insure an observance of the limitation on the power to do business. The contract in question, made by the company, is accordingly not to be held void.

*Held*, Further, that the money collected by the agent belonged to the company, and he was bound to pay it over. The bondsmen are obligated for the honest performance of the agent's duties, and cannot set up the invalidity of the company's insurance contracts to escape liability for the nonpayment of that which the agent received, and which belonged to the company. "The agent got the money and was bound to pay it over. For the faithful performance of his duty in this regard the sureties bound themselves, and they cannot now be heard to defend upon the hypothesis that the original contract between the company and the insured was invalid, or that the corporation had in any respect failed to comply with the statute which attempts to limit the power of foreign corporations to do business in this state." *Rockford Ins. Co., A Corporation, etc., Appellant, vs. Merriock A. Rogers and Milton J. Stair, Appellees*, 81.

See AGENT 4.

SURRENDER. See ASSIGNMENT 4.

TARIFF ASSOCIATION. See TRUST.

TAXATION. See TRUST.

TENANCY IN POSSESSION. See TITLE INSURANCE.

TENANT. See TITLE 14, 17; VACANT 4, 5.

THREE-FOURTHS' VALUE. See OTHER INSURANCE 5.

TIN SHOP. See CONSTRUCTION 4.

## TITLE.

### 1. ASSIGNMENT AND RE-ASSIGNMENT.

The plaintiff assigned the property and policy to B. with the company's consent. Afterwards B. reassigned to plaintiff without the company's knowledge. Subsequently a loss occurred and, after the proof had been submitted but no payment having been made, an agent indorsed on the policy that it should cover the property in the first and second stories of the building.

*Held*, That this was simply an assumption of future liability and did not estop the company from claiming release from its prior liability on account of the transfer of title. *St. Onge vs. Westchester Fire Ins. Co.*, 1017.

### 2. CHANGE BY DEATH.

W. A. T. & Co. consisted of T. and the wife of S., who acted as his wife's agent and worked about the shop. Mrs. S. died and the insurance ran on for several months without objection on the part of the company, the business continuing the same practically as before and the policy being renewed in the meantime. *Held*, Not such a change of title, interest or ownership as to avoid the policy. *Virginia F. & M. Ins. Co. vs. Thomas*, 396, 397.

### 3. CHANGE OF, IN CASE OF MORTGAGEE.

When a loss of insured property occurs according to the terms of the policy, and the insurance policy has attached to it a subrogation contract which stipulates that the loss, if any, is payable to a mortgagee, or his assigns, as his interest may appear, the owner of the mortgage is the insured, to the extent of his interest, and a change of title which increases his interest in the insured property, even to absolute ownership, will not release the insurance company from its liability to pay the loss.

A change in the title of insured property, which increases the interest of the insured from a lien holder to absolute ownership, is not such a change of ownership as requires notice to be given to the insurance company, under the terms of a subrogation contract which stipulates that the mortgagee shall notify the insurance company of any change of ownership. *Dodge vs. Hamburg-Bremen Fire Ins. Co.*, 255.

### 4. CHANGE OF, IN CASE OF MORTGAGOR.

Where a policy of fire insurance insuring the mortgagor, loss, if any, payable to the mortgagee, was issued, and it provided that, if the property is sold, or any change takes place in the title, use, or occupation, without written permission in the policy, the same shall be void; and also provided that, as to the mortgagee, the insurance shall not be invalidated by any act or neglect of the mortgagor, nor any change in title or possession, provided the mortgagee shall notify the insurer of any change of ownership which shall come to the mortgagee's knowledge, and have permission therefor indorsed on the policy; during the term of the policy, the mortgagee foreclosed the mortgage, and acquired title to the property; thereafter, and during such term, a loss occurred,—*held*, the provisions of the policy as to a change of title which should come to the mortgagee's knowledge have reference to a change or transfer of title or possession to a third person, not to one from the mortgagor to the mortgagee by a foreclosure. *Pioneer Savings & Loan Co. vs. St. Paul F. & M. Ins. Co.*, 826, 827.

## 5. CONTRACT JOINTLY WITH WIFE—WAIVER BY AGENT.

The insured verbally stated to the agent that he had the property on contract. After the loss it was found that the contract ran to himself and wife jointly.

*Held*, That there was no misrepresentation of interest.

The standard policy provides that it shall be void if the interest of insured be other than unconditional and sole ownership.

*Held*, That the mere acceptance of such a policy in ignorance of its provision, where the title does not strictly conform to the provision, is not conclusive against the holder.

Where the agent was too ignorant of the English language to fill out the blank regarding title in his report to the company, defect of title was waived.

*Held*, That the insured was entitled to recover for the whole loss, although his wife had an equal interest. *Motke vs. Milwaukee Mechanics' Ins. Co.*, 910.

## 6. EFFECT OF DIVIDED.

The agent, knowing that the goods insured belonged to two parties, while the remaining property belonged to only one of them, insured the whole in a policy to the latter to avoid trouble.

*Held*, That the company was estopped from setting up the defect of title. *Phenix Ins. Co. vs. Angel et al.*, 722.

## 7. ENTIRE CONTRACT—WAIVER OF PROOFS OF LOSS BY ADJUSTER.

The policy was on furniture, beds, linen, wearing apparel, sewing machines, and other enumerated classes of articles, and provided that the entire policy should be void if the interest was other than unconditional ownership.

*Held*, That a sewing machine, held by insured under a contract of purchase, was not covered by the policy, and did not affect it as to the rest.

Unequivocal notification by the adjuster that, under no circumstances, would the company pay, because the policy had never been in force, was a waiver of imperfect proofs of loss, notwithstanding an agreement between the plaintiff and adjuster that nothing said by the latter should waive the company's rights. *Cooper vs. Insurance Co. of State of Pennsylvania*, 985.

## 8. EVIDENCE OF—KNOWLEDGE OF AGENT—RIGHT OF PURCHASE.

The policy insured G., payable to T. as interest might appear. The property was owned by T., but in possession of G. as superintendent, under a contract which included its insurance. The policy provided that it should be void if the insured was not the sole owner.

*Held*, That the contract was admissible to show the relations of G. and T.

*Held*, That evidence that insurer directed proofs to be made from the books of T. on learning the facts is admissible as evidence of a waiver of the provision regarding ownership.

*Held*, That instructions by G. to the party procuring the insurance for him, regarding the title, which were communicated to the agent of the company, are admissible.

*Held*, That representations regarding the title made to a clerk of the same agent, regarding a former policy in another company similar to this policy, and which was cancelled and replaced by this, are admissible.

*Held*, That admissions by the agent after the loss that he had knowledge of the title are admissible as showing waiver.

*Held*, That knowledge of the facts at the time of issuing the policy was a waiver of the provision regarding ownership.

*Held*, That G. as superintendent in charge of a factory, under a twenty-year contract including certain privileges as a purchaser, in case of discontinuance by T., had an insurable interest.

*Held*, That T. was entitled to recover the full value as owner, although he had replaced the property, and G. suffered no loss. *Graham vs. American Fire Ins. Co.*, 744.

9. GOODS ON COMMISSION.

Merchandise was insured by claimants in their own name which did not belong to them but to persons resident elsewhere. Claimants held them on consignment only and sold them for a commission. *Held*, That a clause in the policy requiring a true statement of ownership works a forfeiture if such true statement be not made.

*Held*, That an ordinary insurance agent has no power to waive the above-named provision of the policy. *Westchester Fire Ins. Co. vs. Wagner et al.*, 261.

10. INDIVIDUALS INSURED AS CORPORATION—RIGHTS OF MORTGAGEE.

A representation by two individuals that they were owners of the property sought to be insured, when in fact it was owned by a corporation of the capital stock of which they were the sole proprietors, *held* not such a misrepresentation as avoided the right of a mortgagee to assert its right under a "union-mortgage" clause attached by the insurer to the policy; the mortgagee having no knowledge of, or participation in, the said misrepresentation.

Under the circumstances above stated it was not prejudicial error to refuse to permit the plaintiff in error to show the insolvency of the corporation grantee, at the time either of the insurance effected or of the loss suffered. *North British & Mercantile Ins. Co. vs. Bohn et al.*, 106.

11. MECHANICS' LIENS—INCREASE OF RISK.

Mechanics' liens, filed before the policy was issued, were afterwards reduced to judgment and the property sold, but the redemption period had not expired at the time of fire.

*Held*, That they still remained mere liens, and there was no change of interest within the policy, nor is such sale an increase of hazard. *Greenlee et al. vs. North British & Mercantile Ins. Co.*, 801.

12. MISREPRESENTATIONS AS TO.

While the general doctrine that if one may sustain loss he has an insurable interest; and while it is admitted that knowledge of title by agent is a waiver of the question of title by company; and while a policy is not invalidated by a partial title when inquiry has not been pressed by the company; yet it is different when more exact information with regard to the title is required, as when the true title is called for or where it is provided that if the interest of the insured be any other than the entire, unconditional, and sole ownership of the property it must be so represented to the company and so expressed in the policy, otherwise the policy is void. *Eliza M. Sisk vs. Citizens' Ins. Co.*, 369.

13. OF HEIRS TO INSURANCE MONEY.

A certificate held by an unmarried man who died intestate provided that the benefit money should be paid "to his devisees as provided in last will and testament, or, in the event of their prior death, to the legal heir or devisees of the certificate holder." There was no will and no devisees.

*Held*, That the money should go to the heirs; the father, mother, and sisters. *Covenant Mut. Ben. Ass'n vs. Sears et al.*, 108.

14. OF PART OWNER—IMPROVEMENTS—LITIGATION.

Misrepresentations by the assured, unless material to the risk or fraudulent, will not affect the right of recovery upon a policy of insurance.

The insured in this case stated, in good faith, that he was the owner in fee of the insured property. He was in fact the owner in fee of only one-fourth of the tract of land upon which the house was situated, and owned a life estate in the remainder. The house was erected by him as a residence for himself and family. *Held*, That although there has been no partition, the insured was entitled, as against his co-tenants, to that part of the land upon which the house was situated, and, therefore, his statement that he owned the property in fee does not make the policy void.

One of several tenants in common has the right to erect such buildings on the land as will enable him to live on it; and the improvements in such a case will be assigned in the partition to the tenant making them.

The fact that the insured was claiming to be the owner in fee of the entire tract of land, and that that question was in litigation, did not avoid the policy under a clause providing that if the title was in litigation the policy should be void, there being no question as to the title of the insured to one-fourth of the property. *Kenton Ins. Co. vs. Wigginton*, 111, 112.

#### 15. PAROL GIFT—KNOWLEDGE OF AGENT—PROOFS OF LOSS.

Where the property was bought and placed in possession of the insured by his father, with the understanding that he was to have the property, and it was so stated in his will.

*Held*, That there was sufficient insurable interest to sustain the policy. Such interest is sufficient if it appears that the holder will suffer loss by its destruction.

*Held*, That where the agent was informed of the facts regarding the title, a statement in the policy that it was in fee will not work a forfeiture, although the policy provided that it should be void if the title was not truly stated.

Where the insured swore in the proofs of loss that he held such title, the question whether there was a fraudulent intent was one of fact, where it appeared that the proofs were prepared by the adjuster and might have been negligently signed without reading by the insured. *Home Ins. Co. vs. Mendenhall*, 768, 769.

#### 16. REFORMATION IN CASE OF MISTAKE.

The property which was destroyed was owned by the plaintiff. The policy was issued to her husband. The plaintiff claimed the policy was so issued by a mistake, for which the agents were responsible. She also claimed that the agents afterwards agreed to correct the mistake, and make the policy run in her name. *Held*, That a policy will not be reformed on the ground of a mistake of fact, unless the proof is clear, convincing, and satisfactory. And it must be free from any reasonable controversy. The burden of establishing the facts respecting it are upon the plaintiff, and if the plaintiff fails at all in any of these particulars, he does not become entitled to have the policy reformed as thus altered.

Further *held*, That, although from a conversation between the assured and the agent, about other features of the contract and risk, an inference might have been drawn that the policy was to be changed so as to run to the plaintiff, such evidence is too remote to support a judgment in favor of the plaintiff, when it is testified that nothing was said about ownership at the time. *Connecticut Fire Ins. Co. vs. Mrs. E. H. Smith*, 929.

#### 17. TENANT IN DRUG STORE.

It is not a violation of the Iowa law for one to own a drug store, even though he himself be not a registered pharmacist.

An order for a month's rent given to a party to whom plaintiff had traded the property does not show that the occupant was not the tenant of plaintiff, at least as to the insured furniture and fixtures.

Neither of the above pleas by the insurance company are good. The policy must be paid. *Erb vs. German Ins. Co.*, 576.

#### 18. TO BUILDING IN COURSE OF CONSTRUCTION.

The owner of the land on which is a building in course of construction by a contractor, who is to furnish work and materials and is to be paid only when the work is completed, is also the owner of the building, and has an insurable interest to the full value of the building. *Foley et al. vs. Manufacturers & Builders' Fire Ins. Co.*, 598.

#### 19. TO PLEDGED POLICY.

Where policies have been pledged as collaterals for a loan, a tender by plaintiffs of the amount due extinguishes the title of the lender, and vests the

same in plaintiffs; and if the company issuing the policy obtains it from such lender, with knowledge of the facts, it acquires no better rights than the lender had, and is still liable in an action for conversion. *Hicks et al. vs. National Life Ins. Co.*, 134.

#### 20. WAIVER OF.

A letter written by the secretary of an insurance company, in ignorance of the true state of the plaintiff's title, cannot operate as a waiver of the right of the company to insist on breach of policy condition as a defense. *Cornell vs. Tiverton & L. C. Mut. Fire Ins. Co.*, 520.

#### 21. WHEN WIFE DOES NOT JOIN.

The insured represented in the application that he was absolute owner of the real estate, and the policy provided that if he was not the sole owner in fee simple it should be void. The insured held under a conveyance in which the wife of the grantor did not join.

*Held*, That the wife had no present interest, her interest must be after acquired and was dependent on her survival.

*Held*, That the policy was not avoided by the statement as to ownership. *Ohio Farmers' Ins. Co. vs. Wilson H. Bevis*, 623.

#### 22. WILL CONSTRUED.

The title was by will, devising the property forever, subject to a restriction against alienation for thirteen years, and ownership is unconditional and sole.

The will also divided other property among the heirs including insured, and then provided that all property and bank stock should be sold and divided, and in case of death of insured before reaching thirty, his estate was to be divided among the other heirs.

*Held*, That the homestead insured already given in fee was not included in the property to be divided. *Yost vs. McKee et al.*, 716.

See ASSIGNMENT 1, 2; BENEVOLENT SOCIETY; CONTRACT 3; HEIR; HEIRS; INCUMBRANCE 1; PARTNERS.

### TITLE INSURANCE.

#### TENANCY IN POSSESSION.

*Held*, That the phrase, "Tenancy of the present occupants," stated in a title insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued.

*Held*, Further, that a condition precedent to a right of action upon the policy, which prohibited a recovery unless the insured had contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy, has no application to a case where the land is held by another party in actual adverse possession, and the insured has lost it absolutely by reason of a defect in the insured title. *Place et al. vs. St. Paul Title Ins. & Trust Co.*, 809.

TOTAL DISABILITY. See ACCIDENT 14.

### TOTAL LOSS.

#### UNDER VALUED-POLICY LAW—ARBITRATION.

A loss is total within the meaning of a valued-policy law if the only portion of the building which could be repaired and utilized was the foundation,

and a portion of the second-story walls, whose repair would cost more than to build anew.

In case of such total loss a stipulation as to arbitration becomes void. There is nothing to arbitrate. *O'Keefe vs. Liverpool & London & Globe Ins. Co.*, 888.

#### TRUST.

##### CONSTRUED—RATES BY TARIFF ASSOCIATION—TAXATION.

Where the Code made a trust and combine a felony punishable with \$1,000 fine if its effect is to injure any person or corporation, and an indictment was tried on the theory that it was a misdemeanor, and a fine of \$500 imposed, a new trial will be granted.

It is sufficient to allege public injury without alleging injury to any specific person or corporation.

It is not sufficient to allege a deprivation of the public from the benefit of competition without alleging injury.

It is no answer that the combine was formed prior to the Code. Every act subsequent to the passage of the Code is a renewal of the combine.

An agreement among fire-insurance companies to delegate the power to prescribe rates to a tariff association is a violation of the Code, which defines such combine as an agreement to place the control of business in the hands of trustees by whatever name called.

A law provided that companies, among other things, not influenced directly or indirectly by a tariff association, should pay a lower tax, but others should pay a specified tax.

*Held*, That this did not authorize companies to act in a combine through such tariff association by paying the specified tax. *American Fire Ins. Co., et al. vs. State*, 860.

#### TRUSTEES.

##### RIGHT TO COMMISSIONS AS AGENTS.

The trustees of an insurance company were its agents to receive applications, fix rates, and issue policies which provided for cancellation and return of unearned premiums. It was sometimes necessary for the trustees to guaranty the solvency of the company and the return of unearned premiums, and in view of this the company agreed to allow a commission of 20 instead of 15 per cent on premiums received. The trustees sought to retain, from moneys in their hands, money which they had actually paid to parties as return premiums on their oral guaranty.

*Held*, That such oral contracts under the statute of fraud were not enforceable, and, if voluntarily fulfilled, the trustees could not claim reimbursement from their creditor, the company, unless the latter has placed funds for the purpose in their hands.

*Held*, That the extra commission allowed was not of the nature of such funds.

*Held*, That the commission allowed on premiums actually received was on gross premiums and was not subject to deduction for subsequent cancellations. *Garfield et al. vs. Rutland Ins. Co. et al.*, 1019.

#### UNAUTHORIZED COMPANY. See SURETY 2.

#### USE. See CONSTRUCTION 4; PROOFS OF LOSS 14.

#### VACANT.

##### 1. EVIDENCE OF INCREASE OF RISK.

The decision in the case of *White vs. Insurance Co.* (83 Me., 279, again reported in 85 Me., 97) does not deny that the general burden of proof lies on an insurance company to prove that an insurance risk is increased by the vacancy or nonoccupancy of dwelling houses, but only that such burden may be aided by the common and natural presumption to that effect; and that, in a case utterly devoid of any evidence as to the situation or



circumstances, such presumption would be sufficient to sustain the burden which the statutory provision casts upon the company.

The presumption belongs to the class of mixed presumptions of law and fact, or of presumptions of fact which are sanctioned by the law, because they are in consonance with reason and experience, and because from their importance and frequency of occurrence they have attracted the attention of the law and received its commendation; in principle, like the presumption that all bills and notes are given or indorsed for value, or the presumption which prevails in favor of innocence, or sanity, or against fraud, and other presumptions that might be enumerated.

While this presumption has the effect of *prima facie* proof—until counteracted by evidence—when any evidence is adduced on either or both sides, then the burden of proof is upon the insurance company, aided as it may or may not be by the presumption, to make out the proposition it undertakes to maintain; and if the proofs stand in equilibrium on the proposition, then the company fails.

In this case the house destroyed by fire had been both vacant and unoccupied for more than a year; was situated in the outskirts of Ellsworth, in a secluded and isolated location back from the road, without any near neighbors, at a distance so great from the centre of the city as not likely to receive any protection from its fire department; and there was quite a tempting opportunity for evil-minded persons to visit the premises without being seen either coming or going. The fire broke out at midnight in the ell where laborers had been working during the day. Had the house been occupied at the time the fire might not have occurred, or might have in its early inception been prevented.

*Held*, That on these facts, and such others as the evidence discloses, an action against the insurance company cannot be maintained. *Jones vs. Granite State Fire Ins. Co.*, 611, 612.

#### 2. IN CASE OF ELEVATOR.

The insurance was on an elevator, which was used as a temporary storehouse for the tools and machinery, also covered. The company was informed that it would not be used again as an elevator.

*Held*, That the elevator was not vacant and unoccupied.

The removal of the engine was not an increase of risk. *Clifton Coal Co. vs. Scottish Union & National Ins. Co.*, 1007.

#### 3. IN CASE OF ICE HOUSE.

In an action to recover on a policy of insurance on an ice house, containing a condition that it should be void in case the building, "whether intended for occupancy by owner or tenant," should become vacant and remain unoccupied for ten days, the question of occupancy (if the condition was applicable to such building) was properly submitted to the jury. *Des Moines Ice Co. vs. Niagara Fire Ins. Co.*, 378.

#### 4. IN CASE OF TENANT.

Where the tenant had left the premises without notice, and a new one was waiting to occupy it and had begun to move in, it was a question of fact whether the premises were vacant and unoccupied. *Home Ins. Co. vs. Mendenhall*, 768, 769.

#### 5. IN CASE OF TENANT.

The policy stipulated that it should become void in case the house remained vacant and unoccupied for more than ten days prior to the fire. The house, with the knowledge of the owner, had been vacated by the tenant, only a few trifling articles remaining, and was fired more than ten days thereafter by an incendiary.

*Held*, That the policy was void. *Robinson et al. vs. Aetna Ins. Co.*, 823.

## VALUATION.

## WHEN NOT FRAUDULENT.

Over-valuation by the assured will not avoid a policy of fire insurance unless made in bad faith. *Kenton Ins. Co. vs. Wigginston*, 111, 112.

See ARBITRATION 7.

## VALUE.

## EVIDENCE OF.

Under the provisions of McClain's Code, § 1734, making the amount stated in an insurance policy prima facie evidence of the insurable value of the property insured, it is not necessary for the insured, in an action to recover for a loss, to introduce evidence of value beyond the policy itself; and, if the actual value at the time of loss is less than the amount named in the policy, though caused by the removal of a part of the building by the plaintiff, the burden of proving such fact rests on the defendant. *Des Moines Ice Co. vs. Niagara Fire Ins. Co.*, 378.

See BUILDING; EVIDENCE 5; MORTGAGE 1; PRACTICE.

VALUED POLICY. See LEX LOCI 1, 2.

## VALUED POLICY LAW.

## CONSTITUTIONALITY OF.

The policy was issued upon a building for \$800. The defendant pleaded that the building was worth not to exceed \$100 and the usual provision of the insurance contract that the plaintiff could only recover to the extent of his loss or damage, and that the defendant was willing to pay the amount of the actual damage sustained. The defendant also pleaded that the valued-policy law of Missouri was unconstitutional, in contravention of the constitution of the state of Missouri and of the United States, in that the right of contract is a constitutional right.

*Held*, That the valued-policy law of Missouri is constitutional and that the state has the right to impose any terms whatever upon a foreign insurance company as a condition of its doing business in the state, and that the terms which a state may impose may be either reasonable or unreasonable, and the only remedy which a foreign insurance company has is to keep out of the state, or submit to any conditions which may be imposed upon it by the legislature of such state. *Robert E. Daggs, Respondent, vs. Orient Ins. Co., of Hartford, Conn., Appellant*, 67.

See TOTAL LOSS.

WAGER POLICY. See INSURABLE INTEREST 2, 3.

WAIVER. See ACCIDENT 14; ADJACENT BUILDING; ARBITRATION 8, 9; ARSON; ASSESSMENT 2; BENEVOLENT SOCIETY 13, 18; CONTRACT 4; EVIDENCE 6; LEX LOCI 4; LIMITATION; POLICY 2; PREMIUM 4, 5, 6, 7, 8; PREMIUM NOTE 1, 3; PROOFS OF LOSS 1, 10, 11, 12, 13, 14; REMOVAL 2; RENEWAL 1; RISK 1; SPRINKLER; TITLE 5, 7, 9, 20.

## WAREHOUSEMAN.

## MEASURE OF RECOVERY.

A party having the custody, care or possession of property, as bailee, consignee, carrier, factor or warehouseman, may insure for the benefit of the owner, though having no pecuniary interest and not obligated so to do, and may recover for the benefit of the owner upon the subsequent adoption of the insurance by the latter.

The policy insured a compress company against loss on cotton in bales held for compression or compressed, but not loaded on cars, and for which a

compress shippers' receipt had been issued for certain railroads while contained on open platforms or in sheds of insured, loss payable to the railroads as interest might appear. -

*Held*, That it was not intended to limit the insurance to cotton for which the railroads might be liable, or in which they had an interest. The policy covered all cotton so described, and recovery could be had for the charges of bailee and the interest of the owners, the amount when received to be held in trust for the latter. *Hops Oil Mill Compress & Manufacturing Co. vs. Phoenix Ass'e Co.*, 995, 996.

WARRANTY. See APPLICATION 3, 4.

WIDOW. See HEIR.

WIFE. See ASSIGNMENT 2; BENEVOLENT SOCIETY 8; TITLE 5, 21.

WILL. See TITLE 22.

## CASES REPORTED

	PAGE
Agnew vs. Farmers' Mutual Protective Fire Ins. Co., of Town of Medina, et al.	Wis. S. C. 671
Allen vs. Massachusetts Mut. Acc. Association	Mass. S. J. C. 316
American Central Ins. Co. vs. Bass et al.	Tex. S. C. 718
American Fire Ins. Co. vs. Brooks et al.	Md. C. A. 3
American Fire Ins. Co. et al. vs. State	Miss. S. C. 860
Angier et al. vs. Western Assurance Co.	S. D. S. C. 795
Atlanta Home Ins. Co. vs. Tullis	Ga. S. C. 75
Attleborough Savings Bank vs. Security Ins. Co.	Mass. S. J. C. 680
Baile & Co., Ltd., in Liquidation, vs. Western Ass'e Co., of Toronto	La. S. C. 497
Barnard vs. Peoples Fire Ins. Co.	N. H. S. C. 405
Bon Aqua Improvement Co. vs. Standard Fire Ins. Co.	W. Va. S. C. A. 506
Boyd vs. Mississippi Home Ins. Co.	Miss. S. C. 532
Boyle et al. vs. Northwestern Mutual Relief Ass'n	Wis. S. C. 758
Brady vs. United Life Ins. Ass'n	U. S. C. C. A. 138
Burlington Voluntary Relief Department of Chi., B. & Q. R. R. Co. vs. White	Neb. S. C. 224
Butero vs. Travelers Accident Ins. Co.	Wis. S. C. 805
Cannon vs. Home Ins. Co.	La. S. C. 737
Carmien et al. vs. Cornell et al.	Ind. S. C. 648
Chalaron vs. Insurance Co. of North America	La. S. C. 465
Citizens' Ins. Co., of Pittsburg, vs. Bland	Ky. C. A. 615
Clarke vs. Swartzenberg et al.	Mass. S. J. C. 521
Clifton Coal Co. vs. Scottish Union & National Ins. Co.	Iowa S. C. 1007
Cochran et al. vs. Mutual Life Ins. Co.	U. S. C. C., Ore. 661
Commercial Travelers Mut. Acc. Ass'n of America vs. Fulton et al.	U. S. C. C. A. 565
Commercial Union Ass'e Co. vs. Norwood	Kan. S. C. 177
Connecticut Fire Ins. Co. vs. Smith	Col. C. A. 929
Continental Ins. Co. vs. Rikken et al.	Ore. S. C. 590
Cooper vs. Insurance Co. of State of Pa.	Wis. S. C. 985
Corkery vs. Security Fire Ins. Co.	Iowa S. C. 331
Cornell vs. Tiverton & L. C. Mut. Fire Ins. Co.	R. I. S. C. 520
Covenant Mut. Ben. Ass'n vs. Sears et al.	Ill. S. C. 108
Daggs vs. Orient Ins. Co.	Mo. S. C. 67
Des Moines Ice Co. vs. Niagara Fire Ins. Co.	Iowa S. C. 378
Dixon vs. National Life Ins. Co.	Mass. S. J. C. 776
Dwelling-House Ins. Co. vs. Kansas Loan & Trust Co.	Kan. C. A. 603
Early vs. Standard Life & Accident Ins. Co.	Mich. S. C. 820
Earnshaw vs. California Ins. Co.	U. S. D. C. 116
East Texas Fire Ins. Co. vs. Perkey	Tex. S. C. 53
Eaton vs. Atlas Accident Ins. Co.	Me. S. J. C. 577
Ellis vs. Massachusetts Mut. Life Ins. Co.	Cal. S. C. 97
Endowment Bank, Knights of Pythias, vs. Cogbill	Tenn. S. C. 920
Erb vs. German Ins. Co.	Iowa S. C. 576
Farmers & Merchants' Ins. Co. vs. Graham	Neb. S. C. 711
Farnum et al. vs. Phenix Ins. Co.	Cal. S. C. 473
Fidelity & Casualty Co. vs. Randolph, Executor	U. S. C. C. A. 291
Fidelity & Casualty Co. vs. Waterman	Ill. S. C. 63
Fidelity & Casualty Co., of New York, vs. Willey et al.	U. S. C. C. A. 897
Firemen's Ins. Co. vs. Barnsch	Ill. S. C. 101
Fitchner et al. vs. Fidelity Mut. Fire Association	Iowa S. C. 326
Flynn vs. Massachusetts Ben. Association	Mass. S. J. C. 438
Foley et al. vs. Manufacturers' & Builders' Fire Ins. Co.	N. Y. C. A. 598
Gallant vs. Metropolitan Life Ins. Co.	Mass. S. J. C. 543
Gardner vs. Fidelity Mutual Life Association.—Warner vs. Same	Minn. S. C. 652

	PAGE
Garfield et al. vs. Rutland Ins. Co. et al.	Vt. S. C. 1019
Geare et al. vs. United States Life Ins. Co.	Minn. S. C. 317
Georgia Home Ins. Co. vs. Hall et al.	Ga. S. C. 202
German-American Ins. Co. vs. Norris et al.	Ky. C. A. 384
German Fire Ins. Co. vs. Roost	Ohio S. C. 699
German Ins. Co., of Freeport, Ill., vs. First National Bank of Booneville, N. Y.	Kan. S. C. 600
Gibson vs. Connecticut Fire Ins. Co.	U. S. C. C., Mo. 86
Gibson vs. Imperial Council of Order of United Friends.	Mass. S. J. C. 815
Gibson vs. St. Paul Fire & Marine Ins. Co.	U. S. C. C., Mo. 94
Graham vs. American Fire Ins. Co.	S. C. S. C. 744
Gray vs. Reynolds	N. J. C. E. & A. 937
Greenlee vs. Iowa State Ins. Co.	Iowa S. C. 1016
Greenlee et al. vs. North British & Mercantile Ins. Co.	Iowa S. C. 801
Griffith vs. New York Life Ins. Co.	Cal. S. C. 212
Guterman et al. vs. German-American Ins. Co.	Mich. S. C. 727
Hamburg vs. St. Paul Fire & Marine Ins. Co.	Minn. S. C. 782
Hanna vs. Connecticut Mut. Life Ins. Co.	N. Y. C. A. 312
Hanson vs. Minnesota Scandinavian Relief Ass'n et al.	Minn. S. C. 488
Harding vs. Norwich Union Fire Ins. Co.	S. D. S. C. 901
Hartford Steam Boiler Insp. & Ins. Co. vs. Lasher	
Stocking Co.	Vt. S. C. 207
Hass et al. vs. Mutual Relief Ass'n of Petaluma	Cal. S. C. 992
Heron vs. Phoenix Mutual Fire Ins. Co.	Pa. S. C. 690
Hey vs. Guarantors' Liability Indemnity Co.	Pa. S. C. 1012
Hicks et al. vs. National Life Ins. Co.	U. S. C. C. A. 134
Hogben vs. Metropolitan Life Ins. Co.	Conn. S. C. E. 998
Holter Lumber Co. vs. Fireman's Fund Ins. Co.	Mont. S. C. 10
Home Fire Ins. Co. vs. Wood et al.	Neb. S. C. 686
Home Fire Ins. Co. of Omaha vs. Skoumal	Neb. S. C. 1021
Home Friendly Society vs. Berry	Ga. S. C. 341
Home Ins. Co. vs. Delta Bank	Miss. S. C. 233
Home Ins. Co. vs. Mendenhall	Ill. S. C. 768
Home Ins. Co., of New York, vs. Karn	Ky. C. A. 545
Hope Oil Mill Compress & Mfg. Co. vs. Phoenix Ass'e Co.	Miss. S. C. 995
Houghton vs. Bradley et al.	Mich. S. C. 1004
Jacobs vs. New York Life Ins. Co.	Miss. S. C. 163
Jerrett et al. vs. John Hancock Mut. Life Ins. Co.	R. I. S. C. 529
Johnson vs. Scottish Union & Nat. Ins. Co.	Wis. S. C. 59
Johnson vs. Supreme Lodge Knights of Honor et al.	Ark. S. C. 434
Jones vs. Granite State Fire Ins. Co.	Me. S. J. C. 611
Jones vs. Methvin	Ga. S. C. 80
Jones vs. New York Life Ins. Co.	Mass. S. J. C. 1009
Jurgens vs. New York Life Ins. Co.	Cal. S. C. 103
Kansas Farmers' Fire Ins. Co. vs. Saindon	Kan. S. C. 197
Keene vs. New England Mut. Accident Association	Mass. S. J. C. 401
Kelly vs. Life Insurance Clearing Co.	Ala. S. C. 892
Kenton Ins. Co. vs. Wigginton	Ky. C. A. 111
Knights Templars & Masonic Mut. Aid Ass'n vs. Greene et al.	U. S. C. C., Ohio. 947
Konrad vs. Union Casualty & Surety Co., of St. Louis	La. S. C. 536
Koshland vs. Fire Ass'n of Philadelphia	Ore. S. C. 943
Koshland vs. Hartford Fire Ins. Co.	Ore. S. C. 945
Koshland vs. Home Mut. Ins. Co.	Ore. S. C. 940
Kottman vs. Minnesota Odd Fellows' Mut. Ben. Soc.	Minn. S. C. 235
Lagrone vs. Timmerman et al.	So. Car. S. C. 15
Lauer et al. vs. Gray	N. J. C. E. & A. 956
Levine et al. vs. Lancashire Ins. Co.	Minn. S. C. 36
Liverpool & London & Globe Ins. Co. vs. Ellington	Ga. S. C. 492
Liverpool & London & Globe Ins. Co. vs. Sheffy	Miss. S. C. 349
London Assurance vs. Companhia De Moagens Do Barreiro	U. S. S. C. 833
London Assurance Corporation vs. Cowan	Miss. S. C. 358

	PAGE
Long vs. North British & Mercantile Ins. Co.	Pa. S. C. 356
Lowry et al. vs. Insurance Co. of North America	Miss. S. C. 618
McCoy vs. Roman Catholic Mut. Ins. Co.	Mass. S. J. C. 237
McLaughlin vs. McLaughlin et al.	Cal. S. C. 501
McMahan vs. Sewickly Mutual Fire Ins. Co.	Pa. S. C. 721
Maier vs. Fidelity Mut. Life Association	U. S. C. C. A. 292
Manton vs. Robinson	R. I. S. C. 595
Maynard vs. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n.	Utah S. C. 579
Mechanics' Ins. Co. vs. Hodge	Ill. S. C. 406
Mee vs. Bankers' Life Association, of Minnesota	Minn. S. C. 853
Merchants' Ins. Co. of Newark vs. New Mexico Lumber Co.	Col. C. A. 969
Merrett vs. Preferred Masonic Mut. Acc. Ass'n of America	Mich. S. C. 126
Merrill vs. Commonwealth Mut. Fire Ins. Co.	Mass. S. J. C. 80
Metropolitan Life Ins. Co. vs. McNall	U. S. C. C., Kan. 641
Milkman vs. United Mut. Ins. Co.	R. I. S. C. 593
Miotke vs. Milwaukee Mechanics' Ins. Co.	Mich. S. C. 910
Modern Woodmen Accident Association vs. Kline	Neb. S. C. 724
Mueller vs. Grand Grove, State of Minnesota, United Ancient Order of Druids	Minn. S. C. 870
Murdy vs. Skyles et ux.	Iowa S. C. 607
Mutual Life Ins. Co. vs. Gorman	Ky. C. A. 1014
Mutual Life Ins. Co. vs. Nichols	Tex. C. C. A. 443
National Mut. Ins. Co. vs. Home Ben. Soc., of N. Y.	Pa. S. C. 917
Nelson et al. vs. Atlanta Home Ins. Co.	N. C. S. C. 913
North British & Mercantile Ins. Co. vs. Bohn et al.	Neb. S. C. 106
Northern Assurance Co. vs. Hamilton et al.	Neb. S. C. 824
Northwest Transp. Co. vs. Boston Marine Ins. Co.	U. S. C. C., Mich. 239
Norwich Union Fire Ins. Soc. vs. Standard Oil Co. et al.	U. S. C. C. A. 128
Nye vs. Grand Lodge A. O. U. W. et al.	Ind. A. C. 419
O'Keefe vs. Liverpool & London & Globe Ins. Co.	Mo. S. C. 888
Omaha Fire Ins. Co. vs. Crighton	Neb. S. C. 791
People's Mut. Ben. Society vs. Templeton	Ind. A. C. 484
Perry vs. Dwelling-House Ins. Co.	N. H. S. C. 120
Phenix Ins. Co. vs. Hart	Ill. S. C. 391
Phenix Ins. Co. vs. Bad Bila Hora C. S. P. S.	Neb. S. C. 190
Phenix Ins. Co. vs. Warttemberg	U. S. C. C. A. 552
Phenix Ins. Co. et al. vs. Angel et al.	Ky. C. A. 722
Pioneer Savings & Loan Co. vs. St. Paul Fire & Marine Ins. Co.	Minn. S. C. 826
Place et al. vs. St. Paul Title Ins. & Trust Co.	Minn. S. C. 809
Preferred Accident Ins. Co. vs. Randolph, Executor	U. S. C. C. A. 291
Provident Savings Life Ass'e Soc. vs. Reutlinger	Ark. S. C. 141
Quinn vs. Supreme Council, Catholic Knights of America et al.	Tenn. S. C. 988
Rainger vs. Boston Mut. Life Association	Mass. S. J. C. 188
Redmond vs. Industrial Benefit Ass'n	N. Y. C. A. 812
Reynolds vs. Atlas Accident Ins. Co.	Minn. S. C. 778
Richardson vs. White et al.	Mass. S. J. C. 542
Riley vs. Riley et al.	Wis. S. C. 118
Robinson et al. vs. Aetna Ins. Co.	Ky. C. A. 823
Rockford Ins. Co. vs. Rogers and Stair	Col. C. A. 81
Rockford Ins. Co. vs. Winfield	Kan. S. C. 785
Runkle et al. vs. Hartford Ins. Co.	Iowa S. C. 390
St. Onge vs. Westchester Fire Ins. Co.	U. S. C. C., R. I. 101
Schmurr vs. State Ins. Co.	Ore. S. C. 373
Schultz et al. vs. Citizens' Mutual Life Ins. Co.	Minn. S. C. 387
Scottish Union & National Ins. Co. vs. Dangaix	Ala. S. C. 306
Scottish Union & National Ins. Co. vs. Keene	Md. C. A. 943
Shackelford vs. Supreme Conclave Knights of Damon	Ga. S. C. 561
Sisk vs. Citizens' Ins. Co.	Ind. A. C. 369
Sloman et al. vs. Mercantile Credit Guarantee Co.	Mich. S. C. 665
Smith et al. vs. Pinch et al.	Mich. S. C. 353

	PAGE
Snyder vs. Dwelling-House Ins. Co. ....	N. J. C. E. & A. .... 905
Sofge et al. vs. Supreme Lodge Knights of Honor et al. ....	Tenn. S. C. .... 682
Southern Home Building & Loan Ass'n vs. Home Ins. Co., of New Orleans. ....	Ga. S. C. .... 524
Springfield F. & M. Ins. Co. vs. Payne et al. ....	Kan. S. C. .... 46
Spruill vs. Northwestern Mutual Life Ins. Co. ....	N. C. S. C. .... 881
Standard Life & Acc. Ins. Co. vs. Randolph, Executor. ....	U. S. C. C. A. .... 291
Stephens vs. Railway Officials' & Employes' Acc. Ass'n. ....	Miss. S. C. .... 540
Strauss et al. vs. Phenix Ins. Co. ....	Col. C. A. .... 676
Sun Mutual Ins. Co. vs. Crist. ....	Ky. C. A. .... 695
Supreme Lodge Knights of Honor vs. Keener. ....	Tex. C. C. A. .... 413
Supreme Lodge Knights of Pythias vs. Stein. ....	Miss. S. C. .... 558
Theunou vs. Iowa Mut. Ben. Ass'n. ....	Iowa S. C. .... 586
Travelers Ins. Co. vs. Randolph, Executor. ....	U. S. C. C. A. .... 273
Travelers Ins. Co. vs. Selden. ....	U. S. C. C. A. .... 704
Tritschler vs. Keystone Mutual Benefit Association. ....	Pa. S. C. .... 693
Turner vs. Fidelity & Casualty Co. ....	Mich. S. C. .... 657
Union Casualty & Surety Co. vs. Randolph, Executor. ....	U. S. C. C. A. .... 291
Union Central Life Ins. Co. vs. Woods. ....	Ind. A. C. .... 151
Union Guaranty & Trust Co. vs. Robinson. ....	U. S. C. C. A. .... 582
United Underwriters' Ins. Co. et al. vs. Powell et al. ....	Ga. S. C. .... 526
Virginia Fire & Marine Ins. Co. vs. Thomas. ....	Va. S. C. A. .... 396
Warner vs. National Life Association. ....	Mich. S. C. .... 345
Washington Nat. Bank vs. Smith et al., etc. ....	Wash. S. C. .... 183
Wehle et al. vs. United States Mut. Acc. Ass'n. ....	N. Y. C. A. .... 817
Western Assurance Co. vs. Williams. ....	Ga. S. C. .... 338
Whitmore et al. vs. Supreme Lodge Knights & Ladies of Honor. ....	Mo. S. C. .... 514
Willey vs. Fidelity & Casualty Co. ....	U. S. C. C., Pa. .... 713
Wolters et al. vs. Western Assurance Co. ....	Wis. S. C. .... 877
Yost vs. McKee et al. ....	Pa. S. C. .... 716
Zimmermann vs. Dwelling-House Ins. Co. ....	Mich. S. C. .... 77

LOWER COURT DECISIONS.

Dodge vs. Hamburg-Bremen Fire Ins. Co. ....	Kan. C. A. .... 255
Imperial Manufacturing Co. vs. American Credit Indemnity Co. ....	La. C. A. for P. of O. .... 626
Manhattan Life Ins. Co. vs. Fields. ....	Tex. C. C. A. .... 164
Ohio Farmers' Ins. Co. vs. Bevis. ....	Ind. Ap. C. .... 623
Steinhausen vs. The Preferred Mut. Acc. Ass'n. ....	N. Y. S. C. .... 454
Westchester Fire Ins. Co. vs. Wagner et al. ....	Tex. C. C. A. .... 261

MISCELLANY.

Adams vs. Grand Lodge, A. O. U. W. et al. ....	Cal. S. C. .... 634
Addis et al. vs. Addis. ....	N. Y. S. C. .... 636
Ætna Ins. Co. vs. Meyer. ....	Ohio S. C. .... 367
Ætna Ins. Co. et al. vs. Rosenberg et al. ....	Ark. S. C. .... 461
Allred et al. vs. Hartford Fire Ins. Co. ....	Tex. C. C. A. .... 828
American Casualty Ins. & Sec. Co. vs. Arrott. ....	Pa. S. C. .... 458, 459
American Employers' Liability Ins. Co. et al. vs. Fordyce et al. ....	Ark. S. C. .... 461
American Fire Ins. Co. vs. Bland. ....	Ky. C. A. .... 925
American Fire Ins. Co. vs. Sisk. ....	Ind. A. C. .... 458
Anderson vs. John Hancock Mut. Life Ins. Co. ....	Brooklyn C. C. .... 175
Arbuckle vs. Interstate Casualty Co. ....	U. S. C. C., Col. .... 925
Baldwin vs. Citizens' Ins. Co. ....	N. Y. S. C. .... 638
Bank of Glasco vs. Springfield Fire & Marine Ins. Co. ....	Kan. C. A. .... 926
Barrett vs. Northwestern Mut. Life Ins. Co. ....	Iowa S. C. .... 269
Beatty vs. Mutual Reserve Life Ass'n. ....	U. S. C. C. A. .... 460
Beckett vs. Northwestern Masonic Aid Association. ....	Minn. S. C. .... 729
Benedix vs. German Ins. Co., of Freeport. ....	Wis. S. C. .... 270
Biermeister & Spicer vs. City of London Fire Ins. Co. ....	N. Y. S. C. .... 637

Bonanno vs. The Boskenna Bay.—Graziano vs. Same.—	
Mirto vs. Same.—Westervelt vs. Same.—Saitta vs.	
Same.—Mercadante vs. Same.—Sgobel et al. vs.	
Same.—Foti vs. Same .....	N. Y. D. C., S. D. .... 173
Boulden vs. Phoenix Ins. Co. ....	Ala. S. C. .... 461
Bowman vs. Moore .....	Cal. S. C. .... 271
Bowring vs. Providence-Washington Ins. Co. ....	N. Y. D. C. .... 639
Bridge vs. Wheeler .....	Mass. S. J. C. .... 269
Burns et al. vs. Grand Lodge, A. O. U. W. ....	Mass. S. J. C. .... 730
Capital City Ins. Co. vs. Autrey .....	Ala. S. C. .... 635
Carlson vs. Presbyterian Board of Relief for Disabled	
Ministers et al. ....	Minn. S. C. .... 731
Case of Charter Oak Life Ins. Co. ....	Conn. S. C. E. .... 634
Case of The Ontario .....	U. S. D. C., Mich. .... 175
Chickasaw County Mutual Fire Ins. Co. vs. Weller ..	Iowa S. C. .... 730
Clark vs. Reis, Treasurer .....	Cal. S. C. .... 368
Cobbeys vs. Dorland et al. ....	Neb. S. C. .... 458
Cochran vs. London Assurance Corporation .....	Va. S. C. A. .... 927
Commercial Fire Ins. Co. vs. Morris et al. ....	Ala. S. C. .... 632
Commercial Union Ass'n Co. vs. Meyer .....	Tex. C. C. A. .... 460
Commonwealth vs. Provident Bicycle Ass'n .....	Pa. S. C. .... 829
Commonwealth vs. Reinoehl .....	Pa. S. C. .... 267
Continental Ins. Co. vs. Chew .....	Ind. A. C. .... 464
Cooledge vs. Continental Ins. Co. ....	Vt. S. C. .... 730
Corey et al. vs. Sherman et al. ....	Iowa S. C. .... 365
Crutchfield vs. Bailey .....	Ga. S. C. .... 463
Daugherty vs. Knights of Pythias .....	La. S. C. .... 460
Davis Lumber Co. vs. Home Ins. Co. ....	Wis. S. C. .... 925
Deyo et al. vs. The Oswego et al. ....	N. Y. C. C., S. D. .... 172
Dishong vs. Iowa Life & Endowment Association ..	Iowa S. C. .... 366
D'Orlu vs. Bankers' & Merchants' Mut. Life Ass'n ..	U. S. C. C., Cal. .... 362
Dorsey vs. Fidelity & Casualty Co. ....	Ga. S. C. .... 462
Duncan vs. Preferred Mut. Acc. Association .....	N. Y. City Superior C. .... 366
Fawcett vs. Supreme Sitting, Order of Iron Hall ..	Conn. S. C. E. .... 169
First National Bank of Baton Rouge vs. Dakota F. & M.	
Ins. Co. ....	S. D. S. C. .... 631
Flanagan vs. Phenix Ins. Co. ....	W. Va. S. C. A. .... 459
Fleeman vs. Fleeman et al. ....	Superior Ct. Buffalo. .... 361
Garrettson vs. Equitable Mut. Life & Endowment Ass'n.	Iowa S. C. .... 633
German Ins. Co. vs. Read's Executors .....	Ky. C. A. .... 272
German Mutual Ins. Co. vs. Niewedde .....	Ind. Ap. C. .... 730
Glover vs. Rochester-German Ins. Co. ....	Wash. S. C. .... 639
Goldbaum et al. vs. Blum et al. ....	Tex. S. C. .... 829
Grand Lodge A. O. U. W. of Ind. vs. King .....	Ind. A. C. .... 463
Greenwood Ice & Coal Co. vs. Georgia Home Ins. Co. .	Miss. S. C. .... 633
Griess et al. vs. Massachusetts Benefit Ass'n .....	N. Y. S. C. .... 638
Griesemer vs. Mutnal Life Ins. Co. ....	Wash. S. C. .... 731
Grindle vs. York Mutual Aid Ass'n .....	Me. S. J. O. .... 631
Hall vs. Allen .....	Miss. S. C. .... 926
Handwerker vs. Diermeyer et al. ....	Tenn. S. C. .... 462
Hansen vs. Supreme Lodge Knights of Honor .....	Ill. A. C. .... 362
Hare vs. Headley et al. ....	N. J. S. C. C. .... 459
Harris, Resp't, vs. Mutual Life, Impl'dt Appl't. ....	N. Y. S. C. .... 362
Harrison vs. Hartford Fire Ins. Co. ....	U. S. C. C., Iowa. .... 271
Hartford Fire Ins. Co. vs. Josey .....	Tex. C. C. A. .... 829
Hartford Fire Ins. Co. vs. Small .....	U. S. C. C. A. .... 635
Hayne vs. Metropolitan Trust Co. ....	Minn. S. C. .... 731
Herndon et al. vs. Aetna Ins. Co. ....	N. C. S. C. .... 363
Heye vs. North German Lloyd .....	N. Y. C. C., S. D. .... 172
High Court of Foresters vs. Zak .....	Ill. S. C. .... 270
Hills et al. vs. Mackill et al. ....	N. Y. D. C., S. D. .... 173
Hirschl et al. vs. Clark .....	Iowa S. C. .... 361
Holliday et al. vs. State Board of Tax Commissioners et al.	Ind. C. C. .... 732
Home Ins. Co. vs. Marple .....	Ind. Ap. C. .... 639



	PAGE
Hubbard et al. vs. Turner et al. .... Ga. S. C. ....	268
Hunten et al. vs. Equitable Life. .... U. S. C. C., Mass. ....	362
Imbrie vs. Manhattan Life Ins. Co. .... Pa. S. C. ....	829
Indiana Farmers' Live-Stock Ins. Co. vs. Byrnett. — Same Ptf. vs. Rundell. — Same Ptf. vs. Bogeman .. Ind. A. C. ....	271
In re Order of Fraternal Guardians' Estate; Appeal of Sheeler et al. .... Pa. S. C. ....	170
Insurance Co. of North America vs. Caruthers et al. .... Miss. S. C. ....	636
Jackson vs. Fidelity & Casualty Co., of New York. .... U. S. C. C. A. ....	928
Jackson et al. vs. Millsbaugh et al. .... Ala. S. C. ....	268
Johnson vs. Phila. & Reading R. R. Co. .... Pa. S. C. ....	267
Johnson et al. vs. Alexander et al. .... Ind. S. C. ....	270
Johnston et al. vs. Northwestern Live-Stock Ins. Co. .... Wis. S. C. ....	732
Jones vs. U. S. Mutual Accident Association. .... Iowa S. C. ....	733
Jory vs. Supreme Council Am. Legion of Honor. .... Cal. S. C. ....	364
Kainer et al. vs. The Bergenseren et al. .... N. Y. D. C., S. D. ....	173
Kelley vs. Mutual Life Ins. Co., of New York. .... U. S. C. C., Iowa. ....	927
Kentucky M. F. S. Co. vs. Logan's Administrators. .... Ky. C. A. ....	266
Kentzler vs. American Mutual Accident Association. .... Wis. S. C. ....	733
Kiernan vs. Dutchess County Mutual Ins. Co. .... N. Y. C. A. ....	733
Kruger vs. Life & Annuity Ass'n. .... California Act. ....	636
Labell et al. vs. Georgia Home Ins. Co. .... Tex. C. C. A. ....	461
Lady Lincoln Lodge vs. Faist et al. .... N. J. C. C. ....	171
La Fonciere Companie, etc., vs. Koons et al. .... U. S. U. C. A. ....	464
La Scala et al. vs. The S-rapis. — La Scala et al. vs. McIntyre et al. .... N. Y. D. C., E. D. ....	171
Leavitt et al. vs. Dunn. .... N. J. C. E. A. ....	171
Lennox vs. Greenwich Ins. Co. .... Pa. S. C. ....	634
L'Hommedieu vs. The Carondelet. .... N. Y. D. C., E. D. ....	172
Liverpool & London & Globe Ins. Co. vs. Stern et al. .... Tex. C. C. A. ....	830
Louck vs. Orient Ins. Co. .... Pa. S. C. ....	462
Lynde vs. Newark Fire Ins. Co. .... Mass. S. J. C. ....	176
McFarland vs. Railway Officials & Employees' Ass'n. .... Wyo. S. C. ....	367
Martin vs. Insurance Co. of North America. .... N. J. S. C. ....	830
Martins vs. Manufacturers' Accident Indemnity Co. .... N. Y. S. C. ....	638
Mengel vs. Northwestern Mut. Life Ins. Co. .... Pa. S. C. ....	459
Metzger vs. Manchester Fire Assurance Co. .... Mich. S. C. ....	734
Michigan Mutual Life Ins. Co. vs. Custer. .... Ind. S. C. ....	830
Millard vs. Supreme Council Amer. Legion of Honor. .... Cal. S. C. ....	175
Mills vs. Home Benefit Life Ass'n. .... Cal. S. C. ....	633
Milwaukee Mechanics' Ins. Co. vs. Niewedde. .... Ind. Ap. C. ....	734
Mitchel vs. Mississippi Home Ins. Co. .... Miss. S. C. ....	634
Mobile Ins. Co. et al. vs. Columbia & Greenville R.R. Co. .... S. C. S. C. ....	268
Moge vs. Societe de Bienfaigance, etc. .... Mass. S. J. C. ....	830
Moyer vs. Sun Ins. Office. .... Pa. S. C. ....	462
Mutual Life Ins. Co. vs. Simpson. .... Tex. C. C. A. ....	459
Mutual Life Ins. Co. vs. Smith. .... Ga. S. C. ....	928
National Fire Ins. Co., of Hartford, vs. Strebe. .... Ind. A. C. ....	926
National Union vs. Marlow. .... U. S. C. C. A. ....	363
Neville vs. Detroit Fire Ass'n. .... Mich. S. C. ....	637
New Haven Steamboat Co. vs. The Mayor, etc. .... N. Y. D. C., S. D. ....	172
New York Life Ins. Co. vs. Smith. .... U. S. C. C. A. ....	635
Norristown Title Trust & Safe Deposit Co. vs. John Hancock Mut. Life. .... Pa. S. C. ....	272
Omaha Fire Ins. Co. vs. Thompson et al. .... Neb. S. C. ....	735
Over vs. Lake Erie & W. R. Co. .... U. S. C. C., Ind. ....	362
Palatine Ins. Co. vs. Evans, Judge. .... Ark. S. C. ....	459
Palmer vs. Welch et al. .... Ill. S. C. ....	269
Parker et al. vs. Rochester-German Ins. Co. .... Mass. S. J. C. ....	635
Peele vs. Provident Fund Society et al. .... Ind. S. C. ....	927
People ex rel. Stevens vs. Fidelity & Casualty Ins. Co. .... Ill. S. C. ....	364
People ex rel. Woodward vs. Rosendale, Att'y-Gen. .... N. Y. C. A. ....	266
Phenix Ins. Co. vs. Rogers et al. .... Ind. A. C. ....	463
Phenix Ins. Co. vs. Wilcox & Gibbs Guano Co. .... U. S. C. C. A. ....	632

	PAGE
Phoenix Ass'e Co. vs. Allison et al. ....	Tex. C. C. A. .... 461
Phoenix Ins. Co. vs. Asbury. ....	Ga. S. C. .... 1024
Pierson et al. vs. Springfield F. & M. Ins. Co. ....	Del. S. C. .... 176
Pratt et al. vs. Globe Mutual Life. ....	Tenn. S. C. .... 176
Quigg vs. Coffy. ....	R. I. S. C. .... 367
Quinlan vs. Providence-Washington Ins. Co. ....	N. Y. S. C. .... 637
Rand et al. vs. Provident Savings Life Ass'e Society. ....	Tenn. S. C. .... 926
Reck vs. Phoenix Ins. Co. ....	N. Y. S. C. .... 174
Benner et al. vs. Supreme Lodge, Bohemian Slavonian Benefit Society. ....	Wis. S. C. .... 635
Republic Life Ins. Co. vs. Swigert, Auditor, et al. ....	Ill. S. C. .... 266
Richards vs. Travelers Ins. Co. ....	Cal. S. C. .... 636
St. Louis, I. M., & S. Railway Co. vs. Commercial Union Ins. Co. ....	U. S. C. C., Ark. .... 363
Schauer vs. Queen Ins. Co. ....	Wis. S. C. .... 367
Schultz vs. Caledonian Ins. Co. ....	Wis. S. C. .... 927
Sherry et ux. vs. Operative Plasterers' Mutual Union. ....	Pa. S. C. .... 735
Shevlin vs. American Mutual Accident Association. ....	Wis. S. C. .... 734
Shove vs. Shove. ....	Wis. S. C. .... 368
Sisk vs. Citizens' Ins. Co. ....	Ind. A. C. .... 458
Smith, Adm'r, vs. German-American Ins. Co. ....	N. Y. S. C. .... 174
Smith vs. California Ins. Co. ....	Me. S. J. C. .... 631
Smith vs. Hopkins et al. ....	Wash. S. C. .... 366
Spring vs. Chautauqua Mut. Life Ass'n. ....	N. Y. S. C. .... 636
Stambler vs. Order of Pente. ....	Pa. S. C. .... 170
State ex rel. Richards, Atty.-Gen'l, vs. Richardson. ....	Ohio S. C. .... 169
Stoelker vs. Thornton et al. ....	Ala. S. C. .... 174
Stohr vs. San Francisco Musical Fund Soc. ....	Cal. S. C. .... 269
Summerfield vs. Phoenix Ass'e Co. ....	U. S. C. C., Va. .... 640
Sun Fire Office vs. Fraser et al. ....	Kan. C. A. .... 831
Sun Fire Office vs. Wich. ....	Col. S. C. .... 831
Sun Mut. Ins. Co. vs. Saginaw Barrel Co. ....	Ill. S. C. .... 176
Supreme Lodge Knights of Pythias of the World vs. Wilson. ....	U. S. C. C. A. .... 637
Tessmann vs. Supreme Commandery of the United Friends of Michigan. ....	Mich. S. C. .... 736
The Steamship Samaua vs. The Erin. ....	N. Y. D. C., E. D. .... 171
Travelers Ins. Co. vs. Nitterhouse. ....	Ind. A. C. .... 460
Union Central Life Ins. Co. vs. Chowling. ....	Tex. S. C. .... 269
Union Mutual Acc. Ass'n vs. Frohard. ....	Ill. S. C. .... 361
United States vs. American Tobacco Co. ....	U. S. S. C. .... 640
Van Werden vs. Equitable Life. ....	Iowa S. C. .... 269
Wainer vs. Milford Mutual Fire Ins. Co. ....	Mass. S. J. C. .... 831
Waldheim vs. John Hancock Life Ins. Co. ....	City Ct. of N. Y. .... 363
Walker vs. Giddings. ....	Mich. S. C. .... 632
Ward vs. National Fire Ins. Co. ....	Wash. S. C. .... 635
Ward vs. Tucker. ....	Wash. S. C. .... 171
Warner vs. Schoharie & Schoenectady County Farmers' Mut. Fire Ins. Co. ....	N. Y. S. C. .... 637
Washington Life Ins. Co. vs. Lane et al. ....	N. J. C. C. .... 174
Wells vs. Covenant Mut. Benefit Ass'n. ....	Mo. S. C. .... 636
Western Assurance Co. vs. McGlathery. ....	Ala. S. C. .... 832
Wheeler vs. Supreme Sitting of Order of Iron Hall. ....	Mich. S. C. .... 459
Whitney vs. National Masonic Acc. Ass'n. ....	Minn. S. C. .... 272
Wildberger vs. Hartford Fire Ins. Co. ....	Miss. S. C. .... 367
Wilhelmi vs. Des Moines Ins. Co. ....	Iowa S. C. .... 271
Williams vs. Maine State Relief Ass'n. ....	Me. S. J. C. .... 832
Williams vs. U. S. Mutual Accident Ass'n. ....	N. Y. S. C. .... 639
Windmuller et al. vs. The Thomas Melville et al. ....	N. Y. C. C., S. D. .... 173
Wood et al. vs. Cascade Fire & Marine Ins. Co. ....	Wash. S. C. .... 169
Wright vs. Mutual Benefit Life Ass'n. ....	N. Y. C. A. .... 270
Zell vs. Herman Farmers' Mut. Ins. Co. ....	Wis. S. C. .... 364

## CASES AND AUTHORITIES CITED.

PAGE	PAGE
Abbott vs. Insurance Co. .... 372	Bailey vs. Bank. .... 102
Accident Ins. Co. vs. Crandall. .... 278	Bailey vs. Insurance Co. .... 439
Acer vs. Merchants' Ins. Co. .... 740	Baird vs. United States. .... 130
Adams vs. Insurance Co. .... 484	Balestracci vs. Insurance Co. .... 499
Addison vs. Insurance Co. .... 372	Ballou vs. Gile. .... 431
Adkins vs. Insurance Co. .... 884	Ballou vs. Talbot. .... 20
Ætna, etc., Insurance Co. vs. Cilm- stead. .... 302	Bancroft vs. Association. .... 144
Ætna Ins. Co. vs. Hannibal & St. J. R. R. Co. .... 130, 131, 132	Bank vs. Benson. .... 543
Ætna Life Ins. Co. vs. Florida. .... 560	Bank vs. Daniel. .... 842
Alexander vs. Wallace. .... 952	Bank vs. Hammerslough. .... 518
Alkan vs. Insurance Co. .... 62, 382	Bank vs. Hume. .... 220
Allen vs. B. & O. R. R. Co. .... 642	Bank vs. Sarlls. .... 651
Allen vs. Insurance Co. .... 181	Bank vs. Wilkin. .... 668
American Central Ins. Co. vs. Mc- Lanathan. .... 181	Bank vs. Wray. .... 32
American Legion vs. Smith. .... 431	Bank of Augusta vs. Earle. .... 69, 70, 7
Ames vs. Insurance Co. .... 1011	Banking Co. vs. Teiger. .... 7
Amick vs. Butler. .... 430, 434	Bard vs. Insurance Co. .... 181
Anderson vs. Burchett. .... 52	Barnard vs. Adams. .... 254
Anderson vs. Manchester Ass'e Co. .... 93	Barnes vs. McMurtry. .... 196
Andrews vs. Burdick. .... 803	Barron vs. Burnside. .... 647
Andrews vs. Pond. .... 842	Barrow vs. Bell. .... 845
Annelly vs. De Saussure. .... 747	Basch vs. Insurance Co. .... 478
Anstruther vs. Chalmers. .... 950	Batchelder vs. Insurance Co. .... 117, 317
Arthurholt vs. Insurance Co. .... 7	Batchelor vs. Association. .... 823
Ashley vs. Ashle. .... 429	Bates vs. Insurance Co. .... 728
Association vs. Froiland. .... 65	Battis vs. Hamlin. .... 766
Association vs. Gillespie. .... 143, 144	Bauble vs. Insurance Co. .... 479
Association vs. Houghton. .... 427, 428, 433, 518	Bauer vs. Samson Lodge. .... 431
Association vs. Hoyt. .... 518	Baul vs. Insurance Co. .... 500
Association vs. Jones. .... 951, 952	Baum vs. Reay. .... 678
Association vs. Loomis. .... 232	Baumgart vs. Modern Woodmen. .... 761, 762
Association vs. Matthews. .... 352	Baxter vs. Insurance Co. .... 136, 238
Association vs. Montgomery. .... 236	Baye vs. Adams. .... 990
Association vs. Payne. .... 884	Beatty vs. Association. .... 859
Association vs. Rolfe. .... 431	Beckwith vs. Cheever. .... 124
Association vs. Shryock. .... 569	Bell vs. Bruen. .... 842
Association vs. Samuels. .... 823	Bell vs. Insurance Co. .... 740
Association vs. Windover. .... 859	Bentley vs. Insurance Co. .... 790
Association vs. Winn. .... 684	Bergson vs. Insurance Co. .... 480
Assurance Co. vs. Hocking. .... 716	Best vs. Frederick. .... 885, 886
Assurance Co. vs. Mason. .... 775	Bettes vs. Magoon. .... 519
Assurance Co. vs. Sainsbury. .... 132	Bever vs. North. .... 624
Assurance Co. vs. Samuels. .... 375	Biddle vs. Insurance Co. .... 425
Assurance Society vs. Clements. .... 136, 948, 949	Bigelow vs. Insurance Co. .... 694, 882, 884, 885
Assurance Society vs. Insurance Co. .... 479	Biggs vs. Insurance Co. .... 979
Atkin vs. Moore. .... 102	Billings vs. Insurance Co. .... 800, 884
Ault vs. Manufacturing Co. .... 988	Bish vs. Insurance Co. .... 197
Bachmeyer vs. Association. .... 806	Blässer vs. Milwaukee Mechanics' Mut. Ins. Co. .... 963
Bacon vs. Association. .... 64	Blake Opera House Co. vs. Home Ins. Co. .... 680
Badenfeld vs. Accident Association. .... 402	Blanks vs. Insurance Co. .... 197
Bagley vs. Grand Lodge, etc. .... 456	Bloomington vs. Blue. .... 990
	Blumer vs. Insurance Co. .... 761
	Board vs. Brown. .... 654

	PAGE		PAGE
Board of Sup'rs vs. Lackawanna Iron & Coal Co. ....	765	Carroll vs. Insurance Co. 43, 45, 482, 483, 484	
Bodine vs. Insurance Co. ....	476, 481, 904	Carrugi vs. Insurance Co. ....	340, 824
Boehen vs. Insurance Co. ....	221, 476, 481	Carson vs. Insurance Co. ....	907, 909
Boetcher vs. Insurance Co. ....	328	Carter vs. Insurance Co. ....	136
Boland vs. Gillett. ....	766	Castner vs. Insurance Co. ....	912
Bolton vs. Bolton. ....	298, 949	Catholic Knights vs. Kuhn. ....	684
Bonefant vs. Insurance Co. ....	659	Catoir vs. American Life Ins. & Trust Co. ....	302
Boon vs. Murphy. ....	916	Chadbourne vs. Insurance Co. ....	479
Boone vs. Stone. ....	102	Chamberlain vs. Insurance Co. ....	68
Borgraefe vs. Lodge. ....	519	Chandler vs. Temple. ....	1010
Borradaile vs. Hunter. ....	882	Chandos vs. Insurance Co. ....	618
Bosworth vs. Society. ....	416	Chapin vs. Fellows. ....	218
Bowditch vs. Borton. ....	709	Chapman vs. Insurance Co. ....	884
Bowen vs. Aubrey. ....	221	Chartrand vs. Brace. ....	949
Bowless vs. Insurance Co. ....	625	Chase vs. Box Co. ....	187
Bowlin vs. Hekla F. Ins. Co. ....	982	Cheek vs. State. ....	792
Bowlus vs. Insurance Co. ....	199, 943	Cheese Co. vs. Smith. ....	494
Bowman vs. Insurance Co. ....	476	Chemical Co. vs. Johnson. ....	914
Bowman vs. Moore. ....	218	Cherry vs. Arthur. ....	187
Breasted vs. Trust Co. ....	694	Chicago, etc., R. R. Co. vs. Lowell. ....	291
Brenner vs. Luth. ....	180	Chipman vs. Carroll. ....	618
Bridgeport Land & Imp. Co. vs. Am. Fireproof Steel Car Co. ....	893	Church vs. Insurance Co. ....	476
Briggs vs. Earl. ....	522	City of Lowell vs. Parker. ....	585
Briggs vs. Insurance Co. ....	704	Claffin vs. Insurance Co. ....	785
Brightman vs. Kirner. ....	766	Clapp vs. Association. ....	440, 443
Britton vs. Supreme Council. ....	431, 951	Clark vs. Allen. ....	429, 990
Brockway vs. Insurance Co. ....	518, 519, 991	Clark vs. Insurance Co. ....	125
Brown vs. Insurance Co. ....	762, 942	Clary vs. Com. ....	864
Brown vs. Kinsey. ....	885	Classon vs. Roman. ....	1023
Brown vs. Lynn. ....	246	Clay F. & M. Ins. Co. vs. Huron Salt & Lumber Mfg. Co. ....	729
Brown vs. Mansur. ....	434	Cleaver vs. Insurance Co. 263, 300, 302	
Bruce vs. Garden. ....	433, 434	Clemans vs. Supreme Assembly. ....	762
Bull vs. Rowe. ....	753	Clover vs. Insurance Co. ....	600
Burbank vs. Association. ....	238	Cobb vs. Association. ....	148
Burkhard vs. Insurance Co. ....	1013	Cobb vs. Insurance Co. ....	351
Burnett vs. Kensington. ....	843, 845	Coburn vs. Investment Co. ....	166
Burns vs. Grand Lodge. ....	523	Cofrode vs. Gartner. ....	445
Bursinger vs. Bank. ....	429, 990	Cogswell vs. Dolliver. ....	41
Burton vs. Insurance Co. ....	427, 433, 487	Cohen vs. Insurance Co. ....	166, 168
Bush vs. Westchester F. Ins. Co. ....	979	Cole vs. Bank. ....	159
Button vs. Association. ....	806	Cole vs. Insurance Co. ....	822
Byrne vs. Marshall. ....	893	Collier vs. Collier. ....	952
Caballers vs. Insurance Co. ....	704	Collins vs. Mack. ....	764
Caffery vs. Insurance Co. ....	221	Collins vs. Whigham. ....	893
California Ins. Co. vs. Union Compress Co. ....	996	Columbia R. R. Co. vs. Hawthorne. ....	278
Cammack vs. Lewis. ....	429, 434	Com. vs. Bartilson. ....	866
Camp vs. Kendricks. ....	651	Com. vs. Harly. ....	864
Campbell vs. Buckman. ....	582	Com. vs. Hide & Leather Ins. Co. ....	1011
Campbell vs. Dearborn. ....	777	Com. vs. Judd. ....	864
Campbell vs. Haverhill. ....	278	Com. Bank of Milwaukee vs. Firemen's Ins. Co. ....	881
Campbell vs. Insurance Co. ....	125, 143, 439, 440	Conkhite vs. Insurance Co. ....	681
Campbell vs. Wilson. ....	445	Connecticut, etc., Ins. Co. vs. New York, etc., R. R. Co. ....	132
Cantillon vs. Assurance Co. ....	843	Connecticut Mut. Life Ins. Co. vs. Union Trust Co. ....	144, 924
Caplis vs. Insurance Co. ....	811	Continental Ins. Co. vs. Chamberlain. ....	2:9
Caraher vs. Insurance Co. ....	382	Continental Ins. Co. vs. Pearce. ....	181
Carey vs. Insurance Co. ....	987	Cook vs. Morris. ....	1003
Carpenter vs. Insurance Co. 371, 747, 904		Cook vs. Standard Life & Accident Ins. Co. ....	302
Carradine vs. Hotchkiss. ....	678		
Carroll vs. E. St. Louis. ....	69		

PAGE	PAGE
Cooper Mfg. Co. vs. Ferguson..... 84	Eagle Fire Co., of New York, vs.
Copeland vs. Insurance Co..... 243	Globe Loan & Trust Co..... 690
Corbett vs. Insurance Co..... 891	Eastern R. R. Co. vs. Relief F. Ins.
Corbitt vs. Corbitt..... 952	Co..... 772, 996
Cormac vs. Bronze Co..... 324	Eastman vs. Association..... 125
Cornell vs. Moulton..... 137	Eckel vs. Renner..... 419
Cornell vs. Railway Co..... 180	Eddings vs. Long..... 436
Corry vs. Insurance Co..... 408	Edings vs. Brown..... 20, 32
Cory vs. Burr..... 253	Edington vs. Insurance Co..... 764
Covington vs. Newberger..... 885	Edmonstone vs. Hartshorn..... 309
Cox vs. Woods..... 689	Elkins vs. Insurance Co..... 480, 714, 899
Crombie vs. Insurance Co..... 408	Elliott vs. Peck..... 582
Cronkhite vs. Insurance Co..... 806	Elsey vs. Association..... 431, 649
Croom vs. Herring..... 436, 952	Emery vs. Insurance Co..... 68
Cross vs. Insurance Co..... 371, 679	Enohin vs. Wylie..... 950
Crouse vs. Insurance Co..... 161	Enos vs. Insurance Co..... 263, 481
Cunningham vs. Macon & Brunswick	Ermentrout vs. Girard F. & M. Ins.
R. R..... 642	Co..... 979
Curtis vs. Millard..... 802	Evans vs. Beaver..... 160
Cushman vs. Insurance Co..... 71, 144	Evans vs. Insurance Co..... 238
Daggs vs. Assurance Co..... 891	Evans vs. Salt..... 436
Dalby vs. Assurance Co..... 425	Everett vs. Assurance Co..... 704
Daniels vs. Pratt..... 431, 523	Everett vs. Insurance Co..... 534
Daughtry vs. Knights of Pythias..... 559	Express Co. vs. Insurance Co..... 253
Davenport vs. Insurance Co..... 45	Fairbanks vs. Long..... 518
Davis vs. Hamlin..... 308	Farnum vs. Insurance Co..... 9, 218, 221
Davis vs. Insurance Co..... 383	Farrow vs. Insurance Co..... 116
Dealy vs. United States..... 867	Fenno vs. Weston..... 210
Dean vs. Legion of Honor..... 523	Field vs. Halzman..... 651
De Beauvoir vs. De Beauvoir..... 435	Field vs. Malone..... 651
De Frece vs. Insurance Co..... 137, 166	Fire Insurance Ass'n vs. Merchants'
De Gogorza vs. Insurance Co..... 694, 883	& Miners' Transportation Co. . . 996
Degraff vs. Insurance Co..... 534	Firemen's Fund Ins. Co. vs. Nor-
Denny vs. Williams..... 189	wood..... 182
Desmazis vs. Insurance Co..... 222	First Cong'l Church vs. Holyoke Mut.
Devereux vs. Press Co..... 35	Fire Ins. Co..... 799
Devine vs. Insurance Co..... 482, 1009	Fitch vs. Am. Pop. Ins. Co..... 457
Dewey vs. Bowman..... 597	Fitch vs. Insurance Co..... 143
Dickinson vs. Dodds..... 124	Fitzgerald vs. Construction Co..... 1023
Diffenbaugh vs. Insurance Co..... 262	Fitzgerald vs. Quann..... 768
Dole vs. Insurance Co..... 251	Fitzmaurice vs. Insurance Co. . 264, 452
Dolliver vs. Insurance Co..... 917	Fitzpatrick vs. Insurance Co..... 429
Donahue vs. Insurance Co..... 483	Flynn vs. Insurance Co. . . 150, 439
Donnelly vs. Insurance Co..... 328	Follis vs. United States Mut. Acc.
Doody vs. Higgins..... 435, 436, 952	Ass'n..... 283
Downey vs. Hoffer..... 990	Folsom vs. Insurance Co..... 126
Doyle vs. Insurance Co..... 69, 647	Fourniquet vs. Perkins..... 243
Doyle vs. United States..... 69	Fowler vs. Butterlv..... 155
Dreher vs. Railroad Co..... 324	Fowler vs. Rathbones..... 254
Drysdale vs. Piggott..... 434	Fox vs. Phoenix Ins. Co..... 742
Ducat vs. Chicago..... 69, 74	Freeman vs. Association..... 569, 575
Dudgeon vs. Pembroke..... 253	Freeman vs. Insurance Co. . . 402, 881
Dugger vs. Insurance Co..... 69	Freeman vs. Knight..... 952
Dunbar vs. Insurance Co..... 62	Freeman vs. Travelers Ins. Co..... 289
Duncan vs. Accident Ass'n..... 404	Fritts vs. Palmer..... 81
Dunham vs. Morse..... 1011	Fritz vs. Insurance Co..... 382
Durar vs. Insurance Co..... 492	Frost vs. Insurance Co..... 594
Durian vs. The Central Verein, etc. 457	Fullam vs. Adams..... 1020
Dusenbury vs. Ellis..... 20	Fuller vs. Insurance Co..... 372
Dutton vs. Willner..... 434	Funk vs. Insurance Ass'n. . . 181
Duvall vs. Goodson..... 949	Gaither vs. Ferebee..... 914
Dwight vs. Insurance Co..... 761	Gardner vs. Michigan Central R. R. 279
Dwight vs. Newell..... 102	Garner vs. Insurance Co..... 220
Eagan vs. Insurance Co..... 476, 481	Garretson vs. Insurance Co..... 329

PAGE	PAGE
Gasser vs. Assurance Co. .... 45	Hamilton vs. Liverpool & London & Globe Ins. Co. .... 499
Gasser vs. Sun Fire Office. .... 784	Hammel vs. Insurance Co. .... 619
Gates vs. Insurance Co. .... 799, 800	Handwerker vs. Diermeyer. .... 684
Gauch vs. Insurance Co. .... 437, 951	Hankins vs. Insurance Co. .... 263
Geib vs. Insurance Co. .... 482, 483	Hankins vs. Rockford Ins. Co. .... 979
Getto vs. Binkert. .... 50	Hannon vs. Grizzard. .... 914
Gibson (Chas.) vs. Connecticut Fire Ins. Co. .... 95	Hard vs. Decorah. .... 511
Gilbert vs. Dutruit. .... 766	Harding vs. Littlehale. .... 592
Gilbert vs. Moose. .... 434	Hardison vs. Railroad Co. .... 886
Gilmore vs. Bangs. .... 494	Harlan vs. Ely. .... 582
Girard L. Ins. Co. vs. Mut. L. Ins. Co. .... 917	Harley vs. Heist. .... 152
Gittings vs. McDermott. .... 436	Harman vs. Vaux. .... 845
Given vs. Insurance Co. .... 119	Harrington vs. Smith. .... 765
Gladding vs. Association. .... 481	Harris vs. Hays. .... 518
Glidden vs. Henry. .... 651	Harrison vs. Nixon. .... 950
Glover vs. Insurance Co. .... 303	Hart vs. Railroad Corp. .... 130, 132, 133
Goddard vs. Insurance Co. .... 452	Hascall vs. Cox. .... 435, 436
Goit vs. Insurance Co. .... 476	Havemeyer vs. Superior Court. .... 868
Golson et al. vs. Ehert. .... 89	Havens vs. Insurance Co. .... 68, 890, 891
Goodwin vs. Society. .... 590	Hawley vs. Railroad Co. .... 324
Gormley vs. Day. .... 511	Hazeltine vs. Page. .... 1020
Gorringe vs. Gutta Percha Works. .... 543	Healey vs. Association. .... 823
Gould vs. Dwelling-House Ins. Co. .... 979	Heaton vs. Insurance Co. .... 476
Gould vs. Emerson. .... 218	Hellenberg vs. Dist. No. 1, etc. .... 456
Gould vs. Insurance Co. .... 302	Helmstags Adm'r vs. Miller. .... 990
Gowan vs. Hanson. .... 766	Hench vs. Insurance Co. .... 804
Grace vs. Insurance Co. .... 7, 479	Henderson vs. Henderson. .... 952
Grand Rapids Electric Light & Power Co. vs. Fidel. & Casual. Ins. Co. .... 860	Herbst vs. Lowe. .... 263
Grand Trunk B. R. vs. Cummings. .... 278	Hermann vs. Insurance Co. .... 7
Grand Trunk B. R. Co. vs. Ives. .... 279	Heuer vs. Insurance Co. .... 704
Grant vs. Varney. .... 679	Hickory vs. United States. .... 567
Grattan vs. Insurance Co. .... 150, 764	Hicks vs. Insurance Co. .... 804
Gray vs. Insurance Co. .... 680	Hicks vs. National C. Ins. Co. .... 90
Green vs. Fisk. .... 243	Hill vs. Insurance Co. .... 822
Green vs. Knoch. .... 79	Hill's Adm'r vs. Mitchell. .... 437
Greenleaf vs. Egan. .... 45	Hillyer vs. Dickinson. .... 189
Greenwood vs. Insurance Co. .... 165, 168	Hinkley vs. Arey. .... 7
Griffith vs. Insurance Co. .... 105, 106	Hinsaman vs. Hinsaman. .... 584
Grigby vs. Telegraph Co. .... 801	Hiscock vs. Harris. .... 45
Gristock vs. Insurance Co. .... 679	Hobson vs. McCambridge. .... 102
Great vs. Pracht. .... 52	Hodge vs. Insurance Co. .... 476
Groomes vs. Waterman. .... 42	Hodgson vs. Insurance Co. .... 618
Gross vs. Insurance Co. .... 987	Hoffman vs. Hoke. .... 990
Gross et al. vs. Milwaukee Mechanics' Ins. Co. .... 979	Hogins vs. Supreme Council. .... 416
Grossman vs. Supreme Lodge, etc. .... 457	Holbrook vs. Insurance Co. .... 534
Grosvenor vs. Insurance Co. .... 619	Holland vs. Taylor. .... 430, 431, 519
Guarantee Co. vs. Wood. .... 688	Holloway vs. Holloway. .... 435
Guest vs. Insurance Co. .... 912	Holmes vs. Braidwood. .... 519
Gunther vs. Liverpool Ins. Co. .... 280	Home F. Ins. Co. vs. Wood. .... 934
Guy vs. Insurance Co. .... 117	Home Flax Co. vs. Beebe. .... 102
Hadley vs. Insurance Co. .... 351	Home Ins. Co. vs. Davis. .... 69
Hagan vs. Insurance Co. .... 329	Home Ins. Co. vs. Wood. .... 181
Hale vs. Insurance Co. .... 238	Home Mut. Ins. Co. vs. Roe. .... 983
Haley vs. Heist. .... 220	Hood vs. Hartshorn. .... 45
Hall vs. Association. .... 126	Hoose vs. Insurance Co. .... 912
Hall vs. Insurance Co. .... 52	Hopkins vs. Railway Co. .... 50, 180
Hall vs. Merrill. .... 491	Hoppe vs. Railway Co. .... 988
Hall vs. Railroad Co. .... 130, 132, 133	Horn vs. Assurance Co. .... 694
Hall vs. Union. .... 560	Hospes vs. Car Co. .... 657
Hamilton vs. Home Ins. Co. .... 499	Houghton vs. Kendall. .... 436
	Howland vs. Blake. .... 689
	Hubbard vs. Stapp. .... 220
	Huck vs. Insurance Co. .... 891

	PAGE		PAGE
Hughes vs. Insurance Co. ....	690	Insurance Co. vs. Elkins. ....	480
Hughes vs. Supreme Lodge. ....	558	Insurance Co. vs. Ende. ....	264, 451
Hunt vs. Weir. ....	102	Insurance Co. vs. Erb. ....	483
Hutchcraft vs. Insurance Co. ....	806	Insurance Co. vs. Fahrenkrug. ....	394, 904
Hutchcraft's Ex'r vs. Insurance Co. ....	542	Insurance Co. vs. Fairbank. ....	196, 201
Hutson vs. Merryfield. ....	428	Insurance Co. vs. Febrath. ....	619
Ibid vs. Ibid. ....	69	Insurance Co. vs. Fennell. ....	478
Illinois Mut. Fire Ins. Co. vs. Mar-		Insurance Co. vs. Fish. ....	394
seilles Mfg. Co. ....	102	Insurance Co. vs. Fletcher. ....	150, 554
Imperial Fire Ins. Co. vs. County of		Insurance Co. vs. France. ....	140, 519,
Coos. ....	747		763, 895
Improvement Co. vs. Munson. ....	278, 709	Insurance Co. vs. French. ....	162
Indemnity Co. vs. Berry. ....	559	Insurance Co. vs. Frost. ....	130, 132
Insurance Co. vs. Adams. ....	243, 248	Insurance Co. vs. Garlington. ....	891
Insurance Co. vs. Akens. ....	884, 886	Insurance Co. vs. Garner. ....	895
Insurance Co. vs. Allen. ....	777, 990	Insurance Co. vs. Glasgow. ....	800
Insurance Co. vs. Amerman. ....	594	Insurance Co. vs. Gould. ....	943
Insurance Co. vs. Anderson. ....	309	Insurance Co. vs. Gridley. ....	149
Insurance Co. vs. Applegate. ....	218	Insurance Co. vs. Griffin. ....	57
Insurance Co. vs. Armstrong. ....	156, 519	Insurance Co. vs. Groom. ....	694
Insurance Co. vs. Atkins. ....	698	Insurance Co. vs. Gustin. ....	1024
Insurance Co. vs. Bachler. ....	891	Insurance Co. vs. Haley. ....	220
Insurance Co. vs. Badger. ....	483	Insurance Co. vs. Hall. ....	482, 659
Insurance Co. vs. Bailey. ....	425	Insurance Co. vs. Hammang. ....	689
Insurance Co. vs. Barnes. ....	480	Insurance Co. vs. Hart. ....	370, 680, 773
Insurance Co. vs. Barraciff. ....	913	Insurance Co. vs. Hazelet. ....	535, 625
Insurance Co. vs. Barwick. ....	195	Insurance Co. vs. Hazlewood. ....	150, 452
Insurance Co. vs. Baum. ....	427, 433, 538	Insurance Co. vs. Hazzard. ....	426, 428,
Insurance Co. vs. Beatty. ....	57		429, 518, 990
Insurance Co. vs. Bennett. ....	806	Insurance Co. vs. Heiduk. ....	196, 690
Insurance Co. vs. Block. ....	221, 375, 478	Insurance Co. vs. Higginbotham. ....	887
Insurance Co. vs. Bohn. ....	107	Insurance Co. vs. Hoffman. ....	1014
Insurance Co. vs. Booker. ....	479	Insurance Co. vs. Hogue. ....	480, 602
Insurance Co. vs. Boon. ....	251	Insurance Co. vs. Holloway. ....	1005
Insurance Co. vs. Boshier. ....	132	Insurance Co. vs. Holthaus. ....	375
Insurance Co. vs. Bowdre. ....	352	Insurance Co. vs. Hoover. ....	221, 357,
Insurance Co. vs. Bredehoft. ....	1023		480, 714, 899
Insurance Co. vs. Brodie. ....	150	Insurance Co. vs. Horner. ....	681
Insurance Co. vs. Brooks. ....	903	Insurance Co. vs. Hyman. ....	773
Insurance Co. vs. Broughton. ....	694	Insurance Co. vs. Ives. ....	394
Insurance Co. vs. Brown. ....	166, 168	Insurance Co. vs. Johnson. ....	143, 425,
Insurance Co. vs. Burroughs. ....	1013		881, 894, 895
Insurance Co. vs. Camp. ....	264	Insurance Co. vs. Jones. ....	482
Insurance Co. vs. Carrow. ....	659	Insurance Co. vs. Jordan. ....	793
Insurance Co. vs. Carter. ....	714, 899	Insurance Co. vs. Josey. ....	266
Insurance Co. vs. Cary. ....	394, 412	Insurance Co. vs. Kane. ....	487
Insurance Co. vs. Chamberlain. ....	555	Insurance Co. vs. Kasey. ....	479
Insurance Co. vs. Chestnut. ....	394	Insurance Co. vs. Kempner. ....	264
Insurance Co. vs. Clancy. ....	719	Insurance Co. vs. Kiunin. ....	400
Insurance Co. vs. Clipp. ....	394	Insurance Co. vs. Kirkpatrick. ....	79
Insurance Co. vs. Coverdale. ....	258,	Insurance Co. vs. Krogger. ....	691, 692
	605, 619	Insurance Co. vs. Lansing. ....	595
Insurance Co. vs. Crane. ....	689	Insurance Co. vs. Lawrence. ....	253, 382
Insurance Co. vs. Crutchfield. ....	7	Insurance Co. vs. Lee. ....	8, 265
Insurance Co. vs. Custer. ....	162	Insurance Co. vs. Lenheim. ....	692
Insurance Co. vs. Deming. ....	625	Insurance Co. vs. Lewis. ....	680
Insurance Co. vs. Doll. ....	968	Insurance Co. vs. Lippold. ....	195
Insurance Co. vs. Doster. ....	279	Insurance Co. vs. Lorenz. ....	679
Insurance Co. vs. Downs. ....	387	Insurance Co. vs. Luttrell. ....	394
Insurance Co. vs. Dunham. ....	371	Insurance Co. vs. Lyons. ....	351, 482
Insurance Co. vs. Dunlap. ....	64, 55, 823	Insurance Co. vs. McConkey. ....	542,
Insurance Co. vs. Earle. ....	351, 479, 482,		694, 806, 884, 885, 886
	483	Insurance Co. vs. McCrear. ....	477, 482, 483
Insurance Co. vs. Eddy. ....	891, 1024	Insurance Co. vs. McGregor. ....	197

PAGE	PAGE
Insurance Co. vs. McIntyre.....891	Insurance Co. vs. Unsell..... 57
Insurance Co. vs. McKee.....394	Insurance Co. vs. Vaughan.....400
Insurance Co. vs. McLanathan..479, 602	Insurance Co. vs. Volger...426, 427, 433, 487
Insurance Co. vs. McMurdy.....150	Insurance Co. vs. Wagner.....773
Insurance Co. vs. McTague.....148	Insurance Co. vs. Wallace.....53, 625
Insurance Co. vs. Maguire.....394	Insurance Co. vs. Walsh.....947
Insurance Co. vs. Mahone....299, 555	Insurance Co. vs. Ward...201, 260, 394
Insurance Co. vs. Malevinsky..377, 451	Insurance Co. vs. Webster.....913
Insurance Co. vs. Manning.....681	Insurance Co. vs. Weide.....40
Insurance Co. vs. Melick.....569	Insurance Co. vs. Wells.....394
Insurance Co. vs. Miers.....772	Insurance Co. vs. Wigginton...387, 617
Insurance Co. vs. Mispelhorn...967	Insurance Co. vs. Wilder.....643, 644
Insurance Co. vs. Mitchell's Ex. etc..291	Insurance Co. vs. Wilkinson...144, 145, 299, 479, 555, 680, 924
Insurance Co. vs. Monroe.....698	Insurance Co. vs. Williams.....1006
Insurance Co. vs. Morso.....647	Insurance Co. vs. Willis & Bro.....983
Insurance Co. vs. Mortimer.....602	Insurance Co. vs. Wilson.....53, 105
Insurance Co. vs. Munger.....602	Insurance Co. vs. Wolff.....1018
Insurance Co. vs. Myer.....197	Insurance Co. vs. Woodworth....445
Insurance Co. vs. Newton.....887	Insurance Co. vs. Wright.....394
Insurance Co. vs. Neyland....476, 479	Insurance Co. vs. York.....201
Insurance Co. vs. Norton....476, 482	Insurance Co. vs. Young.....859
Insurance Co. vs. Norwood.....679	Iron Duke Mine vs. Braastad....1006
Insurance Co. vs. Owens.....387	Jackson vs. Association.....859
Insurance Co. vs. Pacaud.....996	Jacobs vs. Jacobs.....436
Insurance Co. vs. Palmer.....155	James vs. Newton.....543
Insurance Co. vs. Paul.....1014	Janretche vs. Proctor.....717
Insurance Co. vs. Putnam.....483	Jeffries vs. Insurance Co...519, 761, 763, 895
Insurance Co. vs. Raddin.....594	Jewell vs. Parr.....886
Insurance Co. vs. Reynolds.....6	Johannes vs. Fire Office.....987
Insurance Co. vs. Rogers....143, 452	John vs. Insurance Co.....704
Insurance Co. vs. Ruckman.....483	Johns vs. Association.....806
Insurance Co. vs. Rudwig.....594	Johnson vs. Berkshire Ins. Co....283
Insurance Co. vs. Saindon.....943	Johnson vs. Insurance Co.....403
Insurance Co. vs. Sawyer.....816	Johnson vs. Sheddon.....850
Insurance Co. vs. Schettler...393, 482	Johnson vs. Squires.....582
Insurance Co. vs. Schmidt.....804	Johnson vs. Supreme Lodge.....434
Insurance Co. vs. Schreck.....195	Jones vs. East Tennessee R. R. Co..279
Insurance Co. vs. Sefton...426, 429, 434, 990	Jones vs. Henhall.....678
Insurance Co. vs. Sherwood....243, 251, 253	Jones vs. Insurance Co.....968
Insurance Co. vs. Shimer.....774	Judge vs. Insurance Co.....947
Insurance Co. vs. Shimp.....594	Kane vs. Northern Central Railway.279
Insurance Co. vs. Spiers.377,387,451	Kausal vs. Association.....7
483, 549, 617	Keech vs. Sandford.....308
Insurance Co. vs. Stanton.....394	Keene vs. New England Mutual...283
Insurance Co. vs. Starr.....262	Keeney vs. Insurance Co.....968
Insurance Co. vs. Stein....618, 699, 943	Kelly vs. Railroad Co.....511
Insurance Co. vs. Stocks.....394, 774	Kent vs. Tyson.....124
Insurance Co. vs. Storig.....775	Kernochan vs. Insurance Co.....600
Insurance Co. vs. Sturges.....990	Keteltas vs. Keteltas.....953, 954
Insurance Co. vs. Sweet.....689	Key vs. Insurance Co.....328, 329
Insurance Co. vs. Swigert.....7	Kindel vs. Lithographing Co.....84
Insurance Co. vs. Terry.....694, 882	King vs. Blackwell.....915
Insurance Co. vs. Thomas.....893, 895	Kingsford vs. Marshall.....845
Insurance Co. vs. Thompson...1024	Kipper vs. Glancy.....651
Insurance Co. vs. Tomlinson...161, 162, 595	Kirkman vs. Insurance Co.....263
Insurance Co. vs. Transportation Co.252, 253	Kister vs. Insurance Co.....943
Insurance Co. vs. Trefz.....148	Kitchen vs. Hartford Fire Ins. Co..301
Insurance Co. vs. Tucker.....375, 775	Knights of Honor vs. Watson.....434
Insurance Co. vs. Turnbull.....479	Knights of Pythias vs. Rosenfeld...762, 922, 924
Insurance Co. vs. Tweed.....253	Knop vs. Insurance Co.....371, 679



	PAGE		PAGE
Knowles vs. Insurance Co .....	679	McDongall vs. Assurance Soc .....	137
Koshland vs. Insurance Co .....	944	McDougle vs. Assurance .....	840
Kramer vs. Supreme Lodge .....	558	McGonigle vs. Daugherty .....	518
Kratenstein vs. Assurance Co .....	590	McIntyre vs. Insurance Co .....	263
Kullberg vs. O'Donnell .....	190	McKee vs. State .....	864
Kyle vs. Commer'l Union Assur. Co .....	979	McLaren vs. Insurance Co .....	772
Kyte vs. Assurance Co .....	263	McLeran vs. McNamara .....	12
Laee vs. Fixen .....	45	McWilliams vs. Nisly .....	717
Lafayette Ins. Co. vs. French .....	69, 71	Macomber vs. Doane .....	543
Lamberton vs. Insurance Co .....	482	Mallory vs. Insurance Co .....	303, 451,
Lamont vs. Grand Lodge .....	432		806, 886
Lancaster Silver-Plate Co. vs. Man-		Manufactory vs. Davis .....	510
chester Fire Assur. Co .....	692	Manufacturers' Accident Indemnity	
Lancaster Silver-Plate Co. vs. Nat.		Co. vs. Dorgan .....	291
Fire Ins. Co .....	692	Manufacturing Co. vs. Insurance Co.	
Lancy vs. Insurance Co .....	613		476, 492
Langdon vs. Insurance Co .....	451, 990	Manufacturing Co. vs. Klotz .....	868
Langworthy vs. Insurance Co .....	534	Marine Ins. Co. vs. St. Louis I. M. &	
Lasher vs. Insurance Co .....	483	S. Ry. Co .....	130, 132
Latiox vs. Insurance Co .....	476, 478	Markey vs. Insurance Co .....	1011
Lattan vs. Insurance Co .....	8	Marshall vs. Hubbard .....	280
Lawton vs. Corlies .....	954, 955	Marshall vs. Insurance Co .....	125
Lea vs. Hinton .....	434	Martin vs. Insurance Co .....	197, 326,
Lea vs. State .....	864		619, 804
Leach vs. Insurance Co .....	115, 126	Martin vs. Stubbings .....	429, 434
Lee vs. Abdy .....	159	Marvin vs. Insurance Co .....	263
Leese vs. Sherwood .....	12	Marx vs. Travelers Ins. Co .....	286, 290
Legion of Honor vs. Perry .....	431, 432, 523	Mather vs. Robinson .....	41
Lehigh Water Co. vs. Easton .....	72	Mathews vs. Insurance Co .....	799
Levie vs. Insurance Co .....	189	Maxcy vs. Insurance Co .....	618
Lewis vs. Rucker .....	850	Mayer vs. Attorney-General .....	938
Limburg vs. Insurance Co .....	382	Mayo vs. Assurance Soc .....	951
Lindner vs. Insurance Co .....	890	Mears vs. Insurance Co .....	692
Lingenfelter vs. Insurance Co .....	904	Meehan vs. Valentine .....	280
List vs. Commonwealth .....	69	Menneille vs. Corporation .....	65
Little vs. Cogswell .....	591	Mentz vs. Insurance Co .....	483, 716
Liverpool & G. W. Steam Co. vs.		Merriman vs. Magiveny .....	510
Phoenix Ins. Co .....	842	Merritt vs. Railroad Co .....	190
Lloyd vs. Guibert .....	92	Mersereau vs. Phoenix Mut. Life Ins.	
Lodge vs. Insurance Co .....	804	Co .....	302
Lodge vs. Ladd .....	684	Mersereau vs. Insurance Co .....	263
Lohnes vs. Insurance Co .....	7	Michigan Pipe Co. vs. Michigan F. &	
Longueville vs. Assurance Co .....	534	M. Ins. Co .....	79
Loomis vs. Insurance Co .....	425, 426	Mickey vs. Insurance Co .....	383
Lord vs. Dall .....	425	Millaudon vs. Insurance Co .....	499
Louck vs. Insurance Co .....	1014	Miller vs. Brumbough .....	52
Louisiana Mutual Ins. Co. vs. New		Miller vs. Campbell .....	159
Orleans Ins. Co .....	467	Miller vs. Insurance Co .....	221, 283,
Low vs. Smith .....	436		714, 715, 899, 1011
Low vs. Welch .....	543	Mills vs. Insurance Co .....	534
Luce vs. Dunham .....	953, 954	Milner vs. Bowman .....	427
Luhrs vs. Luhrs .....	456	Miner vs. Association .....	347
Luhrs vs. Sup. Lodge, etc .....	456	Miner vs. Insurance Co .....	377
Lumber Co. vs. Hayes .....	868	Moffit vs. Insurance Co .....	370
Lunt vs. Insurance Co .....	117	Mohr & Mohr Distillery Co. vs. Ohio	
Lyman vs. Insurance Co .....	799	Ins. Co .....	8
Lyman vs. King .....	159	Montclair vs. Dana .....	280
Lyon vs. Insurance Co .....	659, 903	Montgomery vs. Insurance Co .....	704
McBride vs. Insurance Co .....	483	Moody vs. Walker .....	435
McCabe vs. Spruil .....	436	Moore vs. Insurance Co .....	263
McCluer vs. Insurance Co .....	534	More vs. Bennett .....	868
McCoy vs. Association .....	559	More vs. Insurance Co .....	57
McCraw vs. Insurance Co .....	57	Morgan vs. Insurance Co .....	321
McCullough Heirs vs. Gilmore .....	717	Morgan vs. Lewis .....	915

	PAGE		PAGE
Morgan vs. Smith.....	915	Oregon R. R. & Nav. Co. vs. Orego-	
Morris Run Coal Co. vs. Barclay		nian R. R. Co.....	33
Coal Co.....	868	O'Reilly vs. Assurance Corp.....	263
Morrison vs. Insurance Co.....	265, 451	Osceola Tribe vs. Schmidt.....	519
Moseby vs. Burrow.....	168	Oshkosh Packing & Provision Co. vs.	
Mosness vs. Insurance Co.....	45, 784	Merc. Ins. Co.....	891
Motley vs. Insurance Co.....	618	Osmundson vs. Thompson.....	669
Moulor vs. Insurance Co.....	140, 143,	Osterloh vs. Insurance Co.....	594
	451, 762	Packard vs. Insurance.....	220
Mounsey vs. Blamire.....	435	Packer vs. Benton.....	1020
Mt. Adams & E. P. Inclined R. R.		Page vs. Burnstine.....	434
Co. vs. Lowery.....	280, 304	Paine vs. Sherwood.....	41
Mullen vs. Insurance Co.....	9, 479	Palmer vs. Poor.....	486
Mulrey vs. Insurance Co.....	238	Palmer Sav. Bank vs. Ins. Co. of	
Mundt vs. Railroad Co.....	766	North America.....	621
Murdock vs. Insurance Co.....	773	Park Bros. & Co. vs. Bushnell....	567
Murdock vs. Ward.....	953	Parson vs. Lyman.....	950
Murphey vs. Weil.....	988	Patten vs. Insurance Co.....	125
Murphy vs. Insurance Co.....	372, 479,	Paul vs. Insurance Co.....	64, 818, 823
	482, 483	Paul vs. Virginia.....	69
Murphy vs. Red.....	429, 990	Pelkington vs. Insurance Co.....	482
Murray vs. Association.....	856	Pembina Mining Co. vs. Pennsylv'a.	74
Murray vs. Wells.....	609	Pence vs. Makepeace.....	154
Murrel vs. Railroad Co.....	91	Penfold vs. Insurance Co.....	884
Mutual Ass'n vs. Montgomery.....	949	People vs. Arnold.....	862
Mutual Ben. Soc. vs. Burkhardt.....	456	People vs. Mather.....	864
Mutual Co. vs. Allen.....	429		865
Myar vs. Snow.....	435	People vs. North River Sugar Ref. Co.	868
Myers vs. Insurance Co.....	375	People vs. Sheldon.....	868
National Bank vs. Insurance Co.....	143	People vs. Utica Ins. Co.....	765
	281, 841	Peoria, etc., Ins. Co. vs. Hall.....	302
Nave vs. Assurance Co.....	890	Perley vs. Perley.....	1010
Nelson's Heirs vs. Clay's Heirs.....	115	Perrin's Admr's vs. Insurance Co.....	800
New vs. Insurance Co.....	370	Peters vs. Insurance Co.....	251
Newell vs. People.....	766	Peters vs. Insurance Co.....	534
New England Dredging Co. vs. Gran-		Peterson vs. Ruhnke.....	45
ite Co.....	439	Phelan vs. Insurance Co.....	136
Newton vs. Fay.....	777	Phenix Ins. Co. vs. Omaha Loan &	
Newton vs. Insurance Co.....	694	Trust Co.....	619, 997
New York Cent. Ins. Co. vs. National		Philadelphia Association vs. People.	69
Protection Ins. Co.....	789	Philadelphia Tool Co. vs. British-	
New York Life Ins. Co. vs. Fletcher.	297	America Ass'e Co.....	371, 679
Noble vs. Blount.....	519	Phillips vs. Insurance Co.....	372, 492
Noble vs. Mitchell.....	69	Phillips vs. Carpenter.....	949
North America Ins. Co. vs. Hibernia		Phoenix Ins. Co. vs. Levy.....	74
Ins. Co.....	470	Pickett vs. Insurance Co.....	64
North Pennsylvania R. R. Co. vs.		Pickup vs. Insurance Co.....	117
Commercial Nat. Bank.....	140	Pierce vs. Insurance Co.....	694, 864
Northern Pacific R. R. vs. Everett....	279	Pierce vs. People.....	7
Noyes vs. Insurance Co.....	533	Pileher vs. Insurance Co.....	220
Noyes vs. Stall.....	864	Pilzer Mfg. Co. vs. Sun Fire Office..	
Nurney vs. Insurance Co.....	483		747, 751, 753
O'Brien vs. Insurance Co.....	263, 476,	Pinkham vs. Insurance Co.....	372
	483, 912	Pino vs. Insurance Co.....	476
O'Brien vs. Society.....	815	Pitney vs. Insurance Co.....	351, 618, 619
O'Bryan vs. Allen.....	72	Player vs. Tarkington.....	500
Occum vs. A. W. Sprague Mfg. Co.....	1003	Pleasants vs. Fant.....	279, 710
Ogden vs. Glidden.....	766	Plumb vs. Insurance Co.....	762
Ogden vs. Insurance Co.....	336	Poindexter vs. Greenhow.....	642
Oil Co. vs. Triumph Ins. Co.....	6	Pollock vs. Association.....	822
Old Saucelito L. D. D. Co. vs. Com-		Post vs. Insurance Co.....	476, 479
mmercial Co.....	484	Powers vs. Erwin.....	886
Olmsted vs. Keyes.....	428	Powers Dry Goods Co. vs. Imperial	
		F. Ins. Co.....	784

	PAGE		PAGE
Prentice vs. Steele.....	159	Rogers vs. Kneeland.....	765
Prescott vs. Flinn.....	124	Rood vs. Benevolent Ass'n.....	416
Price vs. Supreme Lodge.....	990	Roos vs. Insurance Co.....	729
Priest vs. Insurance Co.....	238	Rose vs. Bank.....	158
Pritchard vs. Norton.....	91, 92	Roux vs. Salvador.....	846
Providence Life Ins. Co. vs. Martin.....	288	Rue vs. Railway Co.....	167, 168
Pudritzky vs. Supreme Lodge.....	150	Ruffing vs. Tilton.....	651
Purifoy vs. Railroad Co.....	885, 914	Runkle vs. Insurance Co.....	8, 804
Queen Ins. Co. vs. Leslie.....	68	Ruppert vs. Insurance Co.....	218
Queen Ins. Co. vs. State.....	868	Ruse vs. Insurance Co.....	618
Queen Ins. Co. vs. Young.....	982	Russell vs. Insurance Co.....	804, 943
Quigley vs. Trust Co.....	680	Sabin vs. Grand Lodge, etc.....	456
Quinlan vs. Insurance Co.....	263	Safe & Lock Co. vs. Huston.....	180
Quinlan vs. P. W. Ins. Co.....	979	St. Clair vs. Cox.....	74, 601
Railroad vs. Eminons.....	71	St. John vs. Insurance Co.....	429
Railroad Co. vs. Converse.....	140	St. Louis, I. M. & S. R. R. Co., vs. Commercial Union Ins. Co.....	85, 132
Railroad Co. vs. Davidson.....	941	Sanger vs. Rothschild.....	431
Railroad Co. vs. Horst.....	765	Santa Clara Co. vs. Southern Pac. R. R. Co.....	69
Railroad Co. vs. Kellogg.....	252	Sargent vs. Morris.....	116
Railroad Co. vs. Kountz.....	69	Scagel vs. Railroad Co.....	324
Railroad Co. vs. People.....	511	Scarth vs. Society.....	384
Railroad Co. vs. Reynolds.....	582	Scheffer vs. Railroad Co.....	253
Railroad Co. vs. Woodson.....	710	Schneider vs. Insurance Co.....	220
Railway Co. vs. Ellis.....	168	Schofield vs. Chi. & St. Paul R. R.....	280
Railway Co. vs. Gilmer.....	893	Schott vs. Youree.....	102
Railway Co. vs. Harrison.....	445	Schrader vs. Hoover.....	610
Railway Co. vs. Mackey.....	69, 71	Schroedel vs. Insurance Co.....	912
Railway Co. vs. Miller.....	445, 792	Schultz vs. Insurance Co.....	987
Railway Co. vs. Whitley.....	444, 445	Schwarzbach vs. Protective Union.....	594
Rand vs. Society.....	924	Scott vs. Avery.....	45
Randall vs. Baltimore & Ohio R. R.....	280	Scudder vs. Bank.....	842
Randall vs. Railroad Co.....	706	Security Ins. Co. vs. Fay.....	301
Rasmussen vs. Insurance Co.....	987	Selden vs. American Ins. Co.....	710
Rawls vs. Am. Mut. Life Ins. Co.....	456	Seyk vs. Insurance Co.....	891
Rawson vs. Rawson.....	436	Shakman vs. System Co.....	668
Reagn vs. Farmers' Loan & Trust Co.....	642	Shaw vs. Gould.....	950
Redigan vs. Railroad Co.....	403	Sheets vs. Selden's Lessee.....	137
Reilly vs. Insurance Co.....	68	Sheldon vs. Insurance Co.....	476
Reilly vs. Railway Co.....	519	Sherwood vs. Alvis.....	80
Renier vs. Insurance Co.....	482, 680	Shimer vs. Hammond.....	803
Rice vs. Society.....	859	Short vs. Insurance Co.....	1009
Rich vs. Flanders.....	72	Shuggart vs. Insurance Co.....	481
Richards vs. Miller.....	436	Sibley vs. Insurance Co.....	912
Richmond vs. Johnson.....	456	Silvers vs. Association.....	949
Richmond & Danville R. R. vs. Powers.....	279	Singleton vs. Insurance Co.....	518
Ricker vs. Insurance Co.....	220	Skillings vs. Association.....	522
Riggs vs. Insurance Co.....	600	Small vs. Clewley.....	614
Riley vs. Insurance Co.....	584	Smedley vs. Felt.....	609, 610
Rindge vs. Society.....	431, 439, 440, 522, 523	Smelser vs. Turnpike Co.....	486
Ripley vs. Insurance Co.....	197	Smith vs. Allen.....	689
Rittler vs. Smith.....	429	Smith vs. Barclay.....	45
Rivara vs. Insurance Co.....	352, 477, 479	Smith vs. Culligan.....	518
Robbins vs. Insurance Co.....	680	Smith vs. Deere.....	50
Robbins vs. Webb.....	893	Smith vs. Insurance Co.....	7, 939
Roberts vs. Dunsmuir.....	445	Smith vs. Nat. Benefit Soc. of N. Y.....	451
Roberts vs. Firemen's Ins. Co.....	996	Smith vs. Niagara F. Ins. Co.....	982
Roberts vs. Insurance Co.....	893	Smith vs. Society.....	685
Robinson vs. Bland.....	91	Society vs. Baldwin.....	519
Robinson vs. Hurley.....	597	Society vs. Burkhart.....	430
Rochester Loan & Bldg. Co. vs. Lib. erty Ins. Co.....	996	South Bend Toy Mfg. Co. vs. Dakota F. & M. Ins. Co.....	903, 904
Rodenbough vs. Rosebury.....	42	Southard vs. Railway Pass. Ass'n.....	286
Rogers vs. Insurance Co.....	451, 1002		

	PAGE		PAGE
Southwest Lead & Zinc Co. vs. Phoenix Ins. Co.	13	Tillman vs. Davis	436, 952, 954
Soyer vs. Water Co.	14	Titus vs. Insurance Co.	594, 741
Spare vs. Insurance Co.	790	Tompkins vs. Dudley	598
Sparf, etc., vs. United States	279	Tompkins vs. Hunter	768
Spaulding vs. Insurance Co.	1006	Topping vs. Bickford	492
Spencer vs. Association	314	Town of Sullivan vs. Phillips	651
Stagg vs. Insurance Co.	1006	Tradandt vs. Insurance Co.	105
Stanbrough vs. Daniels	803	Trager vs. Insurance Co.	220
Stanley vs. The Wabash, etc., Railway Co.	91	Transportation Co. vs. Downer	244
State vs. Chancy	886	Transportation Co. vs. Insurance Co.	483
State vs. Foster	124	Travelers Ins. Co. vs. McConkey	281
State vs. Loomis	74	Travelers Ins. Co. vs. Mitchell	304
State vs. McBryde	886	Trew vs. Assurance Co.	539, 817, 818
State vs. Powell	885, 886	Trull vs. Insurance Co.	408
State vs. White	885	Trust Co. vs. Boardman	600
State ex rel. Ben. Ass'n vs. Root	69	Trustees vs. Insurance Co.	476, 482
State ex rel. etc., vs. Rotwitt	85	Trustees St. Clair Female Academy vs. Delaware Ins. Co.	935
Stauffer vs. Insurance Co.	166	Tuck vs. Insurance Co.	126
Steam Co. vs. Insurance Co.	243, 244	Tucker vs. Insurance Co.	403
Stearns vs. Insurance Co.	513	Tyler vs. Kent	486
Stebbins vs. Insurance Co.	124	Uhrig vs. Insurance Co.	45
Steel vs. Insurance Co.	197	Ulrich vs. Reineohl	430
Steen vs. Insurance Co.	482	Underhill vs. Van Cortlandt	52
Steinberg vs. Insurance Co.	689	Underwood vs. Bank	777
Stevens vs. Wiley	777	Union National Bank vs. German Ins. Co.	18, 181
Stilling vs. Town of Thorp	674	Union Pacific R. R. Co. vs. Callahan	278
Stoelker vs. Thornton	434	United Order of the Golden Cross vs. Merrick	816
Stone vs. Insurance Co.	329	United States vs. Babbitt	765
Stone's Adm'rs vs. Casualty Co.	909	United States vs. Britton	867
Storer vs. Eaton	360	United States vs. Lee	643
Story vs. Insurance Co.	594	Universal Ins. Co. vs. Weiss	72
Stringham vs. Cook	988	Utley vs. Clarke-Gardner Lodge Mining Co.	84
Strong vs. Downing	159	Utter vs. Insurance Co.	660, 807
Strong vs. Mitchell	1020	Valentine vs. Wheeler	1010
Strong vs. School	651	Valton vs. Fund Co.	429
Sumner vs. Williams	22	Van Houten vs. Metropolitan Life Ins. Co.	303
Supreme Conclave vs. Cappella	491, 505	Van Kirk vs. Insurance Co.	62
Supreme Lodge vs. Johnson	416	Van Schoick vs. Insurance Co.	371, 476, 482
Supreme Lodge vs. La Malta	557	Van Zandt vs. Insurance Co.	883
Supreme Lodge vs. Nairn	431	Vawter vs. Griffin	158
Supreme Lodge vs. Wickser	416	Vide Borgreife vs. Supreme Lodge	416
Swank vs. Hufnagle	486	Vide Lyon vs. Supreme Assembly	417
Sweet vs. Dutton	436, 952	Viele vs. Insurance Co.	377, 479, 482, 483
Swett vs. Society	238	Wadsworth vs. Tradesmen's Co.	668
Swick vs. Insurance Co.	518	Wagon Co. vs. Ins. Co.	476, 479, 483
Swift vs. Mass. Life Ins. Co.	457	Walker vs. Maitland	799, 800
Tanguay vs. O'Connell	624	Walker vs. Struve	893
Tate vs. Railroad Co.	651	Wallace vs. Insurance Co.	483, 668
Tateum vs. Ross	523	Wallingford vs. Burr	712
Tatty vs. Trust Co.	138	Walradt vs. Insurance Co.	947
Tebbets vs. Guarantee Co.	668	Walsh vs. Insurance Co.	481
Tedrick vs. Wells	102	Walsh vs. Walsh	955
Tennant vs. Insurance Co.	476, 477	Warhoe Tool Mfg. Co. vs. Hibernia F. Ins. Co.	1011
Tesson vs. Insurance Co.	13	Waring vs. Insurance Co.	913, 996
Thames & Mersey Marine Ins. Co. vs. Pitts	845	Warnock vs. Davis	426, 429, 434, 518, 990, 992
Thomas vs. Railroad Co.	33		
Thomas vs. Schee	324		
Thompson vs. Insurance Co.	197, 659		
Thompson vs. Phenix Ins. Co.	2-1		
Thorndike vs. Association	45		
Thwing vs. Insurance Co.	74		

	PAGE		PAGE
Washburn Mill Co. vs. Fire Ass'n of Phila.....	827	Williams vs. Insurance Co.....	382, 891
Water-Power Co. vs. Gray.....	52	Williams vs. Williams.....	358
Waters vs. Insurance Co.....	799, 800	Williamson vs. Insurance Co.....	618
Watts vs. Sweeney.....	651	Wilson vs. Clark.....	486
Weaver vs. Bromley.....	678	Wilson vs. Northwestern Mut. Acc. Ass'n.....	289
Webb vs. Michener.....	41	Wilson vs. Smith.....	844
Webster vs. Insurance Co.....	377	Wilson vs. The Xantho.....	254
Weed vs. London & Lancashire Ins. Co.....	979	Wind Mill Co. vs. Piercy.....	180
Weiss vs. Insurance Co.....	943	Wing vs. District Tp.....	379
Welsh vs. Crater.....	952	Wingfield vs. Wingfield.....	436
Wendt vs. Legion of Honor.....	504	Winter vs. Railroad Co.....	324
Western Assur. Co. vs. Doull et al.....	982	Wist vs. Lodge.....	560
Western & A. Pipe Lines vs. Home Ins. Co.....	1014	Wittkowsky vs. Wasson.....	885, 886
Weston vs. Lumley.....	486	Wood vs. Insurance Co.....	476, 680, 603
Westover vs. Insurance Co.....	764	Woodruff vs. Insurance Co.....	1009
Whalen vs. Railroad Co.....	324	Woodward vs. James.....	953, 955
Wheaton vs. Insurance Co.....	480	Woolen Mill Co. vs. Hawley.....	187
Wheeler vs. Insurance Co.....	1011	Wright vs. Trustees.....	436
White vs. Insurance Co.....	613, 1011	Yankton F. Ins. Co. vs. Fremont E. & M. V. R. Co.....	801
Whited vs. Insurance Co.....	479, 482, 483	Yates vs. Thompson.....	950
Whited vs. Stanfield.....	436	Yeaton vs. Fry.....	248
Whitehead vs. Insurance Co.....	220	York vs. State.....	445
Whitney vs. Insurance Co.....	382	Young vs. Alford.....	886
Whittaker vs. Gas Co.....	597	Young vs. Insurance Co.....	351, 476, 660
Whitting vs. Insurance Co.....	1002	Zalesky vs. Insurance Co.....	590
Wilkinson vs. Insurance Co.....	144, 145	Zeilke vs. Assurance Corp.....	483
Willard vs. Ostrander.....	180	Zimmerman vs. Wead.....	102
Willey vs. Railroad.....	916	Zimmermann vs. Insurance Co.....	790
Williams vs. Crescent Mut. Ins. Co.....	740	Zoller vs. McDonald.....	12

# INDEX OF CASES REPORTED.

## Volumes I-VI. New Series.

Adams vs. Grand Lodge, A. O. U W. et al. ....	XXVI., 634	American Steam Boiler Ins. Co. vs. Chicago Sugar Refining Co. ....	XXIII., 91
Adams vs. New York Bowery Fire Ins. Co. ....	XXI., 833	Anderson vs. John Hancock Mut. Life Ins. Co. ....	XXVI., 175
Adams et al. vs. Northwestern En- dowment and Legacy Ass'n. ....	XXV., 352	Anderson vs. Manchester Fire Ass'e Co. ....	XXIV., 222
Addis et al. vs. Addis. ....	XXVI., 636	Anderson vs. Supreme Council of Chosen Friends. ....	XXIII., 439
Ætna Ins. Co. vs. Daniel Norman. ....	XXIV., 611	Angier et al. vs. Western Ass'e Co. ....	XXVI., 795
Ætna Ins. Co. vs. Holcomb. ....	XXV., 833	Anoka Lumber Co. vs. Fidelity & Casualty Co. (Nelson, Interv'r). ....	XXV., 241
Ætna Ins. Co. vs. McLead et al. ....	XXV., 669	Antes, Garn & Co. vs. Western Ass'e Co. ....	XXI., 284
Ætna Ins. Co. vs. Meyer. ....	XXVI., 367	Anthony vs. Mercantile Mutual Accident Ass'n. ....	XXIV., 226
Ætna Ins. Co. vs. People's Bank of Greenville. ....	XXIII., 807	Anthony et al. vs. Massachusetts Benefit Ass'n. ....	XXII., 821
Ætna Ins. Co. et al. vs. Rosenberg et al. ....	XXVI., 461	Arbuckle vs. Interstate Casualty Co. ....	XXVI., 925
Ætna Life Ins. Co. vs. Florida. ....	XXV., 110	Armstrong vs. Agricultural Ins. Co. ....	XXI., 431
Ætna Life Ins. Co. vs. Ward. ....	XXI., 289	Armstrong et al. vs. Western Mfra. Mut. Ins. Co. ....	XXII., 795
Agnew vs. Farmers' Mutual Pro- tective Fire Ins. Co. of Town of Medina, et al. ....	XXVI., 671	Arnfeld et al. vs. Guardian Ass'e Co. ....	XXV., 858
Agricultural Ins. Co. vs. Hamilton. ....	XXV., 339	Arthurholt vs. Susquehanna Mut. Fire Ins. Co. ....	XXIII., 846
Agricultural Ins. Co. vs. Morrow. ....	XXIV., 346	Atlanta Home Ins. Co. vs. Tullis. ....	XXVI., 75
Agricultural Ins. Co. vs. Potts. ....	XXII., 509	Attleborough Savings Bank vs. Security Ins. Co. ....	XXVI., 620
Ahlberg et al. vs. German Ins. Co. ....	XXII., 307	Au Sable Lumber Co. vs. Detroit Mfra. Mut. Fire Ins. Co. ....	XXI., 311
Alamo Fire Ins. Co. vs. Shacklett. ....	XXIII., 799	Bachmeyer vs. Mut. Reserve Fund Life Ass'n. ....	XXII., 98
Alexander et al. vs. Parker. ....	XXII., 199	Bachmeyer vs. Mutual Reserve Fund Life Ass'n. ....	XXIII., 519
Allen vs. Massachusetts Mut. Acc. Association. ....	XXVI., 316	Baile & Co., Ltd., in Liquidation, vs. Western Assurance Co., of Toronto. ....	XXVI., 497
Allen et al. vs. German-American Ins. Co. ....	XXIII., 378	Baker et al. vs. Insurance Cos. ....	XXIV., 512
Allred et al. vs. Hartford Fire Ins. Co. ....	XXVI., 828	Baldwin vs. Citizen's Ins. Co. ....	XXVI., 638
American Accident Co. vs. Carson. ....	XXV., 786	Ball vs. Northwestern Mutual Accident Ass'n. ....	XXIII., 448
American Acc. Co. vs. Clubb. ....	XXV., 876	Bancroft vs. Russell. ....	XXI., 864
American Accident Co. vs. Reigart. ....	XXIII., 148	Bangor Savings Bank vs. Niagara Fire Ins. Co. ....	XXIII., 292
American Acc. Ins. Co. vs. Norment. ....	XXI., 301	Bank of Glasco vs. Springfield Fire & Marine Ins. Co. ....	XXVI., 926
American Building & Loan Ass'n vs. Farmers' Ins. Co. ....	XXIV., 838	Bankers' Life Ass'n vs. Lisco. ....	XXV., 386
American Casualty Ins. & Sec. Co. vs. Arrott. ....	XXVI., 458	Barbour vs. Connecticut Mut. Life Ins. Co. ....	XXI., 384
American Central Ins. Co. vs. Bass et al. ....	XXVI., 718	Barbour, Admr., vs. Conn. Mut. Life Ins. Co. et al. ....	XXI., 3
American Central Ins. Co. vs. Heaverin. ....	XXV., 711	Bard vs. Penn Mut. Fire Ins. Co. ....	XXII., 375
American Credit Indemnity Co. vs. Cassard. ....	XXV., 868	Barnard vs. Peoples Fire Ins. Co. ....	XXVI., 406
American Credit Indemnity Co. vs. Wood et al. ....	XXV., 641	Barnes vs. Hekla Fire Ins. Co. ....	XXIII., 305
American Employers' Liability Ins. Co. et al. vs. Fordyce et al. ....	XXVI., 461	Barrett vs. Northwestern Mut. Life Ins. Co. ....	XXVI., 269
American Fire Ins. Co. vs. Bland. ....	XXVI., 925		
American Fire Ins. Co. vs. Brooks et al. ....	XXVI., 3		
American Fire Ins. Co. vs. Slisk. ....	XXVI., 458		
American Fire Ins. Co. et al. vs. State. ....	XXVI., 860		

Baumgart et al. vs. Modern Workmen of America.....	XXII., 707	Boyle's Sons vs. Hamburg-Bremen Fire Ins. Co.....	XXIV., 699
Baumgartel vs. Providence-Washington Ins. Co.....	XXII., 387	Bradshaw et al. vs. Agricultural Ins. Co.....	XXII., 181
Beakes vs. Phoenix Ins. Co.....	XXIV., 37	Brady vs. Prudential Ins. Co.....	XXIV., 717
Bean vs. Travelers' Ins. Co.....	XXI., 826	Brady vs. United Life Ins. Ass'n.....	XXVI., 138
Beatty vs. Mutual Reserve Life Ass'n.....	XXVI., 460	Brennan vs. Prudential Ins. Co.....	XXII., 638
Beatty vs. Supreme Commandery of the United Order of the Golden Cross.....	XXII., 880	Brennan et al. vs. Mississippi Home Ins. Co.....	XXII., 719
Becker vs. Berlin Benefit Society.....	XXI., 189	Brew et al. vs. Clement et al.....	XXI., 513
Becker vs. Merchants' Mut. Ins. Co.....	XXII., 227	Bridge vs. Wheeler.....	XXVI., 269
Becker vs. Minnesota Odd Fellows Mut. Ben. Soc. et al.....	XXV., 131	Brigham et al. vs. Wood et al.....	XXI., 461
Beckett vs. Northwestern Masonic Aid Ass'n.....	XXVI., 729	British Assurance Co. vs. Cooper.....	XXV., 437
Beebe vs. Ohio Farmers' Ins. Co.....	XXII., 753	Brock vs. Des Moines Ins. Co.....	XXV., 219
Bellevue Roller Mill Co. et al. vs. London & L. Fire Ins. Co.....	XXIV., 331	Brock vs. Dwelling-House Ins. Co.....	XXIV., 464
Benedict vs. Grand Lodge A.O.U.W.....	XXI., 438	Brooks vs. Georgia Home Ins. Co.....	XXV., 719
Benedix vs. German Ins. Co., of Freeport.....	XXVI., 270	Brown vs. Cotton & Woolen Manufacturers' Mut. Ins. Co.....	XXI., 862
Benjamin vs. Connecticut Indemnity Ass'n.....	XXII., 75	Brown vs. Franklin Mut. F. Ins. Co.....	XXV., 630
Bennett vs. St. Paul F. & M. Ins. Co.....	XXIII., 78	Brown vs. Palatine Ins. Co.....	XXV., 812
Bennett vs. Van Riper et al.....	XXIII., 302	Buick et al. vs. Mechanics' Ins. Co.....	XXIV., 375
Bentley vs. Standard Fire Ins. Co.....	XXV., 780	Bullman vs. Insurance Companies.....	XXII., 688
Bents & Habenicht, Liquidators of the Home Brewing Co. vs. Insurance Co.....	XXIII., 160	Burke vs. Prudential Ins. Co.....	XXII., 536
Bergeron vs. Pamlico Insurance & Banking Co.....	XXII., 182	Burkheiser vs. Mutual Accident Ass'n of the Northwest.....	XXIII., 762
Bergman vs. Ins. Cos.....	XXI., 271	Burlington Ins. Co. vs. Brookway.....	XXI., 624
Berry vs. American Central Ins. Co.....	XXI., 455	Burlington Ins. Co. vs. Campbell et al.....	XXIV., 379
Bickford vs. Travelers Ins. Co.....	XXV., 71	Burlington Ins. Co. vs. Kennerly.....	XXV., 40
Biermeister & Spicer vs. City of London Fire Ins. Co.....	XXVI., 637	Burlington Ins. Co. vs. Lowery.....	XXV., 610
Billings vs. Accident Ins. Co. of North America.....	XXI., 605	Burlington Ins. Co. vs. Ross.....	XXI., 799
Billings vs. German Ins. Co.....	XXI., 929	Burlington Ins. Co. vs. Threlkeld.....	XXV., 32
Bishop vs. Agricultural Ins. Co.....	XXI., 345	Burlington Voluntary Relief Department of Chi., B. & Q. R.R. Co. vs. White.....	XXVI., 224
Blackwell vs. Ins. Co.....	XXI., 97	Burmood vs. Farmers' Union Ins. Co.....	XXIV., 308
Blake vs. Metzgar.....	XXI., 1058	Burnam et al. vs. White.....	XXII., 688
Blinn vs. Dresden Mutual Fire Ins. Co.....	XXIII., 707	Burns et al. vs. Grand Lodge, A. O. U. W.....	XXVI., 730
Bloom vs. State Ins. Co.....	XXV., 511	Burr vs. German Ins. Co.....	XXIII., 151
Bole et al. vs. New Hampshire Fire Ins. Co.....	XXIII., 857	Butero vs. Travelers Accident Ins. Co.....	XXVI., 805
Bonanno vs. The Boskenna Bay-Graziano vs. Same.—Mirto vs. Same.—Mercadante vs. Same.—Sgobel et al. vs. Same.—Foti vs. Same.....	XXVI., 173	Button vs. American Mutual Accident Association.....	XXV., 464
Bon Aqua Improvement Co. vs. Standard Fire Ins. Co.....	XXVI., 506	Caledonian Ins. Co. vs. Traub et al.....	XXV., 791
Boren vs. Manhattan Life Ins. Co.....	XXV., 861	Canfield vs. Great Camp of Knights Cannon vs. Home Ins. Co.....	XXVI., 737
Boesworth et al. vs. Cleary.....	XXI., 184	of the Maccabees.....	XXI., 22
Boulden vs. Phoenix Ins. Co.....	XXII., 176	Capital City Ins. Co. vs. Autrey.....	XXVI., 635
Boulden vs. Phoenix Ins. Co.....	XXVI., 461	Capital City Ins. Co. vs. Caldwell et al.....	XXI., 778
Bourgeois vs. Northwestern National Ins. Co.....	XXIII., 860	Capitol Ins. Co. vs. Bank of Blue Mound.....	XXI., 152
Bourgeois vs. Mutual Fire Ins. Co.....	XXIII., 299	Capitol Ins. Co. vs. Bank of Pleasanton.....	XXI., 519
Bowen vs. National Life Ass'n.....	XXIII., 200	Capitol Ins. Co. vs. Bank of Pleasanton.....	XXII., 361
Bowie vs. Grand Lodge of Legion of the West.....	XXIII., 225	Capitol Ins. Co. vs. Wallace.....	XXII., 397
Bowman vs. Moore.....	XXVI., 271	Capitol Ins. Co. vs. Wallace.....	XXI., 516
Bowring vs. Providence-Washington Ins. Co.....	XXVI., 639	Caplis vs. American Fire Ins. Co.....	XXIV., 551
Boyd vs. Mississippi Home Ins. Co.....	XXVI., 532	Carberry & Hodgson vs. German Ins. Co.....	XXIII., 137
Boyle et al. vs. Northwestern Mutual Relief Ass'n.....	XXVI., 758	Carey vs. Allemania Fire Ins. Co. of Pittsburgh.....	XXV., 137
		Carey vs. Farmers' & Merchants' Ins. Co.....	XXIV., 843
		Carey vs. German-Amer. Ins. Co.....	XXIII., 123
		Carey vs. Liverpool & London & Globe Ins. Co.—First National Bank vs. Same.....	XXV., 556

- Carlson vs. Presbyterian Board of  
Relief for Disabled Ministers  
et al. ....XXVI., 731
- Carmien et al. vs. Cornell et al. ....XXVI., 648
- Carpenter vs. Allemania Fire Ins.  
Co. ....XXII., 634
- Carpenter vs. United States Life  
Ins. Co. ....XXIII., 497
- Carpenter et al. vs. American Acci-  
dent Co. ....XXV., 543
- Carpenter et al. vs. German-Amer-  
ican Ins. Co. ....XXII., 57
- Case of Charter Oak Life Ins. Co. ....XXVI., 634
- Case of Knoedler's Estate. ....XXIII., 180
- Case of the Ontario. ....XXVI., 175
- Cassa Marittima vs. Phoenix Ins. Co. ....XXI., 449
- Catholic Knights of America vs.  
Kuhn. ....XXI., 1013
- Chaloron vs. Insurance Co. of  
North America. ....XXVI., 465
- Chambers vs. Northwestern Mut.  
Life Ins. Co. ....XXV., 755
- Chandos et al. vs. American Fire  
Ins. Co. ....XXII., 425
- Cheeves vs. Anders. ....XXIII., 398
- Cheeves vs. Anders. ....XXIV., 180
- Chicago Sugar Refinery Co. vs. Am.  
Steam Boiler Co. ....XXI., 59
- Chickasaw County Mutual Fire  
Ins. Co. vs. Weller. ....XXVI., 730
- China Mutual Ins. Co. vs. Ward. ....XXIII., 320
- Christian et al. vs. Niagara Ins. Co. ....XXIII., 851
- Church of St. George vs. Sun Fire  
Office. ....XXII., 789
- Citizens' Ins. Co., of Pittsburg vs.  
Bland. ....XXVI., 615
- Clafin et al. vs. United States  
Credit System Co. ....XXV., 524
- Clark vs. Reis, Treasurer. ....XXVI., 368
- Clark vs. Svea Fire Ins. Co. ....XXIII., 876
- Clark et al. vs. Western Ass'e Co. ....XXI., 281
- Clarke vs. Swartsenberg et al. ....XXVI., 521
- Clemans vs. Sup. Ass'y. Royal Soc.  
of Good Fellows. ....XXI., 856
- Clifton Coal Co. vs. Scottish Union  
& National Ins. Co. ....XXVI., 1007
- Clubb vs. American Accident Co.—  
American Acc. Co. vs. Clubb. ....XXV., 876
- Coats vs. West Coast F. & M. Ins.  
Co. ....XXI., 1049
- Cobb vs. Preferred Mut. Acc. Ass'n  
et al.—Preferred Mut. Acc.  
Ass'n et al. vs. Cobb. ....XXV., 59
- Cobbey vs. Dorland et al. ....XXVI., 458
- Coburn et al. vs. Life Indemnity &  
Investment Co. ....XXII., 902
- Cochran vs. London Assurance  
Corporation. ....XXVI., 927
- Cochran et al. vs. Mutual Life Ins.  
Co. ....XXVI., 661
- Codigan Transit Co. vs. The Majestic. ....XXV., 800
- Colby vs. Cedar Rapids Ins. Co. ....XXIV., 695
- Colby vs. Life Indemnity & In-  
vestment Co. ....XXIII., 675
- Colby vs. Parkersburg Ins. Co. ....XXII., 460
- Coleman et al. vs. New Orleans Ins.  
Co. ....XXI., 769
- Coles vs. Jefferson Ins. Co. ....XXV., 247
- Collins vs. Bankers' Acc. Ins. Co.  
et al. ....XXV., 223
- Collins vs. London Assurance  
Corporation. ....XXIV., 658
- Commercial Bank vs. Firemen's  
Ins. Co. ....XXIII., 543
- Commercial Fire Ins. Co. vs.  
Morris et al. ....XXVI., 632
- Commercial Travelers' Mut. Acc.  
Ass'n of America vs. Fulton  
et al. ....XXVI., 565
- Commercial Union Ass'e Co. vs.  
Meyer. ....XXVI., 460
- Commercial Union Ass'e Co. vs.  
Norwood. ....XXVI., 177
- Commercial Union Ins. Co. vs.  
Dunbar. ....XXIII., 800
- Commonwealth vs. Andrews. ....XXIII., 65
- Commonwealth vs. Morningstar. ....XXI., 88
- Commonwealth vs. Provident Bi-  
cycle Ass'n. ....XXVI., 829
- Commonwealth vs. Reineohl. ....XXVI., 267
- Commonwealth vs. Vrooman. ....XXIV., 400
- Commonwealth ex rel. Kirkpat-  
rick, Attorney-General, vs.  
American Life Ins. Co.—  
Appeal of Little. ....XXIII., 739
- Commonwealth ex rel. Williams  
vs. Provident Life Ass'n. ....XXIV., 238
- Companhia de Moagens do Barri-  
ero vs. London Assurance Co.  
and Mannheim Ins. Co. ....XXII., 717
- Connecticut Fire Ins. Co. vs.  
Hamilton. ....XXIII., 241
- Connecticut Fire Ins. Co. vs.  
Smith. ....XXVI., 929
- Connecticut Fire Ins. Co. vs. Tilley. ....XXI., 558
- Connecticut Mutual Life Ins. Co.  
vs. McWhirter. ....XXV., 721
- Continental Ins. Co. vs. Etna Ins.  
Co. ....XXII., 501
- Continental Ins. Co. vs. Board of  
Fire Underwriters of the  
Pacific et al. ....XXIV., 561
- Continental Ins. Co. vs. Chase et al. ....XXV., 398
- Continental Ins. Co. vs. Chew. ....XXVI., 464
- Continental Ins. Co. vs. H. M.  
Loud & Sons' Lumber Co. ....XXIII., 729
- Continental Ins. Co. vs. Riggen  
et al. ....XXVI., 590
- Continental Ins. Co. vs. Ward. ....XXII., 373
- Conway vs. Phoenix Mutual Life  
Ins. Co. ....XXIII., 231
- Cooledge vs. Continental Ins. Co. ....XXVI., 730
- Cooper vs. Insurance Co. of State  
of Pa. ....XXVI., 985
- Cooper vs. United States Mut. Ben.  
Association. ....XXI., 665
- Copeland vs. Phoenix Ins. Co. ....XXII., 224
- Copeland vs. Western Ass'e Co. ....XXIV., 559
- Corey et al. vs. Sherman et al. ....XXVI., 365
- Corkery vs. Security Fire Ins. Co. ....XXVI., 331
- Cornell vs. Tiverton & L. C. Mut.  
Fire Ins. Co. ....XXVI., 520
- Couadeau vs. American Accident  
Co. ....XXIII., 344
- Covenant Mut. Ben. Ass'n vs.  
Sears et al. ....XXVI., 108
- Craig vs. Continental Ins. Co. ....XXI., 127
- Creed et al. vs. Sun Fire Office. ....XXIII., 461
- Crescent Ins. Co. vs. Vicksburg  
Y. & S. R. Packet Co. ....XXII., 748
- Criswell vs. Riley. ....XXII., 319
- Criswell vs. Riley. ....XXI., 763
- Crittenden vs. Springfield Fire &  
Marine Ins. Co. ....XXI., 736



Cross vs. National Fire Ins. Co.....	XXI, 571	Dowling et al. vs. Lancashire Ins. Co. XXV, 430
Crotty vs. Union Mut. Life Ins. Co. XXI, 645		Doying et al. vs. Broadway Ins. Co. XXIII, 394
Crown Point Iron Co. vs. Ins. Cos. XXI, 31		Dryer vs. Security Fire Ins. Co. XXIV, 541
Crutchfield vs. Bailey.....	XXVI, 463	Duncan vs. New York Mut. Ins. Co. XXII, 526
Cunyus vs. Guenther.....	XXII, 239	Duncan vs. New York Mut. Ins. Co. XXI, 960
Curnow vs. Phoenix Ins. Co.....	XXIII, 143	Duncan vs. Preferred Mut. Acc.
Cushing et al. vs. Williamsburgh		Ass'n.....
City Fire Ins. Co.....	XXI, 934	XXVI, 366
Cushman et al. vs. New England		Dunham et al. vs. Morse.....
Fire Ins. Co.....	XXIII, 41	XXII, 793
Cyrenius vs. Mutual Life Ins. Co. XXIV, 554		Dupuy vs. Delaware Ins. Co.....
Dade vs. Aetna Ins. Co.....	XXII, 874	XXIV, 161
Daggs vs. Orient Ins. Co.....	XXVI, 67	Durkee vs. India Mutual Ins. Co. XXIII, 35
Dalley vs. Preferred Mass. Mut.		Dwelling-House Ins. Co. vs.
Accident Ass'n.....	XXIV, 27	Brewster.....
Dale et al. vs. Continental Ins. Co. XXV, 10		XXIV, 284
Danlher vs. Grand Lodge A.O. U.		Dwelling-House Ins. Co. vs. Dowdall XXV, 267
W.....	XXIII, 830	Dwelling-House Ins. Co. vs. Gould. XXI, 535
Daugherty vs. Knights of Pythias. XXVI, 460		Dwelling-House Ins. Co. vs. John-
David vs. Oakland Home Ins. Co. XXIV, 348		son et al.....
Davis vs. Anchor Mut. Fire Ins. Co. XXV, 299		XXI, 911
Davis vs. Phoenix Ins. Co.....	XXV, 876	Dwelling-House Ins. Co. vs. John-
Davis Lumber Co. vs. Home Ins. Co. XXVI, 925		ston et al.....
Deardorff vs. Guaranty Mut. Acc.		XXI, 849
Association.....	XXI, 667	Dwelling-House Ins. Co. vs. Kan-
De Frece vs. National Life Ins. Co. XXII, 112		sas Loan & Trust Co.....
DeJernette vs. Fidelity & Casualty		XXVI, 603
Co.....	XXV, 315	Dwelling-House Ins. Co. vs. Snyder XXV, 715
Delaware Farmers Mut. Fire Ins.		Dwelling-House Ins. Co. vs. Welkel. XXI, 219
Co. etc. vs. Wagner.....	XXIV, 237	Eagan vs. Oakland Home Ins. Co. XXV, 584
Deming vs. Sup. Lodge Knights of		Eagle Fire vs. Globe Loan &
Pythias of the World.....	XXII, 606	Trust Co.....
Des Moines Ice Co. vs. Niagara		XXIV, 615
Fire Ins. Co.....	XXVI, 378	Early vs. Standard Life & Acci-
Detroit Mfg. Mut. vs. Merrill et al. XXIV, 68		dent Ins. Co.....
Deyo et al. vs. The Oswego et al.....	XXVI, 172	XXVI, 820
Diamond Plate Glass Co. vs. Min-		Earnshaw vs. California Ins. Co. XXVI, 116
neapolis Mut. Fire Ins. Co.....	XXII, 559	Easley vs. Valley Mut. Life Ass'n. XXIV, 453
Dibbrell et al. vs. Georgia Home		East Texas Fire Ins. Co. vs. Crawford. XXI, 39
Ins. Co.....	XXI, 736	East Texas Fire Ins. Co. vs. Flippin. XXIII, 219
Dick et al. vs. Equitable Fire &		East Texas Fire Ins. Co. vs. Harris. XXIII, 552
Marine Ins. Co. et al.....	XXV, 449	East Texas Fire Ins. Co. vs.
Dickerman vs. Vermont Mutual		Kempner.....
Fire.....	XXIV, 472	XXIII, 549
Dickinson vs. Grand Lodge A.O.		East Texas Fire Ins. Co. vs. Perkey. XXVI, 53
U. W.....	XXIII, 863	Eaton vs. Atlas Accident Ins. Co. XXVI, 577
Diffenbaugh vs. Union Fire Ins.		Eberman vs. American Fire
Co. of San Francisco.....	XXII, 79	Ins. Co.....
Dishong vs. Iowa Life & Endow-		XXIV, 160
ment Association.....	XXVI, 366	Eddy vs. Insurance Co.....
Dixon vs. National Life Ins. Co. XXVI, 776		XXIV, 3
Dixon vs. Order of Railway Con-		Edwards et al. vs. Arquette (Agri-
ductors.....	XXI, 390	cultural Ins. Co. Garnishee).....
Dodd vs. Home Mut. Ins. Co.....	XXI, 352	XXIV, 290
Dodd vs. Home Mut. Ins. Co., re-		Egan vs. Westchester Fire Ins. Co. XXV, 361
hearing.....	XXI, 359	Ehrlich vs. Aetna Life Ins. Co.....
Dodge vs. Boston Marine Ins. Co. XXIII, 465		XXI, 100
Dodge vs. Hamburg-Bremen Fire		Ehream Mach. Co. vs. Phenix
Ins. Co.....	XXVI, 255	Ins. Co.....
Donald vs. Chicago B. & Q. Ry. Co. XXIV, 640		XXIV, 316
Donaldson vs. Sun Mut. Ins. Co.....	XXV, 277	Ellerbe vs. Barney.....
Donnell vs. Donnell et al.....	XXIV, 371	XXIII, 366
Donogh vs. Farmers' Fire Ins. Co. XXV, 472		Ellerbe vs. Faust.....
D'Orlu vs. Bankers & Merchants'		XXIII, 368
Mut. Life Ass'n.....	XXVI, 362	Ellerbe, Supt. Insurance, vs.
Dorey vs. Fidelity & Casualty Co. XXVI, 462		United Masonic Benefit Ass'n.
Dougherty vs. Pacific Mut. Life		(Cannon et al. Interveners).....
Ins. Co.....	XXII, 729	XXII, 445
Douglass vs. Parker.....	XXII, 714	Ellis vs. Massachusetts Mut. Life
Douglass vs. Phoenix Ins. Co.....	XXII, 561	Ins. Co.....
Dover Glass Works vs. American		XXVI, 97
Fire Ins. Co.....	XXIV, 12	Elmendorph vs. Citizens' Mut.
		Fire Ins. Co.....
		XXII, 618
		Emigh vs. State Ins. Co.....
		XXIII, 688
		Empire State Ins. Co. vs. Ameri-
		can Central Ins. Co.....
		XXII, 626
		Endowment Bank, Knights of
		Pythias, vs. Cogbill.....
		XXVI, 920
		Endowment Banks, Knights of
		Pythias, vs. Rosenfeld.....
		XXII, 547
		England et al. vs. Westchester Fire
		Ins. Co.....
		XXI, 808
		Enos et al. vs. St. Paul Fire &
		Marine Ins. Co.....
		XXIII, 268
		Enright vs. Standard Life and Ac-
		cident Ins. Co. of Detroit.....
		XXII, 623
		Epstein vs. State Ins. Co.....
		XXI, 612
		Equitable Accident Ins. Co. vs. Os-
		born.....
		XXI, 947
		Equitable Fire Ins. Co. vs. Alex-
		ander.....
		XXII, 800

Equitable Life Assurance Society <i>vs.</i> Winning.....	XXIII., 81	Fisher <i>vs.</i> Metropolitan Ins. Co.....	XXIV., 139
Equitable Mut. Acc. Ass'n <i>vs.</i> Mc- Cluskey.....	XXI., 540	Fisher <i>vs.</i> Metropolitan Life Ins. Co.....	XXIII., 238
Erb <i>vs.</i> German Ins. Co.....	XXVI., 578	Fitchner et al. <i>vs.</i> Fidelity Mut. Fire Ass'n.....	XXVI., 326
Krmentraut and Maxcy <i>vs.</i> Girard F. & M. Ins. Co.....	XXV., 87	Fitsmaurice <i>vs.</i> Mut. Life Ins. Co.....	XXI., 830
Everson <i>vs.</i> Equitable Life Assur- ance Co.....	XXIV., 401	Flanagan <i>vs.</i> Phenix Ins. Co.....	XXVI., 459
Falk <i>vs.</i> Jones et al.....	XXI., 479	Fleeman <i>vs.</i> Fleeman et al.....	XXVI., 361
Farmers' Mutual Fire Ins. Ass'n <i>vs.</i> Burch.....	XXV., 580	Fleisch et al. <i>vs.</i> Ins. Co. of North America.....	XXIII., 634
Farmers' Mut. Fire Ins. Co. <i>vs.</i> Benton.....	XXIV., 34	Flynn <i>vs.</i> Massachusetts Benefit Ass'n.....	XXVI., 438
Farmers' Mutual Fire Ins. Co. <i>vs.</i> Schaeffer.....	XXV., 552	Fogg et al. <i>vs.</i> Supreme Lodge of Order of Golden Lion.....	XXII., 848
Farmers' Mut. Ins. <i>vs.</i> Kryder.....	XXII., 62	Folb et al. <i>vs.</i> Phenix Ins. Co.....	XXIII., 685
Farmers' Union Ins. Co. <i>vs.</i> Wilder.....	XXII., 129	Foley <i>vs.</i> Farragut Fire Ins. Co.....	XXIII., 78
Farmers & Merchants' Ins. Co. <i>vs.</i> Graham.....	XXVI., 711	Foley et al. <i>vs.</i> Manufacturers & Builders' Fire Ins. Co.....	XXVI., 598
Farmers' & Merchants' Ins. Co. <i>vs.</i> Moore.....	XXV., 785	Follis <i>vs.</i> United States Mutual Accident Ass'n.....	XXV., 498
Farmers & Merchants' Ins. Co. <i>vs.</i> Nixon.....	XXI., 860	Forbes <i>vs.</i> American Ins. Co.....	XXV., 101
Farnum et al. <i>vs.</i> Phenix Ins. Co.....	XXVI., 473	Fox <i>vs.</i> Capital Ins. Co.....	XXIV., 203
Farr <i>vs.</i> Trustees of Grand Lodge A. O. U. W. et al.....	XXII., 760	Frane <i>vs.</i> Burlington Ins. Co.....	XXII., 364
Faughner et al. <i>vs.</i> Manufacturers' Mut. Fire Ins. Co.....	XXI., 154	Frank <i>vs.</i> Pacific Mut. Life Ins. Co.....	XXIV., 538
Faust <i>vs.</i> American Fire Ins. Co.....	XXV., 176	Frankfurter <i>vs.</i> Home Ins. Co.....	XXIV., 76
Fawcett <i>vs.</i> Supreme Sitting, Order of Iron Hall.....	XXVI., 169	Franklin Brass Co. <i>vs.</i> Phenix Ass'n Co.....	XXIV., 521
Fayerweather et al. <i>vs.</i> Phenix Ins. Co.....	XXI., 342	Fred Miller Brewing Co. <i>vs.</i> Coun- cil Bluffs Ins. Co.....	XXV., 17
Fenn <i>vs.</i> Union Central Life Ins. Co.....	XXV., 321	Freedman <i>vs.</i> Fire Ass'n of Phila.....	XXV., 74
Fidelity Mut. Life Ass'n <i>vs.</i> Ficklin et al.....	XXI., 658	Freeman <i>vs.</i> Mercantile Mut. Acc. Ass'n.....	XXI., 663
Fidelity Mut. Life Ass'n <i>vs.</i> Winn.....	XXV., 400	French <i>vs.</i> Mutual Reserve Fund Ass'n.....	XXII., 153
Fidelity & Casualty Co. <i>vs.</i> Alpers et al.....	XXIV., 831	French <i>vs.</i> The People.....	XXIV., 678
Fidelity & Casualty Co. <i>vs.</i> Ran- dolph, Executor.....	XXVI., 291	Friedman <i>vs.</i> Fennell.....	XXII., 240
Fidelity & Casualty Co. <i>vs.</i> The Consolidated Bank.....	XXV., 320	Frits <i>vs.</i> Lebanon Mut. Ins. Co.....	XXII., 590
Fidelity & Casualty Co. <i>vs.</i> Water- man.....	XXVI., 63	Frits <i>vs.</i> Quaker City Mut. Fire Ins. Co.....	XXIII., 480
Fidelity & Casualty Co., of New York, <i>vs.</i> Willey et al.....	XXVI., 897	Frommers <i>vs.</i> Yanktown Fire Ins. Co.....	XXIV., 672
Fillmore <i>vs.</i> Great Camp of the Maccabees.....	XXV., 640	Fulton & McNett, Trustees for the Phenix Mutual Life Ins. Co. <i>vs.</i> Phenix Ins. Co.....	XXIII., 314
Finch <i>vs.</i> Grand Grove, etc., Ancient Order of Druids.....	XXV., 494	Gale <i>vs.</i> Mutual Aid & Acc. Ass'n.....	XXII., 240
Fire Ass'n of Philadelphia <i>vs.</i> Flournoy.....	XXIII., 535	Gallant <i>vs.</i> Metropolitan Life Ins. Co.....	XXVI., 543
Fire Ins. Ass'n, Limited, <i>vs.</i> Wick- ham et al.....	XXI., 193	Garbutt <i>vs.</i> Citizens' Life & En- dowment Ass'n.....	XXII., 464
Firemen's Fund Ins. Co. <i>vs.</i> Buck- staff.....	XXIII., 650	Gardner <i>vs.</i> Fidelity Mut. Life Ass'n.—Warner <i>vs.</i> Same.....	XXVI., 652
Firemen's Ins. Co. <i>vs.</i> Appleton Paper & Pulp Co.....	XXV., 634	Garfield et al. <i>vs.</i> Rutland Ins. Co. et al.....	XXVI., 1019
Firemen's Ins. Co. <i>vs.</i> Barnsch.....	XXVI., 101	Garretson <i>vs.</i> Merchants and Bankers' Ins. Co.....	XXIV., 320
First Congregational Church <i>vs.</i> Insurance Cos.....	XXII., 449	Garretson <i>vs.</i> Equitable Mut. Life & Endowment Ass'n.....	XXVI., 633
First National Bank of Baton Rouge <i>vs.</i> Dakota F. & M. Ins. Co.....	XXVI., 631	Geare et al. <i>vs.</i> United States Life Ins. Co.....	XXVI., 317
First Nat'l Bank of Devil's Lake <i>vs.</i> American Central Ins. Co.....	XXIV., 56	Georgia Home Ins. Co. <i>vs.</i> Bartlett.....	XXIV., 685
First Nat. Bank of Devils Lake <i>vs.</i> Manchester Fire Assurance Co.....	XXV., 272	Georgia Home Ins. Co. <i>vs.</i> Hall et al.....	XXVI., 202
Fischer <i>vs.</i> American Legion of Honor.....	XXV., 77	Gerling <i>vs.</i> Agricultural Ins. Co.....	XXIV., 385
		German-American Ins. Co. <i>vs.</i> Buckstaff.....	XXIII., 641
		German-American Ins. Co. <i>vs.</i> Com- mercial Fire Ins. Co.....	XXI., 626
		German-American Ins. Co. <i>vs.</i> Hart.....	XXIV., 273
		German-American Ins. Co. <i>vs.</i> Humphrey.....	XXV., 658

German-American Ins. Co. vs. Norris et al. ....XXVI., 384	Greene et al. vs. Northwestern Live Stock Ins. Co. ....XXII., 256
German Fire Ins. Co. vs. Laggart. ....XXI., 374	Greenlee vs. Iowa State Ins. Co. ....XXVI., 1016
German Fire Ins. Co. vs. Roost. ....XXVI., 699	Greenlee et al. vs. North British & Mercantile Ins. Co. ....XXVI., 801
German Ins. Co. vs. Brown. ....XXIV., 635	Greenwich Ins. Co. vs. Sabotnick. ....XXIII., 154
German Ins. Co. vs. Davis. ....XXIII., 768	Greenwich Ins. Co. vs. Waterman et al. ....XXII., 651
German Ins. Co. vs. Fairbank. ....XXI., 83	Greenwood Ice & Coal Co. vs. Georgia Home Ins. Co. ....XXVI., 633
German Ins. Co. vs. Hart. ....XXIV., 79	Greiss vs. State Investment & Ins. Co. ....XXII., 629
German Ins. Co. vs. Hyman. ....XXI., 941	Grieco et al. vs. Massachusetts Benefit Ass'n. ....XXVI., 638
German Ins. Co. vs. Read's Ex's. ....XXVI., 272	Griesemer vs. Mutual Life Ins. Co. ....XXVI., 731
German Ins. Co. vs. York. ....XXI., 508	Griffith vs. New York Life Ins. Co. ....XXVI., 212
German Ins. Co., of Freeport, Ill., vs. First National Bank of Booneville, N. Y. ....XXVI., 600	Grindle vs. York Mutual Aid Ass'n. ....XXVI., 871
German Ins. Co. of Freeport vs. Penrod et al. ....XXII., 41	Gristock vs. Royal Ins. Co. ....XXI., 631
German Ins. Co. of Freeport vs. Rounds. ....XXII., 48	Griswold vs. Illinois Central Rail- road Co. ....XXI., 961
German Ins. & Savings Institu- tion vs. Kline. ....XXIV., 703	Griswold vs. Ill. Cent. R. R. Co. ....XXIII., 400
German Mut. Ins. Co. vs. Niewelde. ....XXVI., 730	Gross et al. vs. Ins. Companies. ....XXV., 681
Germania Fire Ins. Co. vs. Home Ins. Co. ....XXIV., 382	Grubbs vs. Virginia Fire & Marine Ins. Co. ....XXI., 470
Germania Ins. Co. vs. Bromwell. ....XXV., 372	Gude et al. vs. Exchange Fire Ins. Co. ....XXII., 552
Gibb et al. vs. Fire Ins. County of Philadelphia. ....XXIV., 313	Guterman et al. vs. German-Amer- ican Ins. Co. ....XXVI., 727
Gibson vs. Connecticut Fire Ins. Co. ....XXVI., 86	Gutterson vs. Gutterson et al. ....XXI., 883
Gibson vs. Imperial Council of Order of United Friends. ....XXVI., 815	Hahn vs. Guardian Assurance Co. ....XXII., 721
Gibson vs. St. Paul Fire & Marine Ins. Co. ....XXVI., 94	Haire vs. Ohio Farmers' Ins. Co. ....XXII., 66
Gilbert et al. vs. New Zealand Ins. Co. ....XXI., 428	Hale vs. Life Indemnity & Invest- ment Co. ....XXV., 63
Gillett vs. Burlington Ins. Co. ....XXIV., 147	Hale vs. Life Indemnity & Invest- ment Co. ....XXV., 801
Girard F. Ins. Co. vs. Boulden. ....XXII., 238	Hall vs. Allen. ....XXVI., 926
Given vs. Rettew. ....XXIII., 752	Hall vs. American Employers' Lia- bility Ins. Co. ....XXV., 154
Glaze vs. Three Rivers Farmers' Mut. Fire Ins. Co. ....XXII., 863	Hall vs. American Masonic Acci- dent Ass'n. ....XXIV., 22
Globe Reserve Mut. Life Ins. Co. vs. Duffy et al. ....XXII., 121	Hall vs. Concordia Fire Ins. Co. ....XXI., 731
Glover vs. Rochester-German Ins. Co. ....XXVI., 639	Hall vs. Niagara Fire Ins. Co. ....XXIII., 667
Goldbaum et al. vs. Blum et al. ....XXVI., 829	Hamberg vs. St. Paul Fire & Marine Ins. Co. ....XXVI., 782
Golden et al. vs. Northern Ass'e Co. ....XXI., 360	Hamill vs. Supreme Council of the Royal Arcanum. ....XXII., 860
Goldman et al. vs. North British & Mercantile Ins. Co. ....XXV., 601	Hamilton vs. Dwelling House Ins. Co. ....XXIII., 339
Goode et al. vs. Georgia Home Ins. Co. ....XXV., 459	Hamilton et al. vs. Phoenix Ins. Co. ....XXIII., 561
Goodman vs. Cohen. ....XXI., 424	Hand vs. National Live-stock Ins. Co. ....XXIII., 794
Goodwin vs. Provident Savings Life Ass'e Society. ....XXV., 401	Handwerker vs. Diermeyer et al. ....XXVI., 462
Gould vs. Dwelling-House Ins. Co. ....XXI., 328	Hanford vs. Massachusetts Ben- edit Ass'n. ....XXIII., 747
Grable, Trustee, vs. German Ins. Co., of Freeport. ....XXI., 132	Hankins vs. Rockford Ins. Co. ....XXI., 192
Grace et al. vs. Northwestern Mut. Relief Ass'n. ....XXIII., 699	Hanna vs. Connecticut Mut. Life Ins. Co. ....XXVI., 312
Graham vs. American Fire Ins. Co. ....XXVI., 744	Hanover Fire Ins. Co. vs. Brown et al. ....XXII., 840
Grand Lodge A. O. U. W. vs. Noll et al. ....XXII., 476	Hanover Fire Ins. Co. vs. Gustin. ....XXIII., 651
Grand Lodge A. O. U. W. et al. vs. Belcham. ....XXII., 523	Hanover Fire Ins. Co. vs. Lewis et al. ....XXI., 316
Grand Lodge A. O. U. W. of Ind. vs. King. ....XXVI., 463	Hanover Fire Ins. Co. vs. National Exchange Bank et al. ....XXV., 475
Graves et al. vs. Merchants & Bank- ers' Ins. Co. ....XXI., 884	Hanover Fire Ins. Co. and Citizens' Ins. Co. vs. Ames. ....XXII., 560
Gray vs. Merriman. ....XXIII., 765	Hanover Fire Ins. Co. et al. vs. Bohn et al. ....XXV., 681
Gray vs. Reynolds. ....XXVI., 937	Hanover Fire Ins. Co. et al. vs. Schellak et al. ....XXII., 69
Green vs. Des Moines Fire Ins. Co. ....XXII., 643	Hansen vs. Sup. Lodge Knights of Honor. ....XXVI., 362
Green vs. Liverpool & London & Globe Ins. Co. ....XXIV., 180	

- Hanson vs. Minnesota Scandi-  
 navian Relief Ass'n et al. ....XXVI., 488  
 Harding vs. Norwich Union Fire  
 Ins. Co. ....XXVI., 901  
 Hardwick vs. State Ins. Co. ....XXII., 262  
 Hardy et al. vs. Lancashire Ins. Co. XXV., 746  
 Hare vs. Headley et al. ....XXVI., 459  
 Harnden vs. Milwaukee Mechan-  
 ics' Ins. Co. ....XXV., 124  
 Harris vs. Phenix Ins. Co. ....XXII., 116  
 Harris, Resp't, vs. Mutual Life,  
 Impl'dt Appl't. ....XXVI., 362  
 Harrison vs. Hartford Fire Ins. Co. XXVI., 271  
 Harrison vs. Hartford Fire Ins. Co. XXIII., 161  
 Hart vs. Citizens' Ins. Co. ....XXIII., 32  
 Hart et al. vs. Niagara Fire Ins. Co. XXIV., 87  
 Hartford Fire Ins. Co. vs. Josey. XXVI., 829  
 Hartford F. Ins. Co. vs. Kahn. ....XXIII., 184  
 Hartford Fire Ins. Co. vs. Mc-  
 Lemore et al. ....XXIII., 788  
 Hartford Fire Ins. Co. vs. Small. XXVI., 635  
 Hartford Fire Ins. Co. et al. vs.  
 Bonner Mercantile Co. ....XXII., 801  
 Hartford Life & Annuity Ins. Co.  
 vs. Unsell. ....XXI., 481  
 Hartford Life & Annuity Co. vs.  
 Wayland. ....XXII., 890  
 Hartford Steam-Boller Inspection  
 & Ins. Co. vs. Cartier. ....XXI., 503  
 Hartford Steam Boller Insp. &  
 Ins. Co. vs. Lasher Stocking Co. XXVI., 207  
 Hartwell vs. California Ins. Co. ....XXII., 636  
 Harvey vs. Van Cott et al. ....XXIII., 78  
 Hase et al. vs. Mutual Relief Ass'n  
 of Petaluma. ....XXVI., 992  
 Hastings vs. Brooklyn Life Ins. Co. XXII., 699  
 Hathaway vs. Orient Ins. Co. ....XXII., 358  
 Havens et al. vs. Germania Fire  
 Ins. Co. et al. ....XXIV., 321  
 Haverstick vs. Penn Tp. Fire Ins.  
 Co. ....XXIII., 451  
 Hawkins vs. McCalla et al. ....XXIV., 720  
 Hawley vs. L. & L. & G. Ins. Co. XXIII., 874  
 Hawley vs. Michigan Mut. Life  
 Ins. Co. ....XXIV., 216  
 Hayne vs. Metropolitan Trust Co. XXVI., 731  
 Heldenrich vs. Etna Ins. Co. ....XXIII., 800  
 Heinlein vs. Imperial Life Ins. Co. XXIII., 690  
 Helwig vs. Mutual Life Ins. Co. ....XXI., 660  
 Hembean vs. Great Camp of  
 Knights of Maccabees. ....XXIII., 704  
 Henschel vs. Oregon F. & M. Ins. Co. XXIII., 80  
 Henderson vs. Travelers Ins. Co. XXIV., 351  
 Hendrick vs. Employers' Liabil-  
 ity Ass'e Corp. ....XXIV., 69  
 Hennessey vs. Niagara Fire Ins.  
 Co. ....XXIII., 796  
 Henschel vs. Oregon F. & M. Ins.  
 Co. ....XXI., 1039  
 Henschel vs. Oregon F. & M. Ins.  
 Co. ....XXII., 385  
 Herndon vs. Imperial Fire Ins. Co. XXI., 990  
 Herndon et al. vs. Etna Ins. Co. XXVI., 363  
 Heron vs. Phenix Mutual Fire  
 Ins. Co. ....XXVI., 690  
 Heuer vs. Northwestern National  
 Ins. Co. ....XXII., 518  
 Heuer vs. Westchester Fire Ins. Co. XXIV., 471  
 Heusinkveld vs. St. Paul Fire &  
 Marine Ins. Co. ....XXV., 392  
 Hey vs. Guarantors' Liability In-  
 demnity Co. ....XXVI., 1012  
 Heye vs. North German Lloyd. ....XXVI., 172  
 Heywood vs. Maine Mutual Aoci-  
 dent Ass'n. ....XXIII., 480  
 Hibernia Ins. Co. vs. Malevinsky. XXIII., 593  
 Hickerson et al. vs. Ins. Cos. ....XXV., 422  
 Hicks et al. vs. National Life Ins.  
 Co. ....XXVI., 134  
 High Court of Foresters vs. Zak. ....XXVI., 270  
 Hill vs. Commercial Union Ins. Co. XXV., 185  
 Hill vs. Ohio Ins. Co. ....XXIII., 559  
 Hill vs. Phenix Ins. Co. of Brooklyn. XXV., 663  
 Hill vs. United States Life Ins.  
 Ass'n. ....XXII., 394  
 Hills et al. vs. Mackill et al. ....XXVI., 173  
 Hines vs. Mutual Life Ins. Co. ....XXV., 555  
 Hirsch et al. vs. Clark. ....XXVI., 361  
 Hogan vs. Metropolitan Ins. Co. ....XXV., 228  
 Hogben vs. Metropolitan Life  
 Ins. Co. ....XXVI., 998  
 Hogue vs. Minnesota Packing &  
 Provision Co. ....XXIV., 119  
 Holbrook et al. vs. Mill Owners'  
 Mut. Ins. Co. ....XXII., 832  
 Holdom vs. Grand Lodge A.O.U.W. XXV., 44  
 Holland vs. Supreme Council of  
 Order of Chosen Friends. ....XXII., 719  
 Holliday et al. vs. State Board of  
 Tax Commissioner et al. ....XXVI., 732  
 Holloway vs. Dwelling-House Ins.  
 Co. ....XXI., 379  
 Holmes vs. Davenport. ....XXI., 479  
 Holmes vs. Gilman et al. ....XXII., 641  
 Holter Lumber Co. vs. Fireman's  
 Fund Ins. Co. ....XXVI., 10  
 Home Benefit Ass'n vs. Sargent. ....XXI., 304  
 Home Fire Ins. Co. vs. Bean. ....XXIV., 516  
 Home Fire Ins. Co. vs. Fallon. ....XXIV., 690  
 Home Fire Ins. Co. vs. Garbacz. ....XXV., 782  
 Home Fire Ins. Co. vs. Hammang  
 et al. ....XXIV., 493  
 Home Fire Ins. Co. vs. Wood et al. XXVI., 686  
 Home Fire Ins. Co. of Omaha vs.  
 Skoumal. ....XXVI., 1021  
 Home Friendly Society vs. Berry. XXVI., 341  
 Home Ins. Co. vs. Bethel et al. ....XXII., 104  
 Home Ins. Co. vs. Delta Bank. ....XXVI., 233  
 Home Ins. Co. vs. Gibson. ....XXIV., 458  
 Home Ins. Co. vs. McRichards. ....XXI., 1041  
 Home Ins. Co. vs. Marple. ....XXVI., 639  
 Home Ins. Co. vs. Marshall et al. ....XXI., 845  
 Home Ins. Co. vs. Mendenhall. ....XXVI., 768  
 Home Ins. Co. vs. Scales et al. ....XXIII., 712  
 Home Ins. Co. vs. Stone River Nat.  
 Bank. ....XXI., 896  
 Home Ins. Co. vs. Winn. ....XXIV., 126  
 Home Ins. Co. vs. Wood. ....XXI., 179  
 Home Ins. Co., of New York, vs.  
 Karn. ....XXVI., 545  
 Hong Sling vs. Royal Ins. Co. et al. XXI., 718  
 Hong Sling vs. Scottish Union &  
 Nat. Ins. Co. ....XXI., 110  
 Hook vs. Mutual Fire Ins. Co. ....XXIII., 557  
 Hooper vs. People of State of Cali-  
 fornia. ....XXIV., 578  
 Hope Oil Mill Compress & Mfg.  
 Co. vs. Phenix Ass'e Co. ....XXVI., 995  
 Hopkins et al. vs. Hopkins' Adm'r  
 et al. ....XXII., 530  
 Hotchkiss vs. Phenix Ins. Co. ....XXI., 349  
 Houghton vs. Bradley et al. ....XXVI., 1004  
 Howard Ins. Co. vs. Owens. ....XXII., 514  
 Hubbard et al. vs. Turner et al. ....XXVI., 268

Hughes vs. Ina. Co. of North America.....	XXIII, 721	Johnston et al. vs. Northwestern Live-Stock Ins. Co.....	XXVI, 732
Humphreys vs. National Benefit Association.....	XXI, 69	Jones vs. Alliance Mut. Fire Ins. Co.—Appeal of Kinney.....	XXV, 569
Hunten et al. vs. Equitable Life.....	XXVI, 362	Jones vs. Granite State Fire Ins. Co.....	XXVI, 611
Hunter vs. Scott.....	XXI, 378	Jones vs. Methvin.....	XXVI, 80
Hurd vs. Doty.....	XXIII, 20	Jones vs. New York Life Ins. Co.....	XXVI, 1009
Idaho Forwarding Co. vs. Fireman's Fund Ins. Co.....	XXI, 756	Jones vs. Phoenix Ins. Co., of Hartford, Conn.....	XXV, 396
Illinois Live-stock Ins. Co. vs. Baker.....	XXIV, 122	Jones vs. U. S. Mutual Accident Ass'n.....	XXVI, 733
Imbrie vs. Manhattan Life Ins. Co.....	XXVI, 829	Jory vs. Supreme Council American Legion of Honor.....	XXVI, 364
Imperial Fire Ins. Co. vs. Coos County.....	XXIII, 282	Jurgens vs. New York Life Ins. Co.....	XXVI, 103
Imperial Life Ins. Co. vs. Glass.....	XXII, 299	Kahn vs. Traders' Ins. Co.....	XXIII, 401
Imperial Life Ins. Co. vs. Hamblitzer, State Treasurer.....	XXII, 640	Kahnweiler et al. vs. Phenix Ins. Co.....	XXIII, 391
Imperial Mfg. Co. vs. American Credit Indemnity Co.....	XXVI, 626	Kalner et al. vs. The Bergensern et al.....	XXVI, 173
Indiana Farmers' Live-Stock Ins. Co. vs. Byrnett.—Same Ptf. vs. Rundell.—Same Ptf. vs. Bogeman.....	XXVI, 271	Kansas Farmers' Fire Ins. Co. vs. Hawley.....	XXI, 75
Indiana Farmers' Live-stock Ins. Co. vs. Rundell.....	XXII, 836	Kansas Farmers' Fire Ins. Co. vs. Saindon.....	XXIII, 208
Ingersoll vs. Knights of Golden Rule.....	XXI, 276	Kansas Farmers' Fire Ins. Co. vs. Saindon.....	XXVI, 197
In matter of the Pelican Ins. Co. in Liquidation.....	XXIV, 535	Kansas Mut. Life Ass'n vs. Hill, Treasurer, et al.....	XXII, 673
In re Conrad's Estate.....	XXIII, 683	Kase vs. Hartford Fire Ins. Co.....	XXV, 158
In re Equitable Reserve Fund Life Association.....	XXI, 385	Keene vs. New England Mut. Acc. Association.....	XXVI, 401
In re Minneapolis Mut. Fire Ins. Co., Powell et al. vs. Wyman.....	XXI, 546	Keller vs. Travelers' Ins. Co.....	XXIV, 396
In re Order of Fraternal Guardians' Estate; Appeal of Sheeler et al.....	XXVI, 170	Kelley vs. Mutual Life Ins. Co., of New York.....	XXVI, 927
In re St. Paul German Ins. Co. Screven vs. Franzen.....	XXIV, 130	Kells vs. Northwestern Live-Stock Ins. Co.....	XXV, 627
Insurance Co. of North America vs. Bachler.....	XXIV, 481	Kelly vs. Life Insurance Clearing Co.....	XXVI, 892
Insurance Co. of North America vs. Caruthers et al.....	XXVI, 636	Kennan vs. Rundle et al.....	XXI, 524
Insurance Co. of North America vs. Johnson.....	XXV, 376	Kenton Ins. Co. vs. Wigginton.....	XXVI, 111
Insurance Cos. vs. Barwick.....	XXII, 265	Kentucky Life & Accident Ins. vs. Hamilton.....	XXIV, 43
Insurance Companies vs. Board of Com'rs of Shawnee County et al.....	XXV, 466	Kentucky M. F. S. Co. vs. Logan's Administrators.....	XXVI, 266
Insurance Cos. vs. Bohn et al.....	XXIV, 408	Kentucky Mut. Security Fund Co. et al. vs. Turner et al.....	XXII, 238
Insurance Cos. vs. Boulden.....	XXII, 188	Kentzler vs. American Mutual Accident Association.....	XXVI, 733
Insurance Cos. vs. Eddy.....	XXII, 468	Kerlin vs. National Accident Ass'n.....	XXIII, 867
Ionia, E. & B. Farmers' Mut. Fire Ins. Co. vs. Ionia Circuit Judge.....	XXIII, 630	Kern et al. vs. Grier et al.....	XXIII, 715
Ionia, E. & B. Farmers' Mut. Fire Ins. Co. vs. Otto.....	XXII, 857	Kessler vs. Kuhns.....	XXI, 384
Jackson vs. Fidelity & Casualty Co., of New York.....	XXVI, 928	Kiernan vs. Dutchess County Mut. Ins. Co.....	XXVI, 733
Jackson et al. vs. Millsbaugh et al.....	XXVI, 268	King-Brick Manufacturing Co. vs. Insurance Cos.....	XXV, 36
Jacobs vs. New York Life Ins. Co.....	XXVI, 163	Kinney vs. Baltimore & Ohio Employees' Relief Ass'n.....	XXI, 176
James et al. vs. Ina. Co. of N. A.....	XXI, 377	Kirkman vs. Farmers' Ins. Co.....	XXIII, 453
Jerrett et al. vs. John Hancock Mut. Life Ins. Co.....	XXVI, 529	Kitterlin vs. Milwaukee Mechanics' Mut. Ins. Co.....	XXI, 192
Johnson vs. Dakota F. & M. Ins. Co.....	XXI, 575	Knights Templar & Masons' Life Indemnity Co. vs. Berry et al.....	XXIII, 640
Johnson vs. Hall.....	XXI, 638	Knights Templars & Masonic Mut. Aid Ass'n vs. Greene et al.....	XXVI, 947
Johnston vs. Niagara Fire Ins. Co.....	XXV, 558	Knop vs. National Fire Ins. Co.....	XXIV, 65
Johnson vs. Phila. & Reading R. R. Co.....	XXVI, 267	Knop vs. National Fire Ins. Co.....	XXV, 181
Johnson vs. Scottish Union & National Ins. Co.....	XXVI, 59	Knoxville Fire Ins. Co. vs. Avery et al.....	XXV, 234
Johnson vs. Sup. Lodge Knights of Honor et al.....	XXVI, 434	Knoxville Fire Ins. Co. vs. Hirl.....	XXIII, 16
Johnson et al. vs. Alexander et al.....	XXVI, 270	Konrad vs. Union Casualty & Surety Co., of St. Louis.....	XXVI, 536

Koshland vs. Fire Ass'n of Philadelphia.....	XXVI, 943	Liverpool & London & Globe Ins. Co. vs. Stern et al.....	XXVI, 830
Koshland vs. Hartford Fire Ins. Co.....	XXVI, 945	Lodge vs. Capital Ins. Co.....	XXIII, 735
Koshland vs. Home Mut. Ins. Co.....	XXVI, 940	Loeb et al vs. American Cent. Ins. Co.....	XXI, 889
Kottman vs. Minnesota Odd Fellows' Mut. Ben. Society.....	XXVI, 235	Lombard Investment Co. vs. American Surety Co.....	XXIV, 360
Krause vs. Equitable Life Ass'e Society.....	XXIV, 849	London Assurance vs. Companhia De Moagens Do Barreiro.....	XXVI, 833
Krause vs. Equitable Life Ass'e Society of U. S.....	XXIII, 555	London Assurance Corporation vs. Cowan.....	XXVI, 358
Krug vs. German Fire Ins. Co.....	XXI, 573	London Guarantee & Accident Co. vs. Hochelaga Bank.....	XXIII, 479
Kruger vs. Life & Annuity Ass'n.....	XXVI, 636	London & Lancashire Fire Ins. Co. vs. Storrs.....	XXV, 283
Labell et al. vs. Georgia Home Ins. Co.....	XXVI, 461	Long vs. North British & Mercantile Ins. Co.....	XXVI, 356
Laclede Fire Brick Mfg. Co. vs. Hartford Steam Boiler Inspection and Ins. Co.....	XXIII, 491	Loomis vs. Rockford Ins. Co.....	XXI, 564
Ladd et al. vs. Ethna Ins. Co.....	XXV, 382	Lord vs. American Mutual Accident Ass'n.....	XXIV, 299
Lady Lincoln Lodge vs. Falst et al.....	XXVI, 171	Louck vs. Orient Ins. Co.....	XXVI, 462
La Fonciere Companie, etc., vs. Koona et al.....	XXVI, 484	Louisville Underwriters vs. Pence.....	XXI, 493
Lagrone vs. Timmerman et al.....	XXVI, 15	Lovelace vs. Travelers Protective Ass'n of America.....	XXIV, 278
Lakings vs. Phenix Ins. Co.....	XXIV, 545	Loventhal vs. Home Ins. Co.....	XXV, 816
Lancashire Ins. Co. vs. Maxwell.....	XXII, 240	Lovick vs. Provident Life Ass'n.....	XXI, 332
Landis vs. Standard Life & Accident Ins. Co.....	XXII, 827	Lowe et al. vs. United States Mut. Accident Ass'n.....	XXIV, 152
Langan vs. Royal Ins. Co.....	XXIII, 878	Lowry et al. vs. Insurance Co. of North America.....	XXVI, 618
Langdon Branch U. P. Baking Co. vs. Home Ins. Co. of N. O.....	XXII, 640	Lum vs. United States Fire Ins. Co.....	XXV, 53
La Scala et al. vs. The Serapis.—La Scala et al. vs. McIntyre et al.....	XXVI, 171	Lynde vs. Newark Fire Ins. Co.....	XXVI, 176
Latimore et al. vs. Dwelling House Ins. Co.....	XXIII, 471	Lynn Gas & Electric Co. vs. Insurance Companies.....	XXII, 823
Lauer et al. vs. Gray.....	XXVI, 956	Lyon vs. Ins. Co. of Dakota.....	XXI, 188
Lavalle vs. The Society Saint Jean Baptiste de Woonsocket.....	XXI, 813	Lyons vs. Yerex.....	XXIII, 639
Law vs. New England Mut. Accident Ass'n.....	XXII, 317	McCarthy vs. Metropolitan Life Ins. Co.....	XXIV, 149
Leavitt et al. vs. Dunn.....	XXVI, 171	McCarvel vs. Phenix Ins. Co. of Brooklyn.....	XXV, 399
Leffingwell vs. Grand Lodge A. O. U. W. of State of Iowa.....	XXII, 853	McClave vs. Mutual Reserve Fund Life Ass'n.....	XXII, 877
Lehnais vs. Egg Harbor Commercial Bank.....	XXII, 716	McComb et al. vs. Council Bluffs Ins. Co.....	XXI, 480
Leman vs. Manhattan Life Ins. Co.....	XXIII, 539	McCormick et al. vs. Royal Ins. Co.....	XXIII, 778
Lennox vs. Greenwich Ins. Co.....	XXVI, 634	McCoy vs. Roman Catholic Mut. Ins. Co.....	XXVI, 237
Lentz vs. Teutonia Fire Ins. Co.....	XXII, 838	McCullough et al. vs. Phenix Ins. Co.....	XXII, 781
Lester vs. New York Life Ins. Co.....	XXI, 760	McDonald vs. Boiss.....	XXIII, 639
Levie vs. Metropolitan Life Ins. Co.....	XXV, 470	McDonald vs. Fire Association of Philadelphia.....	XXV, 708
Levine et al. vs. Lancashire Ins. Co.....	XXVI, 36	McDougal et al., Admrs. vs. Prov. Savings Life Ass'e Society.....	XXII, 3
Lewis vs. Burlington Ins. Co.....	XXI, 370	McDowell vs. Insurance Cos.....	XXV, 156
L'Homedieu vs. The Carondelet.....	XXVI, 172	McElroy vs. Continental Ins. Co.....	XXII, 133
Liberty Ins. Co. vs. Boulden.....	XXII, 188	McElwee vs. New York Life Ins. Co.....	XXI, 447
Limburg vs. German Fire Ins. Co. of Peoria.....	XXIII, 321	McEvoy vs. Nebraska & I. Ins. Co.....	XXV, 314
Lincoln vs. Boston Marine Ins. Co.....	XXII, 692	McFarland vs. Kittanning Ins. Co.....	XXI, 555
Linder vs. Fidelity & Casualty Co. et al.....	XXII, 472	McFarland vs. Railway Officials & Employees' Ass'n.....	XXVI, 367
Lindner vs. St. Paul Fire & Marine Ins. Co.....	XXV, 848	McFarland vs. St. Paul Fire & Marine Ins. Co.....	XXI, 879
Lindsay vs. Pettigrew.....	XXIV, 320	McFarland vs. United States Mut. Accident Ass'n.....	XXIII, 837
Lithgow vs. Sup. Tent of Knights of Maccabees.....	XXIV, 640	McFetridge vs. American Fire Ins. Co.....	XXIV, 714
Liverpool & London & Globe Ins. Co. vs. Buckstaff.....	XXIII, 648	McFetridge vs. Phenix Ins. Co.....	XXII, 211
Liverpool & London & Globe Ins. Co. vs. Ellington.....	XXVI, 492	McGonigle vs. Agricultural Ins. Co.....	XXIV, 869
Liverpool & Lon. & Globe Ins. Co. vs. Farnsworth Lumber Co.....	XXIV, 876	McGonigle vs. Susquehanna Mut. Fire Ins. Co.....	XXIV, 808
Liverpool & London & Globe Ins. Co. vs. Sheffy.....	XXVI, 349		

McHale vs. McDonnell.....	XXV., 826	Menard vs. Society of St. Jean Baptiste.....	XXIII., 141
McHoney vs. German Ins. Co.....	XXIII., 316	Mengel vs. Northwestern Mut. Life Ins. Co.....	XXVI., 459
McKelvy vs. German-American Ins. Co.....	XXIII., 628	Mennelley vs. Employers' Liabil- ity Ass'e Corporation.....	XXV., 613
McKenzie vs. Scottish Union & National Ins. Co.....	XXV., 561	Merchants' Ins. Co. vs. Brown et al.....	XXII., 876
McKinney vs. German Mut. Fire Ins. Co.....	XXIV., 490	Merchants' Ins. Co. vs. Gibbs.....	XXIII., 791
McLaughlin vs. Equitable Life Assurance Society.....	XXIV., 58	Merchants' Ins. Co. of Newark vs. New Mexico Lumber Co.....	XXVI., 969
McLaughlin vs. McLaughlin et al.....	XXVI., 501	Merchants' Ins. Co. of Newark vs. Prince et al.....	XXII., 45
McMahan vs. Sewickly Mutual Fire Ins. Co.....	XXVI., 721	Merden vs. Hotel Owners' Ins. Co.....	XXII., 147
McMurray vs. Capital Ins. Co.....	XXII., 204	Merrett vs. Preferred Masonic Mut. Acc. Ass'n of America.....	XXVI., 126
McNally et al. vs. Phenix Ins. Co.....	XXII., 807	Merrill vs. Commonwealth Mut. Fire Ins. Co.....	XXVI., 80
MacKinnon et al. vs. Mutual Fire Ins. Co.....	XXII., 125	Merrill vs. Travelers Ins. Co.....	XXV., 143
MacKinnon et al. vs. Mutual Guaranty Fire Ins. Co.....	XXIII., 39	Mesterman vs. Home Mut. Ins. Co.....	XXII., 387
Maginnis's Estate vs. N. O. Cotton Ex. & Mut. Aid Ass'n.....	XXI., 171	Metropolitan Accident Association vs. Froidland.....	XXV., 595
Mahon vs. Pacific Mut. Life Ins. Co.....	XXI., 1052	Metropolitan Life Ins. Co. vs. Anderson.....	XXIII., 785
Mahr et al. vs. Norwich Union Fire Ins. Soc. et al.....	XXI., 113	Metropolitan Life Ins. Co. vs. Fuller.....	XXI., 584
Maier vs. Fidelity Mut. Life Ass'n.....	XXVI., 292	Metropolitan Life Ins. Co. vs. McNall.....	XXVI., 641
Mailhoit vs. Metropolitan Life Ins. Co.....	XXV., 108	Metropolitan Life Ins. Co. vs. O'Brien et al.....	XXI., 938
Mallory vs. Metropolitan Life Ins. Co.....	XXIII., 68	Metzger vs. Manchester Fire Ass'e Co.....	XXVI., 734
Mallory vs. Ohio Farmers' Ins. Co.....	XXI., 1009	Meyer vs. Fidelity & Casualty Co.....	XXV., 346
Manchester Fire Ass'e Co. vs. Glenn et al.....	XXIV., 548	Meyer et al. vs. Great Western Ins. Co.....	XXIV., 184
Manhattan Life Ins. Co. vs. Fields.....	XXVI., 164	Meyers vs. Schumann.....	XXV., 779
Manhattan Life Ins. Co. vs. Willis & Bro. et al.....	XXIV., 139	Miad vs. Phenix Ins. Co.....	XXII., 144
Manlove et al. vs. Commercial Mut. Fire Ins. Co.....	XXI., 174	Michigan Mutual Life Ins. Co. vs. Custer.....	XXVI., 830
Manton vs. Robinson.....	XXVI., 595	Michigan Mutual Life Ins. Co. vs. Leon.....	XXIII., 659
Mfrs. & Merchants Mut. Ins. Co. vs. Armstrong et al.....	XXII., 735	Michigan Mut. Life Ins. Co. vs. Nangle.....	XXII., 434
Margut vs. United Brethren Mut. Aid Society.....	XXI., 662	Michigan Shingle Co. vs. London & Lancashire Ins. Co.....	XXII., 320
Mark et al. vs. Home Ins. Co.....	XXIV., 311	Michigan Shingle Co. vs. State In- vestment & Ins. Co.....	XXII., 241
Martin vs. Capital Ins. Co.....	XXIII., 583	Miles vs. Connecticut Mut. Life Ins. Co.....	XXII., 336
Martin vs. Farmers' Ins. Co.....	XXII., 259	Milkman vs. United Mut. Ins. Co.....	XXVI., 593
Martin vs. Insurance Co. of North America.....	XXVI., 830	Millard vs. Sup. Council American Legion of Honor.....	XXVI., 175
Martin vs. Manufacturers' Acol- dent Indemnity Co.....	XXVI., 638	Miller vs. American Mut. Acol- dent Ins. Co.....	XXII., 214
Martin vs. Union Mut. Life Ins. Co.....	XXV., 517	Miller vs. Campbell.....	XXIII., 458
Masonic Aid Ass'n vs. Taylor.....	XXI., 695	Miller et al. vs. Scottish Union & National Ins. Co.....	XXIII., 725
Masonic Ben. Ass'n of Central Illinois vs. Bunch et al.....	XXII., 609	Mills vs. Home Benefit Life Ass'n.....	XXVI., 633
Massachusetts Ben. Life Ass'n vs. Hale.....	XXV., 319	Milwaukee Mechanics' Ins. Co. vs. Niewedde.....	XXVI., 734
Massachusetts Benefit Life Ass'n vs. Sibley.....	XXIV., 399	Minn., St. P., & S. Sta. M. R. R. Co. vs. Home Ins. Co.....	XXIII., 68
Massachusetts Ben. Life Ass'n vs. Sibley.....	XXV., 607	Minneapolis, St. P. & S. S. M. Ry. Co. vs. Home Ins. Co.....	XXV., 252
Mawhinney vs. Southern Ins. Co.....	XXII., 596	Minneapolis Threshing Machine Co. vs. Firemen's Ins. Co.....	XXIII., 734
Maxcy vs. New Hampshire Fire Ins. Co.....	XXII., 830	Minnesota Title Ins. & Trust Co. vs. Drexel et al.....	XXV., 186
Maynard vs. Locomotive Engin- eers' Mut. Life & Acc. Ins. Ass'n.....	XXVI., 579	Minnock vs. Eureka F. & M. Ins. Co.....	XXII., 87
Mechanics' Ins. Co. vs. Hodge.....	XXVI., 406	Mina vs. Ford et al.....	XXIII., 72
Mechanics & Traders' Ins. Co. vs. Thompson et al.....	XXII., 383	Miotke vs. Milwaukee Mechanics' Ins. Co.....	XXVI., 910
Mee vs. Bankers' Life Ass'n, of Minnesota.....	XXVI., 853	Mitchel vs. Mississippi Home Ins. Co.....	XXVI., 634
Meesman vs. State Ins. Co.....	XXI., 256		

- Mitchell vs. Minnesota Fire Ass'n...XXI, 420  
 Mitchell vs. St. Paul German Fire Ins. Co. ....XXI, 1008  
 Mobile Ins. Co. et al. vs. Columbia & Greenville R. R. Co. ....XXVI, 268  
 Modern Woodmen Acc. Ass'n vs. Kline. ....XXVI, 724  
 Modern Woodmen of America vs. Jameson. ....XXI, 711  
 Modern Woodmen of America vs. Jameson. ....XXII, 837  
 Moffitt vs. Phoenix Ins. Co. ....XXIV, 154  
 Moge vs. Societe de Bienfaisance, etc. ....XXVI, 830  
 Moise vs. Mutual Reserve Fund Life Ass'n. ....XXII, 710  
 Moller vs. American Fire Ins. Co. ....XXII, 309  
 Molloy vs. Sup. Council of Catholic Mut. Ben. Ass'n. ....XXIV, 632  
 Monroe vs. Providence Permanent Firemen's Relief Association. ....XXV, 800  
 Monteleone vs. Royal Ins. Co. ....XXIV, 240  
 Monteleone vs. Royal Ins. Co. ....XXIV, 531  
 Montgomery Co. Farmers' Mut. Ins. Co. vs. Milner. ....XXIII, 456  
 Moody vs. Insurance Company. ....XXIV, 81  
 Moore vs. Order of Railway Conductors of America. ....XXIII, 329  
 Moore vs. Rockford Ins. Co. ....XXIII, 620  
 Moore et al. vs. Hanover Fire Ins. Co. ....XXIII, 468  
 More et al. vs. New York Bowery Fire Ins. Co. ....XXI, 228  
 Moriarty vs. Home Ins. Co. ....XXII, 797  
 Morley vs. L. & L. & G. Ins. Co. ....XXI, 1047  
 Morotock Ins. Co. vs. Cheek. ....XXV, 649  
 Morotock Ins. Co. vs. Rodefer et al. ....XXV, 529  
 Morris vs. Farmers' Mut. Fire Ins. Co., of Harmony. ....XXV, 230  
 Morris vs. German-American Ins. Co. ....XXII, 399  
 Morrow vs. Des Moines Ins. Co. ....XXI, 842  
 Moosness vs. German-American Ins. Co. ....XXI, 915  
 Moyer vs. Sun Ins. Office. ....XXVI, 462  
 Mueller vs. Grand Grove, State of Minnesota, United Ancient Order of Druids. ....XXVI, 870  
 Murdy vs. Skyles et ux. ....XXVI, 607  
 Murphey vs. American Mut. Accident Ass'n. ....XXIV, 557  
 Mutual Accident Ass'n vs. Tuggle. ....XXIII, 639  
 Mutual Benefit Co. on the Appeal of Schoneman. ....XXV, 480  
 Mutual Benefit Life Ins. Co. vs. Robison. ....XXII, 401  
 Mutual Fire Ins. Co. vs. Alvord. ....XXIII, 801  
 Mutual Life Ins. Co. vs. Arhelger. ....XXIII, 606  
 Mutual Life Ins. Co. vs. Blodgett. ....XXIII, 812  
 Mutual Life Ins. Co. vs. Gorman. ....XXVI, 1014  
 Mutual Life Ins. Co. vs. Hayward et al. ....XXIII, 694  
 Mutual Life Ins. Co. vs. Nichols. ....XXVI, 443  
 Mutual Life Ins. Co. vs. Selby. ....XXV, 618  
 Mutual Life Ins. Co. vs. Simpson. ....XXVI, 459  
 Mutual Life Ins. Co. vs. Smith. ....XXVI, 928  
 Mutual Life Ins. Co. vs. Thomson et al. ....XXII, 481  
 Mutual Life Ins. Co. vs. Tillman. ....XXI, 788  
 Mutual Life Ins. Co. et al. vs. Hillmon. ....XXI, 701  
 Myers vs. Lebanon Mut. Ins. Co. ....XXIII, 308  
 Naill vs. Kansas Farmers' Fire Ins. Co. ....XXI, 960  
 Names vs. Dwelling-House Ins. Co. ....XXV, 589  
 Nappanee Furniture Co. vs. Vernon Ins. Co. ....XXIII, 871  
 Natchez & N. O. Packet & Nav. Co. vs. Louisville Underwriters et al. ....XXI, 640  
 National Fire Ins. Co., of Hartford vs. Strebe. ....XXVI, 926  
 National Masonic Accident Ass'n vs. Burr. ....XXIV, 423  
 National Mut. Ins. Co. vs. Home Ben. Soc., of N. Y. ....XXVI, 917  
 National Protective Ass'n vs. Prentice Brown Stone Co. ....XXI, 838  
 National Union vs. Marlow. ....XXVI, 363  
 Neill vs. Order United Friends. ....XXV, 668  
 Nelson et al. vs. Atlanta Home Ins. Co. ....XXVI, 913  
 Neville vs. Detroit Fire Ass'n. ....XXVI, 637  
 New vs. German Ins. Co. ....XXI, 754  
 Newark Machine Co. vs. Kenton Ins. Co. ....XXIII, 349  
 Newcomb vs. Imperial Life Ins. Co. ....XXII, 53  
 Newcomb vs. Provident Fund Society. ....XXIV, 302  
 New England Loan & Trust Co. vs. Kenneally et al. ....XXIII, 799  
 New Era Life Ass'n vs. Roser. ....XXI, 267  
 New Haven Steamboat Co. vs. The Mayor, etc. ....XXVI, 172  
 New York Life Ins. Co. vs. Ireland. ....XXI, 161  
 New York Life Ins. Co. vs. Smith. ....XXVI, 635  
 N. Y. Lumber & Woodworking Co. vs. People's Fire Ins. Co. ....XXII, 632  
 Niagara Fire Ins. Co. vs. Bishop. ....XXV, 24  
 Niagara Fire Ins. Co. vs. Scammon. ....XXI, 925  
 Niagara Fire Ins. Co. vs. Scammon. ....XXII, 137  
 Nicholls et al. vs. Sun Mutual Ins. Co. ....XXIII, 633  
 Nippolt vs. Firemen's Ins. Co. ....XXIII, 577  
 Norristown Title Trust & Safe Deposit Co. vs. John Hancock Mut. Life. ....XXVI, 272  
 North British & Mercantile Ins. Co., vs. Bohn et al. ....XXVI, 106  
 North British & Mercantile Ins. Co. vs. Lambert et al. ....XXIV, 231  
 Northern Assurance Co. vs. Hamilton et al. ....XXVI, 824  
 Northwest Transp. Co. vs. Boston Marine Ins. Co. ....XXVI, 239  
 Northwestern Mut. Life Ins. Co. vs. Barbour et al. ....XXI, 168  
 Northwestern Mut. Life Ins. Co. vs. Stevens et al.—Bankers' Life Ass'n of Minnesota vs. Same. ....XXV, 292  
 Northwestern Travelling Men's Ass'n vs. Schauss. ....XXIII, 372  
 Norwich Union Fire Ins. Soc. vs. Standard Oil Co., et al. ....XXVI, 128  
 Nye vs. Grand Lodge A. O. U. W. et al. ....XXVI, 419  
 Obersteller vs. Commercial Ass'n Co. ....XXII, 395  
 O'Brien vs. Home Ins. Co. ....XXI, 78  
 O'Brien vs. Prescott Ins. Co. ....XXI, 783  
 Ohio Farmers' Ins. Co. vs. Bevis. ....XXVI, 623  
 Ohio Farmers Ins. Co. vs. Maloney. ....XXIV, 400  
 O'Keefe vs. Liverpool & London & Globe Ins. Co. ....XXVI, 888



- O'Leary et al. vs. Merchants' & Bankers' Mut. Ins. Co. ....XXV., 394  
 Olney et al. vs. German Ins. Co. ....XXI., 689  
 Omaha Fire Ins. Co. vs. Crighton. XXVI., 791  
 Omaha Fire Ins. Co. vs. Dierks. ....XXIV., 251  
 Omaha Fire Ins. Co. vs. Dierks et al. XXIV., 241  
 Omaha Fire Ins. Co. vs. Dufek. ....XXIV., 473  
 Omaha Fire Ins. Co. vs. Thompson et al. ....XXVI., 735  
 Ormsby et al. vs. Phenix Ins. Co. XXIV., 110  
 O'Rourke vs. John Hancock Mut. Life Ins. Co. ....XXIV., 180  
 Orr vs. Hanover Fire Ins. Co. ....XXV., 624  
 Over vs. Lake Erie & W. R. Co. ....XXVI., 362  
 Overpeck vs. Overpeck et al. ....XXIII., 74  
 Pacific Mutual Life Ins. Co. vs. Snowden. ....XXIII., 131  
 Page et al. vs. Sun Insurance Office. XXV., 865  
 Paine vs. Pacific Mut. Life Ins. Co. XXIII., 588  
 Palatine Ins. Co. vs. Evans, Judge. XXVI., 459  
 Palmer Bank of Savings vs. Ins. Co. of North America. ....XXV., 739  
 Palmer vs. Welch et al. ....XXVI., 269  
 Parker vs. China Mut. Ins. Co. ....XXV., 282  
 Parker et al. vs. Rochester-German Ins. Co. ....XXVI., 635  
 Parsons vs. Knoxville Fire Ins. Co. XXV., 719  
 Parsons et al. vs. Knoxville Fire Ins. Co. ....XXIV., 852  
 Patten vs. United Life & Acc. Ass'n. XXI., 678  
 Peele vs. Provident Fund Society et al. ....XXVI., 927  
 Peet vs. Dakota F. & M. Ins. Co. ....XXV., 88  
 Pelican Ins. Co. vs. Schwartz et al. XXI., 722  
 Pelican Ins. Co. vs. Smith. ....XXI., 106  
 Pelzer Mfg. Co. vs. Sun Fire Office. XXI., 952  
 Penn Mut. Life Ins. Co. vs. Mechanics' Savings Bank & Trust Co. XXV., 871  
 Pennington vs. Pacific Mut. Life Ins. Co. ....XXII., 25  
 People vs. Formosa. ....XXI., 1017  
 People ex rel. Payson vs. Pavey. XXIII., 880  
 People ex rel. Stevens vs. Fidelity & Casualty Ins. Co. ....XXVI., 364  
 People ex rel. Woodward vs. Rosendale. ....XXIII., 79  
 People ex rel. Woodward vs. Rosendale, Att'y-Gen. ....XXVI., 266  
 People of the State of Michigan vs. Gay. ....XXV., 141  
 People's Mut. Ass'n Fund vs. Baesee. XXI., 157  
 People's Mut. Ben. Society vs. Templeton. ....XXVI., 484  
 People's Mut. Benefit Society vs. Werner. ....XXII., 585  
 People's Mut. Fire Ins. Co. vs. Groff. ....XXII., 741  
 People's Mut. Ins. Fund vs. Brickman-Birch. ....XXII., 554  
 People's Natural Gas Co. vs. Fidelity Title & Trust Co. ....XXI., 751  
 Perine vs. Grand Lodge of Ancient Order United Workmen. ....XXI., 213  
 Perine vs. Grand Lodge A. O. U. W. of Minnesota. ....XXII., 71  
 Perpoli vs. Grand Lodge of Legion of the West. ....XXIV., 68  
 Perry vs. Dwelling-House Ins. Co. XXVI., 120  
 Perry et al. vs. Cobb et al. ....XXV., 481  
 Petrie vs. Phenix Ins. Co. ....XXI., 551  
 Pfeiffer vs. National Live-Stock Ins. Co. ....XXV., 134  
 Phelan vs. Phelan et al. ....XXI., 93  
 Phenix Ins. Co. vs. Bachelder. ....XXI., 618  
 Phenix Ins. Co. vs. Boyer. ....XXI., 409  
 Phenix Ins. Co. vs. Charleston Bridge Co. ....XXIV., 624  
 Phenix Ins. Co. vs. Coomes. ....XXII., 152  
 Phenix Ins. Co. vs. Covey. ....XXIV., 305  
 Phenix Ins. Co. vs. Dungan. ....XXII., 871  
 Phenix Ins. Co. vs. Grimes. ....XXI., 9  
 Phenix Ins. Co. vs. Hart. ....XXVI., 391  
 Phenix Ins. Co. vs. Martin. ....XXIV., 319  
 Phenix Ins. Co. vs. Munger. ....XXI., 682  
 Phenix Ins. Co. vs. Omaha Loan & Trust Co. ....XXIV., 189  
 Phenix Ins. Co. vs. Pennsylvania Co. ....XXIII., 28  
 Phenix Ins. Co. vs. Perry. ....XXI., 881  
 Phenix Ins. Co. vs. Red Billa Hora C. S. P. S. ....XXVI., 190  
 Phenix Ins. Co. vs. Rogers et al. XXVI., 463  
 Phenix Ins. Co. vs. Rollins. ....XXIV., 821  
 Phenix Ins. Co. vs. Ward. ....XXIII., 702  
 Phenix Ins. Co. vs. Warttemberg. XXVI., 552  
 Phenix Ins. Co. vs. Weymouth et al. XXI., 566  
 Phenix Ins. Co. vs. Wilcox & Gibbs Guano Co. ....XXVI., 632  
 Phenix Ins. Co. et al. vs. Angel et al. XXVI., 722  
 Phenix Ins. Co. of Brooklyn vs. Johnston. ....XXII., 29  
 Phenix Ins. Co. of Brooklyn vs. Lorenz. ....XXII., 712  
 Phillips vs. Carpenter et al. ....XXI., 90  
 Phoenix Ass'n Co. vs. Allison et al. XXIV., 873  
 Phoenix Ass'n Co. vs. Allison et al. XXVI., 461  
 Phoenix Ins. Co. vs. Asbury. ....XXVI., 1024  
 Phoenix Ins. Co. vs. Boren et al. XXIII., 80  
 Phoenix Ins. Co. vs. Greer. ....XXV., 311  
 Phoenix Ins. Co. vs. Summerfield. XXII., 746  
 Phoenix Mut. F. Ins. Co. vs. Brechelsen. ....XXIII., 56  
 Pickett vs. Pacific Mut. Life Ins. Co. XXI., 64  
 Pierson et al. vs. Springfield F. & M. Ins. Co. ....XXVI., 178  
 Pioneer Mfg. Co. vs. Phoenix Ass'n Co. ....XXII., 251  
 Pioneer Savings & Loan Co. vs. St. Paul Fire & Marine Ins. Co. XXVI., 826  
 Piper vs. Mercantile Mutual Accident Ass'n. ....XXIV., 67  
 Place et al. vs. St. Paul Title Ins. & Trust Co. ....XXVI., 809  
 Platt vs. Aetna Ins. Co. ....XXIV., 132  
 Porter vs. U. S. Life Ins. Co. ....XXIII., 445  
 Potter et al. vs. Phenix Ins. Co. XXIV., 591  
 Powers' Dry Goods Co. vs. Imperial Fire Ins. Co. ....XXI., 251  
 Pratt vs. Dwelling-House Mut. Ins. Co. ....XXI., 146  
 Pratt et al. vs. Globe Mutual Life. XXVI., 176  
 Pratt et al. vs. Manhattan Life Ins. Co. ....XXIV., 526  
 Preferred Accident Ins. Co. vs. Randolph, Executor. ....XXVI., 291  
 Preferred Mut. Acc. Ass'n et al. vs. Cobb. ....XXV., 59  
 President, etc., of Grand Rapids Hydraulic Co. vs. American Fire Ins. Co. ....XXII., 158  
 Preuster vs. Supreme Council of Order of Chosen Friends. ....XXII., 141  
 Providence-Washington Ins. Co. vs. Bowring et al. ....XXI., 804

Providence-Washington Ins. Co. vs. Brummelkamp.....	XXIII., 60	Richter vs. Harper.....	XXII., 716
Provident Savings Life Ass'n Soc. vs. Llewellyn et al.....	XXIII., 222	Riegel vs. American Life Ins. Co.....	XXII., 277
Provident Savings Life Ass'n Soc. vs. Rentlinger.....	XXVI., 141	Riley vs. Riley et al.....	XXVI., 118
Purcell vs. St. Paul Fire & Marine Ins. Co.....	XXV., 167	Ritter, Executor, vs. Mutual Life Ins. Co.....	XXIV., 706
Purves vs. Insurance Co.....	XXI., 306	Robbins vs. Springfield Fire & Marine Ins. Co.....	XXV., 652
Pythian Life Ass'n vs. Preston.....	XXV., 502	Roberts et al. vs. Northwestern National Ins. Co.....	XXV., 68
Queen Ins. Co. vs. Hudnut Co.....	XXIII., 156	Robinson vs. Pennsylvania Ins. Co.....	XXV., 56
Queen Ins. Co. vs. Kline et al.....	XXV., 236	Robinson vs. Templar Lodge of Odd Fellows.....	XXIII., 490
Queen Ins. Co. et al. vs. State ex rel Attorney-General.....	XXIII., 166	Robinson et al. vs. Aetna Ins. Co.....	XXVI., 823
Quigg vs. Coffy.....	XXVI., 367	Robison et al. vs. Ohio Farmers' Ins. Co.....	XXII., 798
Quigley et al. vs. St. Paul Title Insurance and Trust Co.....	XXIV., 339	Rochester Loan & Banking Co. et al. vs. Liberty Ins. Co.....	XXIV., 655
Quigley et al. vs. St. Paul Title Insurance & Trust Co.....	XXV., 389	Rockford Ins. Co. vs. Farmers' State Bank.....	XXII., 389
Quinlan vs. Providence-Washing- ton Ins. Co.....	XXI., 650	Rockford Ins. Co. vs. Rogers and Stair.....	XXVI., 81
Quinlan vs. Providence-Washing- ton Ins. Co.....	XXVI., 637	Rockford Ins. Co. vs. Winfield.....	XXVI., 785
Quinn vs. Supreme Council, Cath- olic Knights of America et al.....	XXVI., 988	Rollins vs. McHatton.....	XXI., 489
Rahr et al. vs. Manchester Fire Ass'n Co.....	XXV., 750	Ronald vs. Mutual Reserve Fund Life Ins. Ass'n.....	XXI., 634
Railway Passengers & Freight Conductors' Mut. Aid & Bene- fit Ass'n vs. Loomis.....	XXII., 18	Rosebud Mining & Milling Co. vs. Western Ass'n Co.....	XXV., 693
Railway & Passengers Freight Conductors Mutual Aid & Benefit Ass'n vs. Robinson.....	XXIII., 79	Ross vs. Hawkeye Ins. Co.....	XXI., 112
Ralinger vs. Boston Mut. Life Ass'n.....	XXVI., 188	Ross vs. Hawkeye Ins. Co.....	XXIV., 640
Rand et al. vs. Provident Savings Life Ass'n Society.....	XXVI., 928	Rossiter vs. Aetna Life Ins. Co.....	XXV., 161
Ranspach vs. Teutonia Fire Ins. Co.....	XXV., 713	Rothcock vs. Dwelling-House Ins. Co.....	XXIII., 640
Rasmussen et al. vs. New York Life Ins. Co.....	XXV., 96	Royal Ins. Co. vs. Clark.....	XXIV., 836
Reck vs. Hatboro Mut. Live-stock & Protective Ins. Co.....	XXIV., 124	Royal Ins. Co. vs. Wight et al.....	XXIII., 710
Reck vs. Phoenix Ins. Co.....	XXVI., 174	Rundle et al. vs. Kennan.....	XXI., 80
Redmond vs. Industrial Benefit Ass'n.....	XXVI., 812	Runkel vs. Lloyd Plate Glass Ins. Co.....	XXI., 473
Reed vs. Equitable Fire & Marine Ins. Co.....	XXI., 821	Runkle et al. vs. Hartford Ins. Co.....	XXVI., 320
Reichenbach vs. Ellerbee.....	XXII., 764	Russell vs. Manufacturers & Build- ers' Fire Ins. Co.....	XXI., 944
Reliance Lumber Co. vs. Brown.....	XXI., 794	Russell et al. vs. Fidelity Fire Ins. Co.....	XXII., 533
Reliance Mut. Ins. Co. vs. Sawyer et al.....	XXIII., 793	Ruthven et al. vs. American Fire Ins. Co.....	XXIV., 266
Renner et al. vs. Supreme Lodge, Bohemian Slavonian Benefit Society.....	XXVI., 635	Ryan vs. Rockford Ins. Co.....	XXIII., 8
Renninger vs. Dwelling-House Ins. Co.....	XXV., 121	Ryan vs. Rothweiler et al.....	XXIII., 383
Replogle vs. American Ins. Co. et al.....	XXII., 815	Rynalski vs. Ins. Co. of State of Pa.....	XXIII., 43
Republic Life Ins. Co. vs. Swigert Auditor, et al.....	XXVI., 266	Sabin vs. Phinney et al.....	XXII., 478
Reyer vs. Odd Fellows' Fraternal Ass'n of America.....	XXII., 718	Sabin vs. Senate of the National Union.....	XXI., 853
Reynolds vs. Atlas Accident Ins. Co.....	XXVI., 778	St. Louis A. & T. Ry. Co. vs. Fire Ass'n of Philadelphia et al.....	XXII., 567
Rheims vs. Standard Fire Ins. Co.....	XXIV., 253	St. Louis, I. M., & S. Railway Co. vs. Commercial Union Ins. Co.....	XXVI., 363
Rhode Island Underwriters' Ass'n vs. Monarch.....	XXV., 116	St. Onge vs. Westchester Fire Ins. Co.....	XXVI., 1017
Rice et al. vs. Smith.....	XXIV., 317	St. Paul Fire & Marine Ins. Co. vs. Kidd et al.....	XXII., 457
Richards vs. Maine Benefit Ass'n.....	XXII., 865	St. Paul Fire & Marine Ins. Co. vs. Parsons.....	XXI., 73
Richards vs. Travelers Ins. Co.....	XXVI., 636	St. Paul Fire & Marine Ins. Co. vs. Upton.....	XXI., 190
Richardson vs. Mutual Life Ins. Co.....	XXII., 454	St. Paul Fire & Marine Ins. Co. et al. vs. Gotthelf.....	XXII., 34
Richardson vs. White et al.....	XXVI., 543	St. Paul Title Insurance & Trust Co. vs. Johnson et al.....	XXV., 878
Richmond vs. Ass'n Companies.....	XXV., 354	Sample vs. London & Lancashire Fire Ins. Co.....	XXV., 576
		Sargent et al. vs. Supreme Lodge Knights of Honor et al.....	XXII., 545
		Sater vs. Henry County Farmers' Mut. Fire Ins. Co.....	XXIV., 290

<b>Savage vs. Phenix Ins. Co.</b> .....XXI., 967	<b>Sloman et al. vs. Mercantile Credit</b>
<b>Scammell et al. vs. China Mutual</b>	<b>Guarantee Co.</b> .....XXVI., 665
<b>Ins. Co.</b> .....XXV., 357	<b>Small vs. Westchester Fire Ins. Co.</b> XXII., 660
<b>Schauer vs. Queen Ins. Co.</b> .....XXVI., 367	<b>Small et al. vs. Jose et al.</b> .....XXIV., 39
<b>Schenok vs. Louisiana Benevo-</b>	<b>Smith vs. California Ins. Co.</b> .....XXVI., 631
<b>lent &amp; Protective Ass'n.</b> .....XXIV., 399	<b>Smith vs. Hopkins et al.</b> .....XXVI., 666
<b>Schmidt vs. German Mut. Ins. Co.</b> ..XXI., 997	<b>Smith vs. New England Mut.</b>
<b>Schmidt vs. Modern Woodman of</b>	<b>Life Ins. Co.</b> .....XXIV., 212
<b>America.</b> .....XXII., 556	<b>Smith vs. People's Mut. Live-Stock</b>
<b>Schmurr vs. State Ins. Co.</b> .....XXVI., 373	<b>Ins. Co.</b> .....XXV., 444
<b>School Dist. No. 116, of Minnehaha</b>	<b>Smith vs. Preferred Masonic Mut.</b>
<b>Co. vs. German Ins. Co., of</b>	<b>Accident Ass'n.</b> .....XXI., 1035
<b>Freeport.</b> .....XXV., 122	<b>Smith vs. Preferred Mut. Acc.</b>
<b>Schrodel vs. Humboldt Fire Ins.</b>	<b>Ass'n.</b> .....XXIV., 637
<b>Co.</b> .....XXIII., 240	<b>Smith vs. Provident Saving Life</b>
<b>Schroeder vs. Farmers' Mut. Fire</b>	<b>Ass'n Society.</b> .....XXIV., 502
<b>Ins. Co.</b> .....XXI., 1020	<b>Smith, Adm'r. vs. German-Amer-</b>
<b>Schultz vs. Caledonian Ins. Co.</b> .....XXVI., 927	<b>ican Ins. Co.</b> .....XXVI., 174
<b>Schultz et al. vs. Citizens' Mutual</b>	<b>Smith, County Treasurer, vs. Ger-</b>
<b>Life Ins. Co.</b> .....XXVI., 387	<b>man Ins. Co.</b> .....XXV., 192
<b>Schuyler et al. vs. Phoenix Ins. Co.</b> XXII., 150	<b>Smith et al. vs. Continental Ins. Co.</b> XXI., 48
<b>Schwahn et al. vs. Michigan Fire</b>	<b>Smith et al. vs. Phenix Ins. Co.</b> .....XXI., 137
<b>&amp; Marine Ins. Co.</b> .....XXIV., 462	<b>Smith et al. vs. Phenix Ins. Co.</b> .....XXI., 416
<b>Scott vs. Security Fire Ins. Co.</b> .....XXV., 581	<b>Smith et al. vs. Pinch et al.</b> .....XXVI., 353
<b>Scottish U. &amp; N. Ins. Co. vs. Boulden</b> XXII., 188	<b>Smith, Insurance Com. vs. Maine</b>
<b>Scottish Union &amp; National Ins. Co.</b>	<b>Mutual Accident Ass'n (Bur-</b>
<b>vs. Clancy.</b> .....XXII., 442	<b>rill, Intervener).</b> .....XXIV., 879
<b>Scottish Union &amp; National Ins.</b>	<b>Smith, Ins. Commissioner, et al. vs.</b>
<b>Co. vs. Dangalx.</b> .....XXVI., 305	<b>National Credit Ins. Co. et al.</b> ..XXV., 842
<b>Scottish Union &amp; National Ins.</b>	<b>Snyder vs. Dwelling-House Ins.</b>
<b>Co. vs. Keene.</b> .....XXVI., 963	<b>Co.</b> .....XXVI., 905
<b>Seamans, Receiver of Wisconsin</b>	<b>Sofge et al. vs. Supreme Lodge</b>
<b>Mutual Fire Ins. Co., vs. Zim-</b>	<b>Knights of Honor et al.</b> .....XXVI., 682
<b>merman.</b> .....XXIII., 720	<b>Soli vs. Farmers' Mut. Ins. Co.</b> .....XXI., 908
<b>Sellers et al. vs. Commercial Fire</b>	<b>South Bend Toy Manufg. Co. vs.</b>
<b>Ins. Co.</b> .....XXIV., 354	<b>Dakota Fire &amp; Marine Ins. Co.</b> ..XXI., 919
<b>Sengfelder vs. Mutual Life Ins. Co.</b> XXIII., 469	<b>Southern Home Building &amp; Loan</b>
<b>Seymour vs. Chicago Guaranty</b>	<b>Ass'n vs. Home Ins. Co., of N.O.</b> XXVI., 524
<b>Fund Life Co.</b> .....XXII., 787	<b>Southern Ins. Co. vs. Parker.</b> .....XXV., 214
<b>Shackelford vs. Supreme Conclave</b>	<b>Southern Ins. Co. vs. White.</b> .....XXIV., 47
<b>Knights of Damon.</b> .....XXVI., 561	<b>Southern Ins. Co. of New Orleans</b>
<b>Shackett et al. vs. People's Mut.</b>	<b>vs. Wolverton Hardware Co. et al.</b> XXI., 671
<b>Ben. Society.</b> .....XXV., 153	<b>Southwestern Mut. Ben. Ass'n. vs.</b>
<b>Shaffer vs. Spangler.</b> .....XXI., 468	<b>Swenson.</b> .....XXI., 865
<b>Shanahan vs. Metropolitan Life</b>	<b>Speagle vs. Dwelling-House Ins.</b>
<b>Ins. Co.</b> .....XXV., 79	<b>Co.</b> .....XXIV., 829
<b>Shapiro vs. Western Home Ins. Co.</b> XXII., 310	<b>Spies vs. Greenwich Ins. Co.</b> .....XXIII., 3
<b>Sharp vs. Commercial Travelers'</b>	<b>Spring vs. Chautauqua Mut. Life</b>
<b>Mutual Accident Ass'n of</b>	<b>Ass'n.</b> .....XXVI., 636
<b>America.</b> .....XXIII., 757	<b>Springfield F. &amp; M. Ins. Co. vs.</b>
<b>Shaw vs. Firemen's Ins. Co.</b> .....XXIII., 228	<b>Payne et al.</b> .....XXVI., 46
<b>Shea vs. Massachusetts Ben. Ass'n</b> XXIII., 214	<b>Springfield F. &amp; M. vs. Phillips.</b> XXIV., 80
<b>Sheanon vs. Pacific Mut. Life Ins. Co.</b> XXII., 321	<b>Spruill vs. Northwestern Mutual</b>
<b>Sheets vs. Sheets.</b> .....XXIII., 560	<b>Life Ins. Co.</b> .....XXVI., 881
<b>Sherry et ux vs. Operative Plaster-</b>	<b>Stambler vs. Order of Ponto.</b> .....XXVI., 170
<b>ers' Mutual Union.</b> .....XXVI., 735	<b>Standard Life &amp; Accident Co. vs.</b>
<b>Shevlin vs. American Mutual</b>	<b>Board of Assessors of Detroit.</b> XXII., 639
<b>Accident Ass'n.</b> .....XXVI., 734	<b>Standard Life &amp; Accident Ins. Co.</b>
<b>Shove vs. Shove.</b> .....XXVI., 368	<b>vs. Jones.</b> .....XXII., 285
<b>Sibley vs. Mutual Reserve Fund</b>	<b>Standard Life &amp; Accident Ins.</b>
<b>Life Ass'n.</b> .....XXI., 615	<b>Co. vs. Langston.</b> .....XXIV., 711
<b>Silk vs. Mutual Reserve Fund</b>	<b>Standard Life &amp; Accident Ins. Co.</b>
<b>Life Ass'n.</b> .....XXIII., 334	<b>vs. Lauderdale.</b> .....XXIV., 865
<b>Silva et ux. vs. Supreme Council of</b>	<b>Standard Life &amp; Accident Ins. Co.</b>
<b>Portuguese Union of Cal. (Dutra</b>	<b>vs. Martin.</b> .....XXII., 578
<b>Intervener).</b> .....XXV., 65	<b>Standard Life &amp; Acc. Ins. Co. vs.</b>
<b>Simpson vs. Life Ins. Co. of Va.</b> .....XXIV., 235	<b>Randolph, Executor.</b> .....XXVI., 291
<b>Singleton et al. vs. Phenix Ins. Co.</b> XXI., 499	<b>Standart Life &amp; Acc. Ins. Co. vs.</b>
<b>Slak vs. Citizens' Ins. Co.</b> .....XXVI., 369	<b>Thomas et al.</b> .....XXI., 124
<b>Slak vs. Citizens' Ins. Co.</b> .....XXVI., 458	<b>State vs. Phipps et al.</b> .....XXII., 345
<b>Slater vs. Capital Ins. Co.</b> .....XXIV., 174	<b>State vs. Stone.</b> .....XXIII., 193
	<b>State vs. Taylor.</b> .....XXIII., 79

State vs. Wheeler.....	XXI., 620	Sullivan vs. Germania Life Ins. Co. XXV., 412
State vs. Williams.....	XXIII., 609	Sullivan vs. Hartford Fire Ins. Co. XXV., 705
State ex rel., Att'y-Gen'l, vs. Ins. Co. XXI., 673		Summerfield vs. North British & Mercantile Ins. Co. .... XXIV., 442
State ex rel., Clapp, Attorney-General vs. Educational Endowment Association.....	XXI., 561	Summerfield vs. Phenix Ass'n Co. XXVI., 640
State ex rel., Clapp, Attorney-General, vs. Federal Investment Co. XXI., 226		Sun Fire Office vs. Clark et al. .... XXV., 333
State ex rel. Farmers' Mut. Ins. Co. vs. Moore, Auditor.....	XXV., 719	Sun Fire Office vs. Ermentrout..... XXI., 1055
State ex rel. Kinder vs. Eagle Ins. Co. ....	XXII., 559	Sun Fire Office vs. Fraser et al. .... XXVI., 831
State ex rel. Mechanics' & Traders' Ins. Co. vs. Board of Assessors et al. ....	XXV., 147	Sun Fire Office vs. Wich..... XXVI., 831
State ex rel. Richards, Atty-Gen., vs. Mfrs. Mut Fire Ass'n.....	XXII., 695	Sun Ins. Co. vs. Greenville Building and Loan Ass'n, No. 2..... XXV., 657
State ex rel. Richards, Atty-Gen'l, vs. Richardson.....	XXVI., 169	Sun Ins. Co. vs. The Hope..... XXI., 479
State ex rel. Royal Arcanum vs. Benton.....	XXII., 238	Sun Mutual Ins. Co. vs. Crist..... XXVI., 695
State Ins. Co. vs. New Hampshire Trust Co. ....	XXV., 307	Sun Mut. Ins. Co. vs. Jones..... XXI., 56
State Ins. Co. of Des Moines vs. Belford et al. ....	XXV., 127	Sun Mut. Ins. Co. vs. Saginaw Barrel Co. ....
State Ins. Co. of Des Moines vs. Stoffels.....	XXII., 160	Sun Mut. Ins. Co. vs. Searles et al. XXV., 320
State Investment & Ins. Co. vs. Superior Court.....	XXIII., 400	Supreme Council Catholic Knights of America vs. Franke..... XXI., 223
State Mutual Fire Ins. Ass'n vs. Brinkley Stave & Heading Co. XXV., 49		Supreme Lodge Knights of Honor vs. Dalberg..... XXI., 672
State of Louisiana vs. Williams et al. ....	XXIII., 508	Supreme Lodge Knights of Honor vs. Keener..... XXVI., 413
State of Tennessee vs. Phenix Ins. Co. ....	XXII., 400	Supreme Lodge Knights of Pythias vs. Stein..... XXVI., 558
Stauffer vs. Mannheim Mut. Fire Ins. Co. ....	XXI., 1051	Supreme Lodge K. of P. of the World vs. Kalinski..... XXIII., 44
Stauffer vs. Penn. Mut. Fire Ins. Ass'n of Lancaster Co. ....	XXIV., 229	Sup. Lodge K. of P. of the World vs. La Malta et al. ....
Steamship Samana Co., Limited, vs. Hall.....	XXII., 639	Supreme Lodge Knights of Pythias of the World vs. Wilson..... XXVI., 637
Steel vs. Phenix Ins. Co. ....	XXI., 242	Survick vs. Valley Mutual Life Ass'n et al. ....
Steel vs. Phenix Ins. Co. of Bklyn. XXII., 7		XXV., 380
Steele vs. German Ins. Co. ....	XXII., 377	Susquehanna F. Ins. Co. vs. Mardorf. XXII., 239
Stehlick vs. Mechanics' Ins. Co. XXIII., 547		Sutherland vs. Standard Life & Accident Ins. Co. ....
Steinhausen vs. The Preferred Mut. Acc. Ass'n.....	XXVI., 454	XXII., 353
Stensgaard vs. St. Paul Real Estate Title Ins. Co. ....	XXI., 894	Swain et al. vs. Security Life Stock Ins. Co. ....
Stephens vs. Capital Ins. Co. ....	XXII., 208	XXV., 714
Stephens vs. Railway Officials' & Employees' Acc. Ass'n.....	XXVI., 540	Sweeting et al. vs. Mut. Fire Ins. Co. XXV., 730
Stepp vs. National Life & Maturity Association.....	XXIII., 103	Swing vs. H. C. Akeley Lumber Co. XXV., 303
Steppe vs. Alter and O'Rourke.....	XXV., 160	Syndicate Ins. Co. vs. Catchings..... XXIV., 447
Sterling Fire Ins. Co. vs. Beffrey.....	XXI., 274	Talcott vs. Field et al. ....
Stevens vs. Queen Ins. Co. ....	XXI., 443	XXI., 925
Stever vs. People's Mut. Accident Ins. Ass'n.....	XXI., 1029	Tarbell et al. vs. Vermont Mut. Fire Ins. Co. ....
Stewart vs. Helvetia Swiss Fire Ins. Co. ....	XXIV., 475	XXI., 238
Stickley vs. Mobile Ins. Co. ....	XXII., 768	Taylor vs. Merchants & Bankers' Ins. Co. ....
Stoelker vs. Thornton et al. ....	XXVI., 174	XXI., 117
Stohr vs. San Francisco Musical Fund Soc. ....	XXVI., 269	Tefft et al. vs. Providence-Washington Ins. Co. ....
Stone vs. Insurance Co. ....	XXI., 247	XXV., 236
Stoughton vs. Manufacturers' Natural Gas Co. ....	XXIV., 638	Tessmann vs. Supreme Commandery of the United Friends of Michigan.....
Strauss et al. vs. Phenix Ins. Co. XXVI., 676		XXVI., 736
Strunk vs. Firemen's Ins. Co. ....	XXIII., 477	The People, etc., ex rel. vs. Fidelity & Casualty Co. ....
Stuart et al. vs. Sutcliffe et al. ....	XXV., 3	XXIV., 99
Succession of Brownlee.....	XXII., 312	The Scanlan Ins. Co. vs. Johnson..... XXV., 525
		The Steamship Samana vs. The Erin.....
		XXVI., 171
		Theunens vs. Iowa Mut. Ben. Ass'n. XXVI., 586
		Thomas vs. Prudential Ins. Co. ....
		XXI., 654
		Thomas vs. Thomas et al. ....
		XXI., 464
		Thompson vs. Caledonia Fire Ins. Co. ....
		XXV., 559
		Thompson vs. New York Life Ins. Co. ....
		XXII., 485
		Thomson vs. Southern Mut. Ins. Co. ....
		XXI., 1043
		Tierney et al. vs. Phenix Ins. Co. XXIV., 602
		Trabue et al. vs. Dwelling-House Ins. Co. ....
		XXIII., 529
		Traders' Ins. Co. vs. Peonad et al. XXIII., 624
		Traders' Ins. Co. vs. Race (On rehearing).....
		XXI., 1023
		Traders' Ins. Co. et al. vs. Race..... XXI., 363

Travelers Ins. Co. vs. Dunlap.....XXV.,	604	Waldhelm vs. John Hancock Life	
Travelers Ins. Co. vs. Healey et al. XXIII.,	719	Ins. Co. ....XXVI.,	363
Travelers Ins. Co. vs. Lampkin.....XXIV.,	295	Walker vs. American Central Ins.	
Travelers Ins. Co. vs. McCarthy.....XXI.,	235	Co. ....XXIV.,	52
Travelers Ins. Co. vs. Mellok.....XXIV.,	490	Walker vs. German Ins. Co. ....XXII.,	750
Travelers Ins. Co. vs. Murray.....XXI.,	264	Walker vs. Giddings.....XXVI.,	632
Travelers Ins. Co. vs. Nitterhouse. XXVI.,	460	Walradt, Assignee, vs. Phoenix Ins.	
Travelers Ins. Co. vs. Randolph,		Co. ....XXII.,	81
Executor.....XXVI.,	273	Walsh vs. Mutual Life Ins. Co. ....XXI.,	598
Travelers Ins. Co. vs. Selden.....XXVI.,	704	Ward vs. Metropolitan Life Ins. Co. XXV.,	325
Travelers Ins. Co. vs. Sheppard.....XXI.,	475	Ward vs. National Fire Ins. Co. ....XXVI.,	635
Travelers Ins. Co. vs. Snowden.....XXIV.,	825	Ward vs. Tucker.....XXVI.,	173
Trinity College vs. Travelers Ins.		Warner vs. National Life Ass'n.....XXVI.,	345
Co. ....XXIII.,	53	Warner vs. Scholharie & Schenec-	
Tripp vs. Northwestern Live-		tady County Farmers' Mut.	
Stock Ins. Co. ....XXIII.,	603	Fire Ins. Co. ....XXVI.,	637
Tripp vs. Provident Fund Society XXIII.,	387	Warner vs. United States Mut.	
Tritschler vs. Keystone Mutual		Accident Ass'n.....XXII.,	704
Benefit Ass'n.....XXVI.,	693	Washburn Mill Co. vs. Fire Ass'n	
Tubb vs. Liverpool & London &		of Philadelphia.....XXIV.,	292
Globe Ins. Co. ....XXV.,	365	Washburn & Moen Mfg. Co. vs.	
Tucker vs. United Life & Acc. Ins.		Reliance Marine Ins. Co. ....XXIV.,	480
Ass'n.....XXI.,	569	Washington Life Ins. Co. vs. Lane	
Turner vs. Fidelity & Casualty Co. XXVI.,	657	et al. ....XXVI.,	174
Tutorship of the minors Henry		Washington Nat. Bank vs. Smith	
and Adebart Crane.....XXIV.,	560	et al., etc.....XXVI.,	181
Twiss vs. Guaranty Life Ass'n et al. XXII.,	539	Waterbury vs. Dakota Fire & Ma-	
Ulrich vs. Reinhold et al. ....XXI.,	401	rine Ins. Co. ....XXI.,	14
Union Building Ass'n vs. Rock-		Watertown Fire Ins. Co. vs. Rust.....XXI.,	1053
ford Ins. Co. ....XXIII.,	615	Way vs. Abington Mut. Fire Ins.	
Union Casualty & Surety Co. vs.		Co. ....XXV.,	702
Randolph, Executor.....XXVI.,	291	Waycott vs. Metropolitan Life	
Union Central Life Ins. Co. vs.		Ins. Co. ....XXII.,	399
Chowing.....XXVI.,	269	Webster et al. vs. Dwelling-House	
Union Central Life Ins. Co. vs.		Ins. Co. ....XXV.,	486
Smith et al. ....XXIV.,	846	Weed vs. Hamburg-Bremen Fire	
Union Central Life Ins. Co. vs.		Ins. Co. ....XXI.,	577
Woods.....XXVI.,	151	Wehle et al. vs. United States	
Union Guaranty & Trust Co. vs.		Mut. Acc. Ass'n.....XXVI.,	817
Robinson.....XXVI.,	582	Weil, Adm., vs. New York Life	
Union Mut. Acc. Ass'n vs. Frohard. XXVI.,	361	Ins. Co. ....XXIV.,	641
Union National Bank vs. German		Weinfeld vs. Mutual Reserve	
Ins. Co. ....XXV.,	539	Fund Life Ass'n.....XXII.,	474
United States vs. American To-		Wells vs. Covenant Mut. Benefit	
bacco Co. ....XXVI.,	640	Ass'n.....XXVI.,	636
United States Credit System vs.		Welsh vs. London Ass'e Corpora-	
Robertson et al. ....XXIII.,	717	tion.....XXII.,	90
United States Life Ins. Co. vs. Ross. XXV.,	260	West vs. Norwich Union Fire	
United States Mutual Accident		Insurance Society.....XXIV.,	367
Ass'n vs. Mueller.....XXIII.,	824	West et al. vs. British-America	
United Underwriters' Ins. Co.,		Ass'e Co. ....XXV.,	689
et al. vs. Powell et al. ....XXVI.,	526	Westchester Fire Ins. Co. vs. Cor-	
Universal Life Ins. Co. vs. Devore.....XXI.,	337	ordale.....XXI.,	530
Van Frank et al. vs. United States		Westchester Fire Ins. Co. vs.	
Masonic Ben. Ass'n.....XXV.,	149	Storm.....XXIII.,	399
Vankirk vs. Citizens' Ins. Co. ....XXI.,	187	Westchester Fire Ins. Co. vs.	
Vanormer vs. Hornberger et al. ....XXIII.,	66	Wagner et al. ....XXVI.,	261
Van Werden vs. Equitable Life.....XXVI.,	269	Westchester Fire Ins. Co. vs.	
Vergeron vs. German Ins. Co. ....XXIII.,	236	Wagner & Chabot.....XXIV.,	476
Virginia F. & M. Ins. Co. vs.		West Coast Lumber Co. vs. State	
Saunders.....XXII.,	270	Investment & Ins. Co. ....XXII.,	681
Virginia Fire & Marine Ins. Co.		West End Hotel & Land Co. vs.	
vs. Thomas.....XXVI.,	396	American Fire Ins. Co. ....XXV.,	854
Voorheis vs. People's Mut. Ben.		Western Ass'e Co. vs. Althelmer	
Society.....XXII.,	192	Broe.—Imp. Fire Ins. Co. vs.	
Wager vs. Providence Ins. Co.—		Same.....XXIII.,	513
Providence Ins. Co. et al. vs.		Western Ass'e Co. vs. Hall et al. ....XXV.,	874
Morse et al. ....XXIII.,	273	Western Ass'e Co. vs. McGlathery. XXVI.,	832
Wagner et al. vs. Dwelling-House		Western Ass'e Co. vs. Williams.....XXVI.,	338
Ins. Co. ....XXI.,	119	Western Home Ins. Co. vs. Rich-	
Walner vs. Milford Mutual Fire		ardson.....XXIII.,	501
Ins. Co. ....XXVI.,	831	Western Home Ins. Co. vs. Thorp. XXII.,	292

Western Refrigerator Co. vs. American Casualty Insur- ance and Security Co.....	XXIII., 640	Williams vs. United States Mut. Acc. Ass'n.....	XXI., 609
Western & Atlantic Pipe Lines vs. Home Ins. Co.....	XXI., 24	Williams vs. U. S. Mutual Acci- dent Ass'n.....	XXVI., 639
Westfield Cigar Co. vs. Ins. Cos.....	XXV., 521	Williams et al. vs. United Reserve Fund Associates.....	XXV., 790
West Jersey Title & Guaranty Co. vs. Barber.....	XXI., 672	Williamsburgh City Fire Ins. Co. vs. Gwinn.....	XXI., 622
Wheeler vs. Real Estate Title Ins. & Trust Co.....	XXIII., 475	Williamson vs. Michigan Fire & Marine Ins. Co.....	XXIII., 311
Wheeler vs. Supreme Sitting of Order of Iron Hall.....	XXVI., 459	Willow Grove Creamery Co. vs. Planters' Mutual Ins. Co.....	XXIII., 732
White vs. Phoenix Ins. Co.....	XXII., 869	Wilson vs. Mutual Fire Ins. Co.....	XXV., 549
White vs. Provident Savings Life Ass'n Society.....	XXV., 454	Wilson Drug Co. vs. Phoenix Ass'n Co.....	XXI., 858
White vs. Royal Ins. Co.....	XXV., 699	Windmuller et al. vs. The Thomas Melville et al.....	XXVI., 173
White vs. Western Ass'n Co.....	XXII., 305	Wist vs. Grand Lodge A. O. U. W.....	XXII., 167
Whitehouse vs. Cargill.....	XXV., 640	Wolf vs. District Grand Lodge No. 6, I. O. B. B.....	XXIV., 198
Whitlatch vs. Fidelity & Casualty Co.....	XXV., 586	Wolters et al. vs. Western Assur- ance Co.....	XXVI., 877
Whitmore et al. vs. Supreme Lodge Knights & Ladies of Honor.....	XXVI., 514	Wood vs. Standard Mut. Live- stock Ins. Co.....	XXII., 554
Whitney vs. National Masonic Accident Ass'n.....	XXII., 196	Wood et al. vs. Cascade Fire & Marine Ins. Co.....	XXVI., 169
Whitney vs. National Masonic Acc. Ass'n.....	XXVI., 272	Worley vs. State Ins. Co. of Des Moines.....	XXIII., 580
Whitten vs. New England Live- Stock Ins. Co.....	XXV., 682	Wright vs. Mutual Benefit Life Ass'n.....	XXVI., 270
Wilcox vs. Continental Ins. Co.....	XXII., 599	Wright vs. Supreme Commandery of Golden Rule.....	XXI., 950
Wildberger vs. Hartford Fire Ins. Co.....	XXVI., 367	Wright vs. Vermont Life Ins. Co.....	XXV., 238
Wilhelm vs. Des Moines Ins. Co.....	XXII., 371	Yost vs. McKee et al.....	XXVI., 716
Wilhelmi vs. Des Moines Ins. Co.....	XXVI., 271	Young vs. Ohio Farmers' Ins. Co.....	XXII., 440
Willey vs. Fidelity & Casualty Co.....	XXVI., 713	Zell vs. Herman Farmers' Mut. Ins. Co.....	XXVI., 364
Williams vs. Hartford Ins. Co.....	XXIV., 150	Zimeriski vs. Ohio Farmers' Ins. Co.....	XXI., 818
Williams vs. Maine State Relief Ass'n.....	XXVI., 832	Zimmermann vs. Dwelling-House Ins. Co.....	XXVI., 77
Williams vs. Preferred Mutual Accident Ass'n.....	XXIII., 75		

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